Customary International Law through Treaty Consensus

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In international law, it is common for customary international law that predates a treaty on the same subject to continue to govern alongside the treaty. Sometimes, the rules of a treaty can evolve into CIL if non-parties accept those rules as law. However, this process typically excludes the behaviour of treaty parties, who follow the rules due to their treaty obligations. This article explores a notable exception to the ability of non-parties to shape CIL from treaty rules. It argues that when a treaty is endorsed by a vast majority of States, the influence of the small minority of non-parties is diminished. This majority effectively overrides pre-existing CIL (if inconsistent with the treaty), establishes a new CIL through broad consensus, and confines future CIL within the treaty's framework, eliminating the possibility of dissent.

I. Introduction

The jurisprudence of the International Court of Justice (ICJ) and other international courts leaves no doubt about the pivotal role that treaties and customary international law (CIL) play in shaping the framework of international law. Their significance is underscored by their prominent placement in paragraphs (a) and (b) of article 38(1) of the ICJ Statute, which highlights their centrality in regulating State conducts and resolving conflicts. While it is generally accepted that these sources of law are not presented in a hierarchical order, it is undeniable that no other source listed in article 38(1) offers the same level of normative authority both internationally and increasingly within national legal systems.

Though there are different sources of law, treaties and CIL exist in a state of perpetual interdependence, so much so that it may be said (but with all caution) that a rule of CIL is a potential treaty rule, and a treaty rule is a potential CIL. When a CIL rule gets incorporated in a multilateral treaty (convention), as often happens, it gains a more

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concrete expression and its scope becomes more precise, not just for the treaty parties, but also for non-parties. For example, the Vienna Convention on the Law of Treaties (VCLT) of 1969 is often cited as evidence of codified CIL, even in cases involving non-parties. To use only a few of such many occasions, we would refer to *Certain Questions of Mutual Assistance in Criminal Matters*.[1] In the case, the fact that neither Djibouti nor France was a party to the VCLT, did not stop the ICJ from relying on article 31(3) of VCLT as the evidence of codified rule of CIL in settling the dispute in the case. The United Nations Convention on the Law of the Sea (UNCLOS) is another Convention with numerous instances of use in this regard. In *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea,*[2] the ICJ had no difficulty applying the provisions of articles 56, 58, 61, 62 and 73 of UNCLOS to Colombia, a non-party to the UNCLOS on the ground that they reflect CIL.

Our aim is not to challenge established rules and practices but to shed light on a rarely discussed aspect of treaty and CIL relations. This involves scenarios where a vast majority of States are parties to a treaty (a 'majoritarian treaty'),[3] leaving only an insignificant minority as non-parties. Although Professor Baxter highlighted this situation in the 1970s through the 'Baxter Paradox', its potential impact is often overlooked. We will explore this subject using the United Nations Charter's regime on the use of force as an illustration.

Our intention is to show that the rule that ascribes CIL formation to the acceptance of treaty rules as law by non-parties to a treaty would be inapplicable to give the insignificant few the benefit of the determinant of the scope of CIL rules incorporated or crystallised in a treaty rule at the expense of the significant majority. In such a scenario, the dynamics change in two key ways: first, the insignificant minority's power to influence the relationship between CIL and the treaty is neutralised, as the few non-parties cannot generate the 'general practice' needed to establish state practice outside the treaty framework; second, the consent of the significant majority effectively replaces pre-existing CIL (eliminating inconsistencies) with a new one that crystallised during the

[1] *(Djibouti v. France)* ICJ Rep 2008, 177, 219, para 112; *Kasikili/Sedudu Island (Botswana v. Namibia)* ICJ Rep. 1999, 1045, 1059, para 18 (holding that article 31 was applicable to the parties because it reflected CIL, notwithstanding that neither of the parties was a party to the VCLT)
[2] (*Nicaragua v. Colombia*), ICJ Rep 2022, p. 266, 297-298, para 57
[3] 'Majoritarian treaty', as used in this article denotes treaties to which a significant majority of States subscribe as parties. Also, the term significant majority is used to refer to parties to majoritarian treaties and insignificant minority or third States refers to non-parties to such a treaty.

treaty's negotiation and entry into force.[4] Subject to article 64 of VCLT and CIL on jus cogens,[5] such a treaty can have a 'Grotian moment'[6] effect on CIL, particularly when its provisions do not align with preexisting CIL,[7] since the parties cannot have conflicting obligations under different sources of law. However, the inability of non-parties to a convention to determine the CIL scope of CIL/treaty rules does not grant unto the convention parties the power to impose rules that originated in the convention on non-parties. Questions relating to whether rules that originated in a convention are binding on non-parties (third States) as CIL, must find justification in the conduct of non-parties.

We further argue that the CIL that a multilateral convention codifies or crystallises develops only within the framework set by the treaty and the parties' unanimous interpretation of it.[8] This means that the resultant CIL will always be compatible with, and never contradict, the treaty, as any inconsistent practice of the parties (being a significant majority) would violate the treaty. In other words, such CIL will develop only within the framework of the treaty. While it is possible for treaty parties to abandon the treaty by developing contrary CIL, this is highly unlikely given the challenge of securing collective disobedience among all or generality of the parties. We therefore argue that this rare possibility is fraught with the real challenge of the ability to muster the disobedience of all or generality of the parties to treaty because the isolated or even a settled disobedience of a particular treaty rule by a few parties to the treaty cannot be elevated to a norm-creating behaviour, insofar as the majority refuses to board the train of disobedience and the treaty has not gone into desuetude.

Overall, we aim to challenge certain arguments about the relationship between CIL and treaties, particularly in the context of multilateral treaties like the United Nations Charter.

[4] This is subject to there being no indication that the parties did not believe they were replacing pre-existing CIL.
[5] Article 64 provides that 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'.
[6] MP Scharf, 'Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change',43 (3.1) Cornell International Law Journal 439, 440 (2010) (defining 'Grotian Moment', as 'a term that denotes a paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance'.)
[7] This is perhaps another reason it has been observed that '[c]onceptually, treaties are problematic sources for CIL because by their very nature they can alter legal obligations' – Andrew T. Guzman, 'Saving Customary International Law' 27 Michigan Journal of International Law 115, 161-162, (2005).
[8] Anthony D'Amato, *the Concept of Custom in International Law* 165 (1971) (arguing that a widely adopted multilateral convention represents the consensus of States on the precepts contained therein and those precepts are part of international law by that fact alone)

We will also reference relevant decisions related to provisions of UNCLOS where necessary.

Our arguments are laid out in seven parts. Part II uses the Baxter Paradox as a starting point to further outline our intended contribution to the field. Part III explores the paths of custom, focusing on how CIL is formed and how it is often reflected in treaties. Part IV examines the role of non-parties in shaping CIL from treaty provisions and argues that non-parties, when they are an insignificant minority, lack the capacity to generate 'general practice' for the majority. Part V discusses the impact of a significant majority membership on pre-existing and subsequent CIL, arguing that majoritarian treaties create a unique situation where the destiny of CIL cannot be separated from the treaty, while the treaty is in force. Part VI shows that the containment of CIL within the influence and control of the great majority does not mean that the treaty is rigid and frozen, drawing attention to the impact of the subsequent practice of the parties. Finally, Part VII presents our conclusion.

II. Baxter Paradox

From a scholarly perspective, it is not possible to delve into the core of this article without reflecting on the Baxter Paradox,[9] named after Professor R.R. Baxter. According to Baxter:

> It is only fair to observe that the proof of a consistent pattern of conduct by non-parties becomes more difficult as the number of parties to the instrument increases. The number of participants in the process of creating customary law may become so small that the evidence of their practice may be minimal or altogether lacking. Hence the paradox that as the number of parties to a treaty increases it becomes more difficult

[9] Richard R. Baxter, 'Treaties and Custom', 129 Recueil Des Cours 27, 64 (1970 I). see Theodor Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 90(2) The American Journal of International Law 238, 247 (1996); Mathias Forteau, 'A New 'Baxter Paradox'? Does the Work of the ILC on Matters Already Governed by Multilateral Treaties Necessarily Constitute a Dead End? Some Observations on the ILC Draft Articles on the Expulsion of Aliens', file:///C:/Users/ogsai/Downloads/Forteau%20paradox.pdf (accessed 14/08/2024); Hugh Thirlway, 'Professor Baxter's Legacy: Still Paradoxical?' 6:3 *ESIL Reflection* (2017) https://esil-sedi.eu/post_name-121/ (14/08/2024), p. 1

> to demonstrate what is the state of customary international law dehors the treaty. [10]

The observation that the Baxter paradox has not arisen as a practical problem in specific inter-State disputes and is not frequently the subject of academic discussion,[11] indicates, to some extent, that the question it raises has not received the attention it deserves. This is perhaps because, as has been alleged, 'the Baxter paradox is not a genuine paradox.' [12] However, while stating that '…there is perhaps more to be said' about the Baxter paradox, Hugh acknowledged that the paradox 'appears to be still recognized as having some relevance or validity, even if it is 'more apparent than real', i.e. principally of theoretical interest'.[13] Forteau, for instance, drew on Baxter's argument to argue that as the number of State parties to a multilateral treaty grows, it becomes more challenging to codify and progressively develop international law. Forteau therefore questioned the appropriateness of the International Law Commission (ILC) proposing draft articles on topics already governed by numerous multilateral treaties. [14]

Although it has been observed that '[t]he paradox centres on the possible significance of a treaty (particularly a multilateral treaty) for the establishment or emergence of a rule of customary international law',[15] we would take the main theme to be the difficulty of identifying the true state of CIL outside the framework of what we have called majoritarian treaty, which, perhaps reflects on the role of a few non-parties in the development of CIL outside the framework of the convention. Regardless of the varying opinions on the paradox, the concern Baxter raised remains relevant, particularly when considering the practices of State parties and non-parties to a multilateral convention and their impact on the development of parallel CIL rules. We believe that achieving theoretical clarity around this paradox is crucial to addressing and counteracting the arguments often presented regarding multilateral conventions. A well-defined theoretical

[10] Ibid
[11] Thirlway, note 9, p. 2
[12] James Crawford, 'Chance, order, change: the course of international law', 365 Collected Courses of The Hague Academy of International Law, 12, 107 and 110 (2013); Robert Kolb, 'Selected Problems in the Theory of Customary International Law', 50 Netherlands International Law Review, 119, 145−146 (2003) (commenting that the paradox identified by Baxter, among other paradoxes, is only real when stated in the abstract, as 'in concrete cases contextual specificities usually dispel' it. He further stated that the issues identified are typically paradoxes in theory, not in practice). See ILC, 'Third Report on the Identification of Customary Law by Special Rapporteur Michael Wood' UN Doc A/CN.4/682, 29, para 41.
[13] Thirlway, note 9, p. 2
[14] Forteau, note 9, p. 2
[15] Thirlway, note 9, p. 2

framework can illuminate misunderstandings, clarify the relationship between conventional rules and customary international law, and strengthen the overall discourse.

Thirlway identified three situations where the paradox might be relevant. The first is when a treaty codifies existing custom, meaning a customary rule was already in place when the treaty was adopted—though Thirlway concluded that the paradox does not arise here. [16] The second situation is when a convention gives rise to a general practice accepted as law (opinio juris), thus generating a new CIL rule. The third, which he said is 'less clear-cut', is where a convention leads to the crystallization of CIL rule that had started to emerge prior to the treaty's conclusion, with the practice of non-party states playing a role in this process. [17] These are scenarios that continue to occur.

We believe that the paradox theoretically applies in all instances—whether a convention codifies pre-existing CIL, crystallizes an embryonic one, or generates a new CIL rule. So long as there are States that are not parties to the convention, the possibility of there arising a need to ascertain the state of CIL dehors the convention cannot be totally ruled out. As Baxter rightly argued '[i]f a State does not become a party to a codification treaty in the strict sense, its conduct means one less vote in favour of the norms of the treaty as rules of customary international law'.[18] But, as we argue below, insofar as a convention is adopted by a significant majority of States, the convention's practice becomes the 'general practice accepted as law,' objections from a small minority, would in our view, not prevent the emergence of a CIL rule. This perspective is bolstered by the ICJ decision in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*.[19] In this case, the court placed little importance on the fact that the UNCLOS had not yet entered into force and that several States seemed reluctant to ratify it. Instead, the court emphasised the consensus surrounding significant portions of the convention, particularly noting that 'certain provisions of the Convention, concerning the continental shelf and the exclusive economic zone … were adopted without any objections.' Notably, the court made these observations while affirming the 'general international law status of the EEZ.'.[20]

[16] Ibid
[17] Thirlway, ibid. See also Forteau, note 9, p. 3
[18] Baxter, *Treaties and Customs*, note 9, p. 52
[19] (*Canada v. the United States of America*) ICJ Rep 1984, 246
[20] Ibid, p. 294, para 94

The real challenge arises when a convention neither codifies nor crystallises a CIL rule at the time of its conclusion. Here, the emergence of a CIL rule from the treaty provisions depends on the practice of non-party States. If the conducts giving rise to the CIL rule is consistent with the treaty, as we argue later, the actions of non-parties may merely reinforce the CIL character of the conduct, depending on whether there is corresponding *opinio juris* on the part of the treaty parties.[21]

It is here important to clarify that our thesis primarily addresses the role of the practice and *opinio juris* of a small minority of third States in the development of CIL from a multilateral treaty rule and how the fact that it is this minority that determines whether a rule enunciated in a treaty has subsequently passed into CIL. This, in our view, denies the treaty parties who though are in the majority, the faculty to develop their treaty rule into CIL. Though it implicates the Baxter Paradox, it therefore addresses a different aspect of the issue.

III. The Paths of Customs

The foremost treaty provision that has attempted to define CIL is article 38(1)(b) of the Statute of the ICJ, which defines custom as 'as evidence of a general practice accepted as law'.[22] This goes as far back as article 38(2) of the Statute of the Permanent Court of International Justice (PCIJ), from which it was adopted wholesale. The objective (general practice) and subjective (acceptance) elements of this provision have been robustly applied in judicial decisions and copiously studied[23] and discussed in scholarly works. Barring the dent of the concept of instant custom,[24] the 'objective' and 'subjective' elements, usually conceptualised as 'state practice' and *'opinio juris*', are generally

[21] Jonathan I. Charney, 'International Agreements and the Development and the Development of Customary International Law' 61 Washington Law Review: 971, 981 (1986) (drawing attention to how statements by treaty parties that they do not recognise a customary law obligation from their treaty obligations prevents the development of CIL from the treaty in question).
[22] This definition has been reproduced in subsequent enabling treaties of international courts and tribunals.
[23] International Law Commission (ILC), the International Law Association (ILA), International Committee of the Red Cross (ICRC), for example.
[24] The view holds that *opinio juris* alone, without settled state practice, formulates the foundational source of CIL. It argues that state practice, if it has any role at all to play, is a secondary factor in customary international norm formation. See Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', 5 Indian J Int'l L 23 (1965); Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-making', 12 Australian Yearbook Int'l L 22, 37-46 (1992). Anthony D'Amato, 'Trashing Customary International Law', 81 AJIL 101 (1987) 101 Cf J.I Charney, 'International Agreements and the Development of International Law', 61 Washington L Rev 971, 990-996 (1986); H.E Chodosh, 'An Interpretive Theory of International Law', 28 Vanderbilt J Transnat'l L 973, 1052–1056 (1995); Roozbeh (Rudy) B. Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates', 21 (1), EJIL, 173, 183 (2010).

believed to be the irreducible cumulative minimum condition that a rule must fulfil to qualify as CIL.[25]

Early enough, the PCIJ recognised that an aspect of international law is '…usages generally accepted as expressing principles of law and established [by States] in order to regulate the relations between them'.[26] The ICJ has demonstrated its continuous fidelity to the unity of the two elements in several cases. In the *Continental Shelf,* the ICJ declared that 'it is…axiomatic that …the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States'.[27] Notwithstanding the persuasive force of the instant custom doctrine, in the 2019 case of the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,*[28] the court declared that custom 'is constituted through "general practice accepted as law" (article 38 of the Statute of the Court)', The court affirmed its *North Sea Continental Shelf* view 'that not only must the acts concerned amount to a settled practice, they 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 the existence of a rule of law requiring it'.[29]

Without allowing the elements of customs to delay us, one underlining remark that needs making is the troubling nature of the ascertainment of the emergence of a rule of CIL. The root of the problem remains in the mystery identified by Bradley and Gulati that '[n]o one knows precisely how much state practice is required to create a CIL rule, what form that practice must take, or how long it must last. The standards for identifying the requisite opinio juris for CIL are even less clear.'[30] Indeed, judges do have troubles ascertaining state practice and *opinio juris* during adjudication as do writers when speculating on the existence of a rule of CIL. This naturally leads to divergent opinions and consequential doctrinal upheavals[31] on the existence of CIL.

Similar patterns emerge in the arguments presented by States before international courts and tribunals, even when presenting arguments during advisory opinions. When the

[25] See ILC Second Report on Identification of Customary International Law, by Sir Michael Wood, Special Rapporteur 22 May 2014, Document A/CN.4/672, para 22-24
[26] *S.S Lotus*, Series A, No. 10, Judgment of September 7, 1927, p. 18
[27] *(Libyan v. Malta)*, ICJ Rep 1985, 13, 29, para. 27
[28] ICJ Rep 2019, 95, p. 131, para 149
[29] Ibid, p. 131, para 149
[30] Curtis A. Bradley & Mitu Gulati, 'Withdrawing from International Custom', The Yale Law Journal, 202, 243, (2010)
[31] See Amos O Enabulele, *The Methodology of Judicial Notice in the Development of International Law*, 6-7 (2023)

court—whether the PCIJ or the ICJ—has had to explain the challenges in determining the sufficiency of state practice or the legal weight of opinio juris, it has cited specific reasons.[32] In the *Colombian-Peruvian Asylum case*, the facts (state practice) brought to the knowledge of the court by Colombia 'disclosed so much uncertainty and contradiction so much fluctuation and discrepancy … that it …[was] not possible to discern … any constant and uniform usage, accepted as law…'.[33] In *Fisheries Jurisdiction,* what was identified was the problem of a rule still 'evolving and confronted by a widely divergent and, discordant State practice'.[34] In the *Reservations to the Convention on Genocide*, 'the examples … appear[ed] to be too rare in international practice to have given rise to such a rule'. In the *North Sea Continental shelf cases*, the tipping point was the lack of evidence that the States participating in the practice 'so acted because they felt legally compelled to' participate in the practice by reason of a rule of customary law obliging them to do so.[35] In *Rights of Nationals of the United States of America in Morocco*, there was no 'sufficient evidence to enable the Court to reach a conclusion that a right to exercise consular jurisdiction founded upon custom or usage has been established in such a manner that it has become binding on Morocco'.[36] These are by no means exhaustive.

The foregoing are the consequences of the fact that CIL is not known to develop in an atmosphere of negotiation and agreement but develops in the chaotic manner of claims (assertion of right) and/or counterclaims (denial of the asserted right). CIL may remain in this indeterminate form until consolidated in court decisions or treaty provisions. We do see this in decided cases, where even when parties agree that there is a rule of CIL governing a matter, they find themselves unable to agree on the content of the rule. In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area,* for instance, the ICJ found that when considering the 'rules and principles of international law'[37] which, Canada and the United States held should govern maritime delimitations, that they were at one in believing in the existence of a 'fundamental norm of international law' but disagreed on the content of the said 'fundamental norm.'[38] This scenario was also present in the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean*

[32] Note 19, p. 29
[33] (*Colombia v. Peru*) ICJ Rep, 1950, 266, 277
[34] *(United Kingdom v. Iceland)* Merit, ICJ Rep 1974, 3, 39, Declaration of Nagendra Singh
[35] *(Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands)*, ICJ Rep 1969, 3, 41, 43, para 76; p. 44-45, para 78
[36] *(France v. United States of America)*, ICJ Rep 1952, 176, 200
[37] Note 20, p. 295. para 98
[38] Ibid

Sea[39] respecting the rights coastal States can exercise in the contiguous zone, even though both parties agreed that the contiguous zone is recognised under both treaty and CIL, they disagreed on the scope of the rights coastal States can exercise in the zone.

In the following parts, we shall demonstrate that there are three possible paths on which a rule may travel to become CIL. These paths are neither cumulative nor do they deny the pivotal cumulative requirements of state practice and *opinio juris*, though there may be room to question the actual fulfilment of the requirements in some instances, especially where an international court or tribunal declares CIL. The three paths are: the path of the unwritten practice of States; the path of a treaty; and the path of judicial decisions.

Path of the Unwritten Practice of States

A distinguishing characteristic of CIL is its unwritten nature, so that when we speak of customary law in any given system, we speak of a law that is not codified but has arisen from the conducts and beliefs of those subject to its sway. As the Nigerian Supreme Court once declared, customary law is 'a mirror of accepted usage among a given people'.[40] Being linked to the conduct of its subjects, customary law 'is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it'.[41] Thus, in all systems of customary law, the subjects of the law are also the lawmakers; their behaviour and preferences initiate, establish and sustain the law.

We do often see international courts and tribunals affirm that custom is the result of facts collected from the conducts of States; conducts that are carried out in the belief that they are obligatory. When an international court or tribunal affirms that certain treaty rules originated in CIL,[42] it does this from the standpoint that the rules were already asserted in their unwritten form before they got incorporated in treaties. Nevertheless, it is essential to recall that there are customs that arose from the practices of a few States that obviously had the means to enforce their will on others, prior (principally) to the

[39] Note 2
[40] *Owoniyi v Omotosho* [1961] 1 ALL NLR 304
[41] *Princess Bilewu Oyewunmi v. Amos Owoade Ogunesan* [1990] 2 NSCC 242; [1990] 3 NWLR (PART 137), 182
[42] Such as respect for the independence and territorial integrity of States, and the freedom of navigation. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*), Jurisdiction and Admissibility, Judgment, ICJ Rep 1984, p. 392, para 73.

prohibitions contained in the United Nations Charter.[43] Judge Fouad Ammoun was emphatic in stating in the *Barcelona Traction case,* that 'certain customs of wide scope became incorporated into positive law when in fact they were the work of five or six powers.'[44]

The problem with customs (being unwritten) is that their scope are rarely settled, given that disputant States would always want to assert or dispute the custom in a manner that favours them. States hardly find a common ground until a rule of CIL, irrespective of how well-established it is thought to be, receives the imprimatur of judicial decision or treaty. The practice that was asserted, and denied, as particular custom by Portugal and India in the *Right of Passage over Indian Territory*,[45] was found to have been in place for over a Century.

The history of the development of the territorial sea up until the UNCLOS, nicely exemplifies how the basis of a CIL rule may not be in doubt, but the scope would remain a question of claims and counter-claims. Though the regime of the territorial sea was firmly established in CIL, the breadth remained a question of claim and counter-claims, despite the canon ball rule, so much so that no breadth was specified in the 1958 Convention on the Territorial Sea and the Contiguous Zone. In fact, in the *Fisheries Jurisdiction case,* the ICJ helped us to understand that the 1960 Conference failed by one vote to adopt a text governing the two questions of the breadth of the territorial sea and the extent of fishery rights'.[46] However, it was article 3 of the UNCLOS that definitively settled the breadth of 12 nautical miles in both treaty and CIL.

[43]Olivier Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate', 16 (5) European Journal of International Law 803, 811 (2005) In fact Corten only fell a bit short of affirming that this situation still persists in contemporary international law, when in the context of the making of CIL, he pointed to states 'with the power to ensure respect for the rule of law', and that the views of NATO was emphasised to justify the war against Yugoslavia, while the reticence and protests of other states (such as members of the non-aligned movement), on the other hand, were minimized or ignored.

[44](*Belgium v Spain*) ICJ Rep 1970,3, 308, Separate Opinion; R.R. Baxter, 'Multilateral Treaties as Evidence of Customary International Law' 41 Brit Y.B. Int'l L. 275, 275 (1965-1966) (stating that 'the practice of five or ten states, not on its face wholly consistent, may be sufficient to establish that the asserted rule constitutes a general practice creative of legal rights and duties for states and individuals'); Pitman B. Potter, 'Treaties and International Legislation', 61 Am. J. Int'l L. 1005, 1006 (1967) (citing *Schooner Exchange v. McFaddon* (7 Cranch 116, the author noted that 'it was long ago held that unanimous explicit consent is not needed to establish a norm of "customary" international law')

[45] (*Portugal* v. *India*) (Merits), ICJ Rep 1960, 6

[46] Note 34, p. 23 para 52

The Path of Treaty Law

Indeed, one of the fundamental ways CIL evolves is through conventional law. The ICJ recognised this possibility in the *North Sea Continental Shelf* cases, where it affirmed that the possibility of a conventional rule passing into CIL was 'perfectly possible and does from time to time occur';[47] and that irrespective of its contractual or conventional origin, provisions of a convention could be norm-creating and constitute the foundation of, or generate a rule which passes into the corpus of international law to become binding on States which are not parties to the convention.[48] This, according to the court, 'constitutes one of recognised methods by which rules of customary international law may be formed.'[49]

We must not overlook the significance of the 'norm-creating' qualities emphasised by the ICJ. This perspective allows us to recognise that it is not every convention or provision within a convention that is inherently 'norm-creating.' Each must be evaluated based on these qualities, which are influenced not only by the intrinsic nature of the provisions but also by the conduct and beliefs of non-party States. As has been declared by the ICJ, '[t]he determination whether a treaty declared customary international law at the time of its adoption or coming into force or whether, on the other hand, it subsequently passed into CIL is not always easy to make.'[50]

We should also recognise the point made in the *Military and Paramilitary Activities in and against Nicaragua,*[51] that the codification of an existing CIL in a multilateral treaty does not eliminate the CIL's independent application, nor does it exempt treaty parties from complying with it. This however differs from situations where no prior CIL existed, and the treaty parties, through their operation of the treaty, begins shaping a new customary rule. In this case, third States must establish the necessary practice and exhibit the *opinio juris* for the process of developing a corresponding custom from the treaty to be complete.

[47] Note 35, p. 41, para 71
[48] Ibid.
[49] Ibid
[50] Baxter, 'Treaties and Custom' note 9, p. 35
[51] *(Nicaragua v. United States of America), Jurisdiction and Admissibility*, ICJ Rep 1984, 392, 424, para. 73.

As earlier admitted, practice shows that the treaty path diverges into pre-treaty CIL (where provisions of a treaty codify CIL); CIL that is contemporaneous with treaty (the treaty crystallises CIL); and post-treaty CIL (where CIL arises from the provisions of a treaty). This is also in tandem with the view of the ILC, which, drawing from the decisions of the ICJ, stated that a rule set forth in a treaty may reflect a rule of CIL if it is established that the treaty rule: (a) codified a rule of CIL existing at the time when the treaty was concluded; (b) has led to the crystallisation of a rule of CIL that had started to emerge prior to the conclusion of the treaty; or (c) has given rise to a general practice that is accepted as law *(opinio juris),* thus generating a new rule of CIL.[52]

Applying CIL through conventional provisions that reflect it offers the advantage of clarity and efficiency, and also reduces the risk of the absence of rules of relevant content (*non liquet*). When a multilateral convention embodies a CIL rule, it becomes challenging for any State to dispute the existence or application of that rule, as the convention's text carries the weight of collective state practice. Essentially, such a substantially subscribed multilateral convention dominates CIL on the same subject[53] and makes it exceedingly difficult for a dissenting State to counter the consensus established by treaty parties. Indeed a:

> multilateral treaty is, it cannot be emphasized too heavily, a reflection of the State practice of the parties to it and constitutes an expression of their attitude toward customary international law, to be weighed together with all other consistent and inconsistent evidence of the state of customary international law. [54]

Colombia faced this challenge in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, in its attempt to prove that the scope of the power coastal States can exercise over the contiguous zone is wider than the scope recognised by the UNCLOS. Nicaragua had claimed that the provisions of article 33 of the UNCLOS reflect CIL and that the 24-nautical-mile limit prescribed therein is supported by 'practically unanimous' state practice. On the other hand, Colombia argued that article 33 of the

[52] ILC First Report on the 'Formation and Evidence of Customary International Law',
[53] Restatement pt. III introductory note at 2-7 (Tent. Draft No. 6); see Charney, International Agreements, note 21, p. 975
[54] Baxter, Treaties and Customs, note 9, p.52

UNCLOS 'does not reflect present-day customary international law on the contiguous zone'[55] and that 'under existing customary international law, a coastal State is permitted to establish zones contiguous to its territorial sea, of varying breadth and for a range of purposes, going in some respects beyond those expressly envisaged in Article 33 of UNCLOS'. For arguments of this nature, the bottom-line, as was well noted by Nicaragua, is for a State in the stead of Colombia (a non-party) to establish that State practice points to an evolution in CIL such that it now expanded over and beyond the provisions of the UNCLOS.[56]

In its decision, the court affirmed that article 33 of the UNCLOS reflects contemporary CIL on the contiguous zone, both in respect of the powers that a coastal State may exercise therein and the limitation of the breadth of the contiguous zone to 24 nautical miles.[57] The court based its decision on the finding that about 100 States, including States that are not parties to UNCLOS, have established contiguous zones.[58] On the other hand, though finding that the rule of CIL alleged by Colombia regarding the power to exercise control with respect to security in the contiguous zone has been asserted by some States, the court rejected the rule on its finding that the practice has been opposed by other States. Accordingly, the court held that the 'materials adduced by Colombia with regard to national legislation on the contiguous zone do not support Colombia's claim that the customary rules on the contiguous zone have evolved since the adoption of UNCLOS such that they allow a coastal State to extend the maximum breadth of the contiguous zone beyond 24 nautical miles or expand the powers it may exercise therein'.[59] It is arguable that the court could have taken a different view but for the observation of the court that:

> At the First United Nations Conference on the Law of the Sea in 1958, a Polish proposal to add "security" to the list of matters under the contiguous zone régime was adopted by a narrow majority in the First Committee, but it did not obtain the required majority for adoption by the plenary (Official Records of the First United Nations Conference on the

[55] Note 2, p. 326, para 148
[56] Ibid, p. 326, para 147
[57] Ibid, p. 327, para 155
[58] Ibid, p. 327, para 149
[59] Ibid, p. 328, para 154

> Law of the Sea (1958), Vol. II, doc. A/CONF.13/38, p. 40, para. 63). Instead, the Conference accepted, by an overwhelming majority, a proposal submitted by the United States which incorporated Ceylon's proposal to add "immigration" to the article (ibid., para. 64). During the negotiations at the Third United Nations Conference on the Law of the Sea, the wording of Article 24, paragraph 1, of the 1958 Convention was adopted in Article 33, paragraph 1, of UNCLOS without any change as regards the matters in respect of which the coastal State may exercise control.[60]

Where an alleged rule of CIL has not been incorporated into a treaty text or declared by an international court, the pendulum is likely to swing in favour of the party disputing the existence of the custom. Excepting local customs,[61] the ICJ appears to lean on the side of the State denying the existence of a custom.[62] Apart from the criticisms the ICJ has attracted in the manner it declares CIL,[63] there have been instances as well where the ICJ refrained from even probing into whether a conventional rule has actually attained CIL status.[64]

The possibility of the development of CIL from conventional rules must be well situated within the rule that a treaty binds only the States that have become parties to it, and cannot create obligations incumbent upon third States.[65] It is also important to acknowledge the observation of Weil that although this conventional norm has not been frontally assaulted, it is cunningly outflanked because behind the mask of classicism, in reality, the conventional norm itself may now create obligations incumbent upon all States, including those not parties to the convention in question.[66] This possibility of a rule arising from a treaty to bind nonparties is recognized in article 38 of the VCLT. In fact, given the limited state practice generally required to establish a CIL rule, a treaty

[60] Ibid, p. 328, para 153-154
[61] *Dispute Regarding Navigational and other Related Rights (Costa Rica v. Nicaragua)*, ICJ Rep, 2009, 213; *Right of Passage cas*e, note 42; etc.
[62] See the *Asylum case*, note 33; *S.S Lotus*, note 26; *Jurisdictional Immunities of the State Germany v. Italy: Greece Intervening*), ICJ Rep 2012, 99; *North Sea Continental Shelf cases*, note 35; *Navigational Rights* ibid
[63] See note 84
[64] See *Territorial and Maritime Dispute, (Nicaragua v. Colombia)*, ICJ. Rep 2012, 624, 666, para 118; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (*Croatia v. Serbia)*, ICJ Rep 2015, 3, 51-52, paras 102-105; *Qatar v. Bahrain*, Above, note 39, p. 96-97, para 181-183.
[65] Article 34 of the Vienna Convention on the Law of Treaties, 1969
[66] Prosper Weil, 'Towards Relative Normativity in International Law?', 77 Am. J. INT'L L. 413, 438 (1983).

with substantial State participation serves as powerful evidence of the law and does even provide a fertile ground for the cunning outflanking that Weil pointed out.[67] Absent intra-convention dissent, the force of a treaty rule evolving into a CIL rule is extrinsically strengthened or weakened by the absence or presence of conflicting practices from other States.[68] The large number of States already subscribing to a treaty rule accelerates its development into CIL, as fewer States are needed to bring about that transformation—especially since the rule has already been concretized and clarified in the treaty context. When this occurs, as D'Amato rightly observed, it is not that the 'treaties bind nonparties, but that general provisions in treaties give rise to rules of customary law binding upon all states. The custom is binding, not the treaty'.[69]

Ineluctably, the principle that treaties cannot be imposed obligations on third parties without further action or what Scott and Carr called 'their subsequent reactions'[70], remains doctrinally unassailable. The further action envisaged here can only be from the conducts of non-parties that transform the purely treaty rule into a binding obligation for them under CIL. Regarding the role of non-parties in CIL development, Hugh Thirlway posed an important question: If, for example, 85% of non-party States endorse a rule through practice, is not that sufficient to establish a custom, even if they are outnumbered by treaty states? [71] While numerical strength is not the sole measure of sufficient state practice, it seems unlikely that in a multilateral convention with 50 State parties, 85% of the minority—perhaps just 9 States—could generate 'general practice' that is 'extensive and virtually uniform.'[72] Obviously, such a small minority cannot independently establish CIL for the greater majority, irrespective of whether the CIL is consistent or discordant with the conventional rule. A third State that feels so strongly about the normative quality of the conventional rule should exercise the option of acceding to the convention.

[67]Ibid
[68] Baxter, 'Multilateral', note 44, p. 278
[69]Anthony D'Amato, *The Concept of Custom in International Law*, p. 107 (1972); ILC Second Report on Identification of Customary International Law, note 22, para 76(f) (stating that 'for a treaty to serve as evidence of opinio juris, States (and international organizations), whether parties or not, must be shown to regard the rule(s) enumerated in the treaty as binding on them as rules of law regardless of the treaty**'.**
[70] Gary L. Scott & Craig L. Carr, Multilateral Treaties and the Formation of Customary International Law, 25 Denv. J. Int'l L. & Pol'y 71, 81-82 (1996)
[71] Thirlway, note 9, p. 5
[72] *North Sea Continental Shelf cases*, note 35, p. 43, para 74; D'Amato, note 69, p. 104 (arguing that '[a] treaty arguably is a clear record of a binding international commitment that constitutes the "practice of states" and hence is as much a record of customary behavior as any other state act or restraint.')

This is not to say that the state practice of parties to multilateral treaties, which as we have said, the treaty evidences, is of no moment at all in determining whether a multilateral treaty (that does not codify or crystallise CIL) is intended to be of norm-creating character outside its framework. As earlier indicated, there is always room for how the denial of CIL character of a conventional rule by parties 'cast serious and probably decisive doubt on the authority of the rule as a general custom'.[73] An indication as to this emerged in *Dispute concerning Delimitation of the Maritime boundary between Bangladesh and Myanmar in the Bay of Bengal,* respecting whether the equidistance method yet existed outside the frontiers of CIL. This was how Judge Zhiguo Gao classified it in his separate opinion:

> A comprehensive study of 134 instances of State practice in maritime delimitation has found that 103 of those boundaries have been delineated by the method of equidistance, in strict or modified form, accounting for 77 per cent of the total. And yet, the equidistance method is still not a customary obligation, even some four decades after the first ICJ ruling on it was made in the North Sea Continental Shelf cases and three decades after conclusion of the United Nations Convention on the Law of the Sea (the Convention). The mere number of instances of State practice upholding a method is thus not sufficient in itself to establish a legal rule. This applies equally to a method of convenience that frequently features in judicial and arbitral decisions. Its use results simply from the particular geographical situations confronting courts and tribunals, not from any force as a rule of customary law. The mere repeated use of a certain method in case law and State practice on maritime delimitation is not enough to establish the existence of a custom.[74]

Instructively, as at the time this case was decided, over 160 States had become parties to the UNCLOS. It is important to remark here that unlike the 1958 Continental Shelf Convention, the UNCLOS did not seek to grant a mandatory status to the equidistance method in article 15 of UNCLOS. If it did, we believe it would have been difficult to sustain the view that the equidistance method has not attained the status of CIL to become

[73] Oscar Schachter, *International Law in Theory and Practice*, p. 72 (1991)
[74] *(Bangladesh/Myanmar)* ITLOS Rep 2012, 4, p. 201, para 16

obligatory for non-parties, if it finds corresponding acts of third States, because all the parties would have been bound to use the method. Again, given the overwhelming number of State parties to the UNCLOS, it is safe to assume that the 31 States Judge Zhiguo Gao found not to have strictly used the equidistance method included State parties to the Convention. If this assumption is correct, it can only go to show that the parties to the UNCLOS do not regard the method as mandatory, thus making it impossible for a mandatory rule of CIL to arise in that regard.

The practice of state members towards non-parties in relation to the rule is also a relevant factor. This may be exemplified by the *North Sea Continental Shelf cases*,[75] where it was a parties or parties to the multilateral treaty that was seeking the application of the treaty rule to a third State as CIL. This eliminates doubts as to the expectation of the treaty parties that the rule would develop into CIL. Where, on the other hand, it is the treaty party that is resisting the application of the treaty rule to it as CIL, it will be difficult for a court or tribunal to ignore the doubt thereby cast on whether the treaty parties expect the rule to be norm-creating outside the treaty framework.[76]

It is thus illusory to assume that it is always in the interest of parties to multilateral conventions that their convention develops into CIL, especially when the parties leave open the option of withdrawing from the treaty.[77] Only recently, we saw the United Kingdom exit the European Union as a result of concerns expressed by citizens over erosion of domestic competences by EU law. How could it have been explained that the UK is yet bound by principles arising from those law as CIL, despite its withdrawal from the European Union? The rule that ties the application of international law to the consent of States, viewed alongside the rule of sovereign equality and differences between CIL and treaties, call for utmost circumspection in presuming that a treaty does or does not reflect customary law without a clear indication from the treaty itself or the activities of non-

[75] Note 35

[76] Citing treaties that declare that they are entered into by the parties purely as an act of grace, Wesiburd argued that 'it is easy to imagine circumstances in which a particular treaty not only fails to express opinio juris, but actually denies opinio juris, that is, provides evidence that the parties would reject any duty to behave as the treaty required had the treaty not been concluded'. Arthur M. Weisburd, 'Customary International Law: The Problem of Problem of Treaties' 21(1) Vanderbilt Journal of Transnational Law, 1, 24-25 (1988)

[77] Weisburd, 'Customary International Law', ibid, p. 24**,** (stating that 'it does not follow that conclusion of a treaty necessarily implies opinio juris, that is, that the parties believe that the treaty's provisions would legally bind them outside the treaty'); ILC, 'Summary Record of the 728th Meeting', Summary records of the 16th session (1964) I YBILC 33, para. 10. (affirming that '[t]he free operation of the will of the parties should not be prevented by assuming that crystallizing every concept as it had been at the time when the treaty was drawn up').

parties. This is particularly so as there is no legal presumption in this regard. For this purpose, we reiterate the point earlier made that parties to treaties 'continue to play a role both in the formation of customary law pertaining to matters regulated by the Conventions and in the development of additional and interstitial norms'.[78]

The Path of Judicial Decisions

There has been the enduring debate on the role of judicial decisions in the development of CIL.[79] This debate is necessitated by the role international courts and tribunals have continued to play in the declaration, crystallisation and clarification of CIL. The organic but largely indeterminate nature of CIL creates scope for the vital role courts/tribunals have continued to play, given that 'in practice many decisions of the most authoritative courts … are bound to have crucial importance in establishing the existence of customary rules, or in defining their scope or content, or in promoting the evolution of new concepts'.[80] It has been accepted through the ages that judicial decisions 'define for more accurate reference the principles of law already existing'.[81] As aptly put by Sir William Holdsworth, judicial decisions make 'the custom and therefore the law certain'.[82] Similarly, Justice Cardozo declared that 'international law … has at times … a twilight existence which is hardly distinguishable from morality or justice, till at length the imprimatur of the Court attests to its jural quality'.[83]

International courts/tribunals routinely declare that a treaty provision reflects CIL or that the provision is CIL. [84] As earlier stated, for example, the ICJ have at different times held

[78]Meron, note 9, p 247
[79] See Amos O Enabulele, 'Judicial Lawmaking: Understanding Articles 38(1)(d) and 59 of the Statute of the International Court of Justice' 33 (15) Australian Yearbook of International Law, 15 (2015).
[80] Antonio Cassese, *International Law*, 159 (2001)
[81] *In re List & Others (Hostage Trial), United States Military Tribunal at Nuremberg*, February 19, 1948, in H. Lauterpacht ed., Annual Digest & Reports of Public International Law Cases, 1948, 632, 635
[82] See John C. Gardner, 'Judicial Precedent in the Making of International Public Law' 17 J. Comp. Legis. & Int'l L. 3d ser. 251, 256 (1935)
[83] *New Jersey v. Delaware*, 291, U.S 361, 54 S.Ct. 407, 78 L.ED 847 (1934); HA Strydon, 'Customary International Law: The Legacy of the False Prophets' 27 Comp. & Int'l L.J. S. Afr. 276, 297, (1994) (arguing that '[e]ach judgment represents the formal law creating component in the law-making process, which calls a new and individualised legal norm into being'); Roozbeh (Rudy) B. Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates', 21(1) EJIL 173, 175 (2010) (arguing that "[j]urisprudence of international courts and tribunals are adopted into the gradual process of being 'elevated into norms of customary international law'); Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 Am. J. Int'l L. 757, 775 (2001) (arguing that 'judicial decisions can also have a formative effect on custom by crystallizing emerging rules and thus influencing state behavior')
[84] The approach of the court is not always well received: D'Amato A, 'Trashing Customary International Law' 81 American Journal of International Law 101, 102, (1987) (criticizing the court's approach to CIL on several grounds). See also Jonathan I. Charney, 'Universal International Law' 87 Am J Int'l L 529, 537 (1993); J. Patrick Kelly, 'The Twilight of Customary International Law', 40 Va. J. Int'l L. 449, 469, (1999-2000); Enabulele, note 27, p. 7 (stating that the manner the court declares CIL gives the appearance 'that state practice and *opinio juris* are at best conjectural') Judges of the court have even had occasions to criticize the court on this score. See Joint dissenting opinion of Joint dissenting opinion, Judge Guerrero,

that certain provisions of the VCLT declare CIL in *Certain Questions of Mutual Assistance in Criminal Matters*,[85] *Kasikili/Sedudu Island,*[86] *Questions Relating to the Obligation to Prosecute or Extradite*,[87] *Obligation to Negotiate Access to the Pacific Ocean*,[88] *LaGrand, etc.*[89] This is not limited to the VCLT. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,[90] the court asserted that the Genocide Convention embodies principles that are part of CIL. In *Military and Paramilitary Activities in and against Nicaragua,*[91] it was declared that the '[UN] Charter gave expression … to principles already present in customary international law' in the area of the rules governing the use of force. In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*,[92] it was declared that article 121(2), of the 1982 Convention on the Law of the Sea, reflects CIL.[93] In *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea,*[94] the ICJ declared that articles 56, 58, 61, 62 and 73 of UNCLOS reflected CIL rules on the rights and duties in the exclusive economic zone (EEZ) of coastal States and other States. The jurisprudence of international courts and tribunals in this regard have had tremendous effect on CIL.

Precedents, ILC Study and scholarly works testify to instances where judicial decisions have provided the pathway for the maturation and recognition of CIL. It is, for instance, safe to state that 'the principle of prevention', which is now readily accepted as a rule of CIL was introduced into international law in *Corfu Channel*.[95] In the case, the ICJ declared, without, ascribing it to CIL, 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'. [96] Since then, the principle has been applied as CIL in a number of cases. For instance, citing the above

Sir Arnold McNair, Judge Read, Judge Hsu Mo, in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep 1951, 31, 42-43; dissenting opinion of Judge Alvarez, p. 54.)

[85] *(Djibouti v. France)* ICJ Rep 2008, 177, 219, para112; *Legality of Use of Force, (Serbia and Montenegro v. United Kingdom)* Preliminary Objections, ICJ Rep. 2004, 1307, 1345 para 98 (holding that article 31 reflects customary international law).

[86] *(Botswana v. Namibia)* ICJ Rep. 1999, 1045, 1059, para 18 (holding that article 31 was applicable to the parties inasmuch as it reflected customary international law, notwithstanding that neither of the parties was a party to the VCLT)

[87] *(Belgium v. Senegal)*, ICJ Rep 2012, 422, 460, para 113

[88] *(Bolivia v. Chile)* ICJ Rep 2018, 507, 545- 546

[89] *(Germany v. United States of America)*, ICJ Rep 2001, 466, 502, para 101

[90] *(Croatia v. Serbia)* ICJ Rep 2015, 3, 46, para 87

[91] *(Nicaragua v. United States of America)*, Merits, ICJ Rep 1986, 14, 96, para 181

[92] *(Qatar and Bahrain)*, Merits, ICJ Rep 1986, 40

[93] Ibid, p. 40, p. 93 para 173 and 97, para 185

[94] Above, note 2, p. 298 para 57

[95] *(United Kingdom v. Albania)*, Merits, ICJ Rep 1949, 4, 20, 22

[96] Ibid, p. 22

passage in *Corfu Channel* in the case of *Dispute over the Status and use of the Waters of the Silala*, the ICJ observed that 'the Parties agree that they are bound by the customary obligation to prevent transboundary harm'.[97] It has also been observed that '[m]ost commentators on international law believe that this custom [innocent passage] became an accepted principle of international law following the *Corfu Channel Case*.'[98] Reiterating this view, Macrae observed that the concept of free use of the High Seas and the concept of the territorial sea 'became the norm[s] through court decisions, general acceptance and treaty'.[99] The 'object and purpose rule' of reservation crystallised in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. Also, 'the bond of nationality as the basis of diplomatic protection', crystallised as a hard and fast rule of CIL in *Panevezys-Saldutiskis Railway*.[100]

The judicial path bears a strong connection to the other two paths. Whenever the court refrains from making any pronouncement on a disputed alleged CIL rule, it leaves the rule in limbo, and States unsure of the obligatory status of the alleged rule.

IV. Non-Parties to A Convention as Purveyors

The point has been well made that a multilateral convention is a busy (sometimes a short) path of transformation of embryonic rules or facts to CIL. This process requires a clear separation of obligations arising for the parties by virtue of their consent to a multilateral convention and the freewill of States that are not parties to the Convention to adopt and promote the rules contained in the convention by adhering to them as law. While obedience to the provisions of a convention by the parties is underpinned by the consent they have given, the application of a rule arising from the convention by non-parties would merely be incubatory of a rule of CIL – an indication of principle – until such a time that a rule of CIL, if at all, is found to have arisen therefrom. What this clearly means is that, at the incubation stage, non-parties owe no obligation towards either the treaty parties or non-treaty parties to apply the treaty rule or apply it in a certain way. This, as has been stated above, applies only to the subsequent development of a CIL rule from a

[97] (*Chile v. Bolivia*), ICJ Rep 2022, 614, 644-645, para 83
[98] Waldoch, The International Court and the Law of the Sea, 5 INT'L L. Pamphlets, No. 8, 5-7 cited in Leslie M. Macrae, 'Customary International Law and the United Nations' Law of the Sea Treaty',13 Cal. W. Int'l L.J. 181, 218
[99] Macrae, ibid
[100] (1939), series A/B, No. 76, p. 16

treaty and has no application to instances where the treaty crystalises CIL at its inception or where the treaty rule is believed by the treaty parties (who by their sheer number and spread are able to generate the needed general practice) to codify preexisting CIL.

In relation to the subsequent development of CIL from treaty rule, the application of the provisions by non-parties lies on their absolute freewill outside the realm of law. Such a treaty provision is not law for the purpose of application to other States at the instance of State parties, nor is it law to be applied against State parties at the instance of third States, even where a third State actually applies the rule to itself. It is indeed possible to find a situation where third States would, as found in the *North Sea Continental shelf cases*, act, not because they felt legally compelled to act in a way that corresponds to a conventional rule by reason of a rule of CIL obliging them to do so.[101] For such instances of action, however numerous, to qualify as custom, there must be evidence that the States acted because they felt legally compelled to do so 'by reason of a rule of customary law obliging them to do so especially considering that they might have been motivated by other … factors'.[102]

Again, the decision of the ICJ in the *North Sea Continental Shelf cases*[103] provides some scope. The cases demonstrated that it is insufficient that certain States that are not parties to a conventional text have adopted the conventional rule in their dealings without an additional showing that the rule has actually attained the status of CIL. In the *Cases*, the question before the court was whether Germany, which was not a party to the 1958 Geneva Convention on the Continental Shelf, was nonetheless bound by the rule of equidistance delimitation of the continental shelf enacted in article 6 of that Convention. The argument of Denmark and the Netherlands was that the said rule had, subsequent to its adoption in the Convention, become a rule of CIL binding on non-parties to the Convention, including Germany.

The court decided that the instances of action alleged by Denmark and the Netherlands did not justify the emergence of a rule of CIL. This was irrespective of the evidence before the court that some States that were not before the court and not parties to the 1958

[101] Note 35 p. 43, para 76; p. 44-45, para 78
[102] Ibid, p. 44-45, para 78
[103] Ibid

Convention on the Continental Shelf had adopted the methods of the Convention for maritime boundary delimitation. The court minced no words in declaring that no title of law backed the application of the rule by non-parties. Accordingly:

> …even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*…The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[104]

In fact, the court even dismissed the conducts of States, which though were not parties thereto, adopted the method in 'acting actually or potentially in the application of the Convention', as they were or shortly became parties thereto.[105] Importantly, though finding up to fifteen instances [106] that applied the method, the court yet found that the instances were not good enough. And that '[f]rom their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle.'[107] For the States that where not parties to the Convention and did not subsequently become parties, the court considered their action 'problematical' and 'entirely speculative'.[108] The court noted that the latter States were clearly not applying the Convention, and so refused to draw any inference that 'they believed themselves to be applying a mandatory rule of customary international law', [109] in that 'there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature'.[110] Rightly, the ICJ was not interested in the conducts of the parties to the convention, which 'for various reasons' the court did not consider 'to be reliable guides as precedents.[111]

A fundamental point to consider is the possibility of a non-party agreeing that a general rule enacted in a convention is CIL but disagreeing with the specific scope and application

[104] Ibid, p. 44, para 77
[105] Ibid, p. 43, para 75
[106] Ibid, p. 43, para 75
[107] Ibid, p. 43, para 76
[108] Ibid, p. 44, para 76
[109] Ibid
[110] Ibid
[111] Ibid, p. 43, para 75

of the rule, thus revealing irreconcilable inconsistencies between the codified CIL and what the non-party believes the CIL rule to be. This was manifest in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea,*[112] where, though agreeing to the general concept of the contiguous zone as codified in the UNCLOS, Colombia had a different belief on the scope of its application as CIL, so that had the ICJ not found the conventional rule to reflect CIL, it would, perhaps, have been difficult to hold that it had subsequently crystallised in that manner.

Subject to our argument in the next part, it is the unsolicited application of a conventional rule by third States, when such application acquires sufficient density, and a belief in the obligatory character of the rule that alone suffices as the final act in the transformation of a purely conventional rule into CIL. In other words, adherence to the provisions of the convention by the parties thereto cannot qualify for state practice to be considered for the emergence of the provisions as CIL. An 'extensive and virtually uniform'[113] application of a conventional rule with a sense of obligation by States that are not parties to the convention would certainly culminate in the establishment of a rule of CIL, if the application is backed by *opinio juris*. It is however not possible not to acknowledge the role reservations may play here.

We can allude to one instance in which the parties to a convention declared its provisions to be CIL. Even in this instance, the reservations and objections that followed the consent to the Convention leave much room for speculation as to whether all the parties to the Convention actually believed that the rules it declared were CIL. This instance is the Convention on the High Seas, 1958,[114] of which there was strong disagreements on some of its provisions, despite the express statement in the Convention that it codifies the rules of international law relating to the high seas and that the parties 'adopted the following provisions as generally declaratory of established principles of international law'.

Two provisions – articles 9 and 15 – of the Convention were particularly problematic. Article 9 enacted the restrictive immunity doctrine whereby only Ships owned or operated by a State and used only on government non-commercial service are immune; and article

[112] Note 2
[113] *North Sea Continental Shelf cases*, note 35, p. 43, para 74
[114] Done at Geneva on 29 April 1958. Entered into force on 30 September 1962. United Nations, Treaty Series, vol. 450, p. 11, p. 82.

15 defined piracy. Regarding article 9, eleven States – Mexico, Poland, Albania, Belarus, Romania, Russia, Ukraine Bulgaria, Hungary, Russian Federation, and Ukraine – entered reservations rejecting the restrictive immunity doctrine. Rather, they preferred absolute immunity for government owned or operated ships, irrespective of whether they were for commercial or governmental purposes. Only 11 States –United States of America, United Kingdom of Great Britain and Northern Ireland, Thailand, Portugal, Netherlands, Madagascar, Japan, Germany, Denmark, Australia, Israel – objected to the reservations.

The effects of the reservations and objections on the provisions were stated in a communication of the Government of the United States of America of 27 October, 1967, thus:

> The Government of the United States of America has received an inquiry regarding the applicability of several of the Geneva Law of the Sea Conventions of 1958 between the United States and States which ratified or acceded to those Conventions with reservations which the United States found to be unacceptable. The Government of the United States wishes to state that it has considered and will continue to consider all the Geneva Law of the Sea Conventions of 1958 as being in force between it and all other States that have ratified or acceded thereto, including States that have ratified or acceded with reservations unacceptable to the United States. With respect to States which ratified or acceded with reservations unacceptable to the United States, the Conventions are considered by the United States to be in force between it and each of those States except that provisions to which such reservations are addressed shall apply only to the extent that they are not affected by those reservations. The United States considers that such application of the Convention does not in any manner constitute any concurrence by the United States in the substance of any of the reservations involved.

This response in tandem with the decision of the ICJ in Reservations to the Genocide Convention as incorporated into articles 19, 20, and 21 of the VCLT.[115]

If we take the number of States – 41 in all (of a total number of 61 parties) – that did not object to the reservations and are *ipso facto* deemed to have accepted it by reason of article 20(5) of the VCLT,[116] one cannot but wonder the extent to which the Convention could really be said to have declared CIL.

On this point, we must again return to the *North Sea Continental Shelf Cases*, where it was declared that:

> The foregoing conclusion [that article 6 of the convention did not reflect or crystallise CIL] receives significant confirmation from the fact that Article 6 is one of those in respect of which … reservations may be made by any State …, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;-whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. [117]

It has been argued by some scholars, including Baxter, that there is no inconsistency in a treaty declaring that it is declaratory of existing CIL, also permitting unlimited reservations. Baxter rather saw such a treaty as a compilation of legal rules, each one of which must be examined individually. He argued that a State may become a party to the treaty with a reservation to one article which it believes does not reflect the state of the law while the nineteen others do. He however conceded that 'the weight to be attached to the provision as to which a reservation is made is lessened by the reservation'.[118] With specific reference to the Convention on the High Sea, Baxter noted that as of the end of

[115] Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331
[116] We take it for granted, drawing from the Reservations Case, that this provision declares CIL.
[117] Note 35, p. 38-39, para 63.
[118] Baxter, 'Treaties and custom', note 9, p. 50

1969, 13 States had reserved as to six of the 29 substantive provisions of the treaty, and that "[t]hese reservations markedly diminish the declaratory force of the articles to which they relate, but they hardly deny the evidentiary force of either these articles or the articles not yet the subject of reservations.[119]

On his part, while reasoning that the power to make reservations is compatible with the codification character of a convention, Judge Caetano Morelli[120] acknowledged the effect of reservations on a codifying convention vis a vis a reserving State and other States parties. In his words:

> For the power to make reservations is entirely compatible with the codification character of a convention or of a particular rule contained in a convention. Naturally the power to make reservations affects only the contractual obligation flowing from the convention; that obligation, that is to say the obligation vis-à-vis the other contracting parties to consider the rule in question as a customary rule, is excluded in the case of the State making the reservation.[121]

Drawing from Morelli's reasoning, it has been stated that the fact that reservations are permitted to some articles and not to others does not prove that those to which reservations are permitted are not rules of customary law.[122] It is possible to inquire into where to place an objecting State, since as Judge Morelli said, the obligation of the other parties to consider the rule to which reservation was made as CIL is excluded. It would be unreasonable to treat an objecting State as equal to other parties that did not raise objections. The distinct stance of the objecting State should be recognised, setting it apart from those who fully adhere to the CIL in question. It is possible to argue that by not objecting, the non-objecting State party simply agrees that the rule is not CIL, since one (among several) reason(s) a State may object to a reservation is that the rule is a rule of CIL, permitting of no unilateral exclusion.[123]

[119] Ibid, p. 51
[120] Dissenting in *North Sea Contental Shelf cases*, note 35, p. 198
[121] Morelli, ibid, p. 198
[122] Committee on Formation of Customary (General) International Law: Final Report of the Committee Statement of Principles Applicable to the Formation of General Customary International Law, International Law Association London Conference (2000), p. 755
[123] See *North Sea Continental Shelf case*, note 35, p. 38-39, para 63.

In any event, we believe the effect of reservations to provisions of a codifying a convention becomes particularly evident when viewed against the decision of the ICJ in the *Asylum case*.[124]in the case, the agency of the Montevideo Conventions of 1933 and 1939 would have railroaded Peru into the alleged regional or local custom of unilateral qualification of asylum peculiar to Latin-American States had it signed the Convention. The court firmly declared that:

> The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.[125]

The paramount weight the ICJ granted that singular act of the refusal of Peru to ratify the Convention, which could qualify the State as a persistent objector to the practice of unilateral qualification of Asylum by the South American States,[126] could be applied with the same force emphasise the effect of the reservations made to the Convention on the High Seas on the CIL character of the provisions to which reservation was made. In making this point, we should clarify that the objection of a minority cannot forestall the emergence of a rule as CIL;[127] it may exclude them from the sway of the rule, as persistent objectors. Also, as affirmed by the ICJ, there cannot be a unilateral exclusion by way of a reservation to, or failure to sign, a treaty incorporating a rule of CIL.[128]

[124] Note 33
[125] Ibid, p. 277-278.
[126] Ibid, p. 277-278. It has however been argued that this case 'provides little support for the persistent objector doctrine' – See Bradley & Gulati, 'Withdrawing from International Custom', note 30 , p. 235
[127] See the view of the ICJ in *Gulf of Maine*, p. 294, para 94 (holding that the disinclination of a number of States to ratify the UNCLOS 'in no way detracts from the consensus reached on large portions of the instrument and, above all, cannot invalidate the observation that certain provisions of the Convention, concerning the continental shelf and the exclusive economic zone'. This view was taken by the court within the context of the CIL status of the EEZ and the Continental shelf after the making of the UNCLOS but before it came into being.
[128] *North Sea Continental Shelf case*, note 35, p. 38-39, para 63

V. Custom's Rebirth by the Consent of a Significant Majority

We have so far shown three ways in which CIL interfaces with multilateral conventions – by codification, by crystallization, and by the transformation of conventional rules to CIL through the intervention of third parties. What we now seek to show is how a majoritarian convention impacts CIL that predated the convention and controls its subsequent development. To enable us achieve this, we yet have to build on, and expand, the foundation we set out in the preceding parts.

We have already made the point that the conduct of non-parties to a convention is pivotal to the transformation of purely conventional rules to CIL, as copiously exemplified in the *North Sea Continental Shelf cases*.[129] We argue that the consequence of this, generally, is that the acts and beliefs of third parties are the last elements in the transformation of a purely treaty rule to CIL.[130] We fully accept this established rule and do not seek to reinvent it. Our aim is to illustrate how the foundational elements of CIL—general practice and *opinio juris*—limit the ability of non-parties to a majoritarian treaty to influence the development of CIL independently of the treaty's framework. It is our view that the requirement of 'general practice' inherently prevents a small minority from dictating the evolution of CIL related to, or emerging from, a majoritarian treaty.

We would like to use two significantly subscribed treaties and some decisions of the ICJ relating to them to illustrate view. These are the United Nations Charter, particularly article 51 and the provisions relating to the Exclusive Economic Zone (EEZ) in the UNCLOS.

Customary International Law and the Charter Regime on the Use of Force in Brief

There is no gainsaying the fact that the question as to whether article 51 of the UN Charter covers the field of the right of self-defence is a controversial one. Summarising the controversy, Gray located the debate around whether article 51 is an exhaustive statement of the right of self-defence or whether there is a wider customary law right of self-defence

[129] Note 35, p. 43, para 75

[130] The term 'last element' is carefully used to give room for the point earlier made that the view of the parties on whether their treaty rule is CIL is important. In terms of emphasis or of the conditions that an international court/tribunal is bound to consider, the view of state parties is required to be sought but if raised or known to deny that the treaty rule has developed CIL, we believe, it is unlikely that the court or tribunal would readily ignore it.

going beyond the right to respond to an armed attack. Gray noted that those supporting a wide right of self-defence argue that the reference to 'inherent right' in article 51 preserves a customary law right of self-defence, which they argue is wider than article 51 and allows self-defence other than against an armed attack. This group, according to Gray, argue for a right of anticipatory self-defence and of protection of nationals abroad, while those against a wide view of self-defence argue that this interpretation deprives article 51 of any purpose, in that article 51 imposes restrictions on the right of self-defence in response to armed attack. [131] It thus follows, as Gray pointed out, that as the right of self-defence is an exception to the prohibition on the use of force, it should be narrowly construed and explains why those arguing for a narrow right of self-defence also deny that customary law in 1945 included a wide right of self-defence which was preserved by article 51.[132]

The jurisprudence of the ICJ appears to support both positions, which are views based on opposite and irreconcilable premises. Both arguments robustly featured in the *Nicaragua case*[133] where the court obviously adopted both positions in several aspects of the judgment. At some point in the judgment, the court declared: 'so far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it'.[134] For example, while the only logical deduction that could be made from the insistence by the ICJ that there must be 'an armed attack'[135] for article 51 of the Charter to be invoked, is that anticipatory self-defence (for instance) is not permissible, the court contradicted itself when it declared that the prohibition of the use of force in article 2(4) of the Charter and the right of self-defence under article 51 'still exists unmodified' in CIL that predated the Charter. The contradiction may not be apparent unless placed within the context of the divergent

[131] Christine Gray, 'The Use of Force and the International Legal Order' in Malcolm Evans ed. *International Law* (5th edn) 13 (2018)
[132] Gray, ibid
[133] Note 91
[134] Ibid, p. 96, para 181
[135] See *Application of the Convention on the Prevention and Punishment of Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Rep 2005, 168, 223-224, para 148

arguments: those who support the narrow view obtained by the conviction that the Charter exclusively covers the field, uphold the view that there is no occasion for the use of force in self-defence for any purpose – including anticipatory use of force and the protection of nationals – unless in defence of armed attack that had occurred.[136] On the other hand, those who argue that the right to self-defence is also found in CIL, have only one purpose to serve: to expand occasions in which States may exercise the right outside the limitation in article 51.[137] These occasions would certainly indulge anticipatory self-defence which is antithetical to the ICJ's insistence on 'armed attack'.

Glennon brought these irreconcilabilities to the fore in his observation that a broad reading of article 51 yields the implication of 'not only that an inherent right to self-defence existed prior to ratification of the UN Charter, but also that an inherent right continues to exist—unimpaired—after ratification'. [138] He however argued that article 51 did the exact opposite of impairing the right with the requirements of 'if an armed attack has occurred' and 'if the Security Council takes "measures necessary to maintain international peace and security" following an armed attack'. [139] Drawing from these, he asserted that 'article 51 not only impairs the inherent right of self-defence but in fact extinguishes it because the right exists only "until" the Security Council takes such measures'.[140] The bottom-line of the point made by Glennon is that an acceptance by the ICJ that there exists a customary law right to self-defence is an affirmation of the corollary that there is a right to use force in self-defence in anticipation of armed attack, which necessarily wipes out the court's view on the necessity for the 'occurrence of armed attack' to the invocation of self-defence in article 51 of the Charter. The court itself tried unsuccessfully to resolve this conundrum, when it explained that:

> …a principle enshrined in a treaty, if reflected in customary international law, may well be so unencumbered with the conditions and modalities

[136] This has further been circumscribed by the ICJ's insistence on the conditionality of 'complete dependence': *Nicaragua case*, note 91, p. 62-65, para 110-116; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro),* ICJ Rep 2007, 43, 205, para 391-393

[137] Olivier Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate' 16 EJIL, 803, 806, (2005) (arguing that '[a]rticle 51 itself was never intended to compromise the "natural", thus customary, right to legitimate self-defence, either as it existed at the time or as it has evolved since')

[138] Michael J. Glennon, 'The Limitations of Traditional Rules and Institutions Relating to the Use of Force' Marc Weller, ed. *The Oxford Handbook of the Use of Force in International Law* (2015), Oxford Public International Law (http://opil.ouplaw.com). (c) Oxford University Press, 2015

[139] Ibid

[140] Ibid

> surrounding it in the treaty. Whatever influence the Charter may have had on customary international law in these matters, it is clear that in customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed. On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus, for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.[141]

It is important to bear in mind that the court's focus' on CIL/Charter relationship in the case was in response to the view of the US that the court should refrain from applying the rules of CIL 'because they have been "subsumed" and "supervened" by those of international treaty law, and especially those of the United Nations Charter'.[142] The court understood the argument of the US to mean that 'the existence of principles in the United Nations Charter precluded the possibility that similar rules might exist independently in CIL, either because existing customary rules had been incorporated into the Charter, or because the Charter influenced the later adoption of customary rules with a corresponding content'.[143] Within this context, the court furthermore reasoned:

> The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in the treaties .... On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a

[141] *The Nicaragua case*, note 91, p. 105, para 200
[142] Ibid, p. 43, para 174
[143] Ibid, p. 43, para 175

> treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability.[144]

The court also declared, regarding the suggestion that the areas covered by the two sources of law are identical, that the United Nations Charter by no means covers the whole area of the regulation of the use of force in international relations. Also, that on one essential point, the Charter itself refers to pre-existing CIL and that this reference to CIL is contained in the actual text of article 51, which mentions the 'inherent right' of individual or collective self-defence, which 'nothing in the present Charter shall impair' and which applies in the event of an armed attack. On this basis, the court declared that:

> [a]rticle 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover, the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed. Customary international law continues to exist alongside treaty law. The

[144]Ibid, p. 94, para 176

> areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content. [145]

We believe that there was no real basis in the *Nicaragua case* for the view that when CIL is comprised of rules identical to those of treaty law, the latter 'supervenes' the former, so that the customary international law has no further existence of its own'. [146]

Intriguingly, the court repeatedly stated that it must satisfy itself that the Parties are bound by the customary rules in question,[147] by satisfying itself that there exists in CIL an *opinio juris* as to the binding character of abstention to use force.[148] The question, which has already been answered in this work, is whose *opinio juris* or practice was required to be assessed? But the court focused on the conducts of Nicaragua and the US, both of which are parties to the Charter, for the ascertainment of a general (not a particular) custom. This does not seem to be in tandem with the view of the court in the *Jurisdictional Immunities of the State*[149] and in other cases.

Pre Charter CIL

We may begin by recalling our earlier discussions on the path of CIL. Of the three paths we discussed, it is safe to say that the most relevant to CIL on the use of force is the treaty path. It is therefore fitting to search for pre-charter CIL on the use of force in earlier treaties bearing on the subject. The starting point for us is to say that the precursor to the Charter, the League of Nations Covenant did not have a prohibition of the use of force.[150] The provisions of the Covenant most relevant to this discussion are articles 10 and 12. By article 10, members of the League undertook to respect and preserve the territorial integrity and existing political independence of all members of the League from external aggression. In case of any such aggression or in case of any threat or danger of such aggression, the Council was to advise upon the means of fulfilling the obligation. Article

[145] Ibid. Also see also *Military and Paramilitary Activities in and against Nicaragua*, note 51, p. 392. para 73.
[146]ibid, p.95, para 177
[147] Ibid, p. 96, para 179.
[148] Ibid, p. 99, para 188
[149] Note 62
[150] There are older treaties around the use of force but in none was there the kind of comprehensive ban contained in the UN Charter. There was Peace Treaty between Great Britain, France, the Ottoman Empire, Sardinia and Russia (Treaty of Paris) 1856, which ended the Crimean War; The Drago-Porter Convention (1907) on the limitation of the employment of force for recovery of contract debts, which It prohibited the use of military force to recover contract debts owed by sovereign states unless the debtor state refused arbitration (article 1).

12 affirmed the right of members to resort to war, after they have fulfilled the procedural requirements of 'arbitration or judicial settlement or to enquiry by the Council', provided they allowed three months to pass after the judicial settlement, arbitral award or report of Council, as the case may be. This was a slightly modified version of the approach taken in the common articles 1, 2 and 7 of the Conventions of 1899 and 1907 (the Hague Conventions) for the Pacific Settlement of International Disputes, which, while imposing pacific settlement of dispute on the parties, avoided tampering with the right of States to settle their disputes by recourse to war. In fact, by article 7, '[t]he acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war. If it takes place after the commencement of hostilities, the military operations in progress are not interrupted in the absence of an agreement to the contrary.' The League Covenant merely fell short of stating it in this fashion, but the effect would have been the same.

The most notable of the post 1919 League efforts is the General Treaty Providing for the Renunciation of War (Kellogg–Briand Pact),[151] spearheaded by the US (a non-League member). The Pact was initially consented to on August 27, 1928, by fifteen States and subsequently by an additional thirty two States to make it forty-seven State parties. Its major tenets were the outlawing of war as an instrument of national policy and, the settlement of dispute by peaceful means. Instructively, the Pact preserved the right of self-defence and was concerned about wars of aggression.[152] The 1931 Japanese invasion of Manchuria, the Italian annexation of Ethiopia in 1935 and the subsequent aggression that progressed into the Second World War are able to sustain the argument that the Pact had gone into desuetude by the time the UN Charter was made. In agreement with this assessment, Glennon argued that the quantum of violation of the period, meant that the international community at the time as a whole no longer viewed the Kellogg–Briand Pact as a binding rule of international law. [153]

[151] (1929) UKTS 29, Cmd 3410) see Articles 1 and 2. Other treaties are Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain, and Italy 16 October 1925. Articles 1 and 2 of this Treaty are of specific interest. In article 1, the parties collectively and severally guaranteed the maintenance of the territorial status quo resulting from the frontiers between Germany and Belgium and between Germany and France and the inviolability of the said frontiers as fixed by or in pursuance of the Treaty of Peace signed at Versailles in 1919. By article 2 the parties mutually undertook that they will in no case attack or invade each other or resort to war against each other, subject, inter alia, to the exercise of the right of legitimate defense; Anti-War Treaty of Nonaggression and Conciliation (Saavedra Lamas Treaty) (1933), signed by several Latin American States. It prohibited wars of aggression and promoted peaceful settlement of disputes (article 1).
[152] *Ibid*
[153] Note 138

As shown in Baxter's detailed discussion of the subject, the International Military Tribunal at Nuremberg took the opposite view. Though noting that the fact that Germany, whose nationals stood accused of the preparation and waging of a war of aggression and a war in violation of international treaties, was a party to the Kellogg-Briand Pact', made its discussion as part of CIL not strictly necessary, Baxter explained that the Tribunal yet embarked on that voyage. The Tribunal relied on a series of multilateral instruments concluded prior to the Pact to conclude that 'the prohibition of aggressive war was demanded by the conscience of the world. Although it appears that Baxter was unconvinced by the conclusion of the Tribunal, he thought it was not necessary to consider the accuracy of the conclusion reached, except to remark that 'even if the Tribunal was unsatisfactory on this point, the very fact that it has declared that the Pact is evidence of customary international law gives that proposition all the force commanded by a pronouncement of an international tribunal, whether right or wrong'. [154]

Another treaty of note is the 1933 Montevideo Convention on the Rights and Duties of States. This was a Convention done by American States –Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, United States of America, and Venezuela. The most relevant provision of this Convention to this discussion is article 11. This article sought to prohibit the recognition of 'territorial acquisitions or special advantages which have been obtained by force' and acknowledged that the 'territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily'. Concerning this provision, the delegates of Brazil and Peru stated that 'they accept the doctrine in principle but that they do not consider it codifiable because there are some countries which have not yet signed the Anti-War Pact of Rio de Janeiro of which this doctrine is a part and therefore it does not yet constitute positive international law suitable for codification.'[155] In any event, any custom that arose from this, if at all, is likely to be

[154] Baxter, 'Multilateral', note 44, p. 279-80
[155] League of Nations Treaty Series, Volume CLXV 1936 Nos. 3801-3824, No. 3802

confined to the realm of local custom, applicable in the Americas,[156] absent general practice cutting through other continents in this very important subject.

It has not been possible to find evidence of the existence of a comprehensive prohibition of the use of force prior to the emergence of the UN Charter. We therefore believe it is safe to keep faith with Judge Elaraby's (albeit imperfect) distinction in the *Oil Platform* case, between 'a post-Charter era of law-abiding, civilised community of nations and the pre-Charter era when the strong and powerful States were not restrained from attacking the weak at will and with impunity'.[157]

The approach adopted by the ICJ in the *Nicaragua case* was unconvincing in that when searching for the rules of CIL applicable to the case, it turned to the practice and *opinio juris* of the States involved without considering whether it was appropriate to rely on the practice and *opinio juris* of State parties to the Charter for a rule that contradicts the Charter itself. Importantly, the court yet relied principally on instruments generated from the Charter as evidence of state practice and *opinio juris*.[158]

Thus, having failed to find benefits in pre-charter instances of expression of *opinio juris*, the court alluded to various instances of recognition of the prohibition within the province of the Charter.[159] It is important to reaffirm that as the Charter represents the state practice of all its parties, it defies logic to say that the parties are capable of maintaining a practice that points in the direction of a rule that is inconsistent with the Charter. It is fitting also to reiterate the point already made that while it is in order to examine the views of the parties in ascertaining whether their treaty rule has become CIL, but the pivotal conducts are those of non-parties.

One aspect of pre-charter right that cannot be gainsaid is the self-evidencing 'inherent right of self-defence', which is in all systems of law accompanied by necessity and

[156] See the *Asylum case*, note 33
[157] *Oil Platform, (Islamic Republic of Iran v. United States of America),* Merit, ICJ Rep 2003, 161 p. 291; see also Randall Lesaffer, 'Too Much History: From War as Sanction to the Sanctioning of War', (Marc Weller ed.,) *The Oxford Handbook of the Use of Force in International Law* (2015) http://opil.ouplaw.com. (referring to the 'stark contradiction between the licence of the 19th century for states to resort to force and the almost complete, albeit far from effective, prohibition of force in the Charter era'); Tamas Hoffmann, 'War or Peace? - International Legal Issues concerning the Use of Force in the Russia-Ukraine Conflict', 63 Hung. J. Legal Stud. 206, 208 (2022), (observing that 'After 1945, the international law of interstate violence changed fundamentally. Whereas classical international law considered the initiation of war as a sovereign prerogative of states, the United Nations, as reflected in the Preamble to the UN Charter, had the primary objective of protecting future generations from the 'scourge of war', and accordingly sought to strictly limit violence between states')
[158] Note 91, p. 97, para 183
[159] Ibid, p. 98- 104, paras 185-195

proportionality. This right is instinctive and needs not be conferred by any law nor should it be taken away by any law. What the law actually does is to regulate its exercise. Throwing light on the international law right of self-defence, Lesaffer narrated how self-defence gained a lot of traction in state practice during the 1920s and even more so under the Paris Pact (Kellong Briand Pact). He noted that the drafters of the League Covenant and the Peace Treaties inevitably lifted self-defence to the heart of the newly emerging jus ad bellum, to the effect that thereafter, States began, more than ever before, to invoke self-defence. They did so either as a justification for their actions against a so-called aggressor or to trigger collective defence by the international community under article 10 of the Covenant. He noted that under the state practice of the interwar period, these actions were not considered to amount to full war, as both the Covenant and the Paris Pact had left the door wide open for an alternative strategy to resort to force rather than war, primarily in the guise of self-defence. [160] Furthermore, Lesaffer gave insight into what may account for why the right of self-defence was reformulated. According to him, self-defence was used as a ploy to stage wars of aggression 'states would use the smallest instance of use of force by the enemy to justify a disproportionate and all-out reaction …. Also, states pushed their defensive actions beyond the limits that the traditional notion of natural self-defence imposed, so that at times there was little or nothing to distinguish self-defence from full-blown war'.[161] In the end, the Covenant and the Paris Pact did very little to stop the tradition of defensive war or restrict the lax interpretation of the term 'defensive'.[162] He spotlighted three reasons why States resorted to self-defence as a means of aggression, viz: (a) by invoking self-defence they attempted to avoid the restrictions on war from the Covenant and the Paris Pact and the consequences of its violations; (b) by not considering a conflict as war; and (c) States could relax the strict duties of neutrality and act with partiality towards the two sides in the conflict.[163]

When these observations are considered alongside the language of article 51, it is difficult not to conclude that the language was deliberate, experienced-based and intended to reformulate any customary law that may have arisen from the manner States were wont

[160] Randall Lesaffer, 'Too Much History: From War as Sanction to the Sanctioning of War', Marc Weller ed, *The Oxford Handbook of the Use of Force in International Law* (2015) http://opil.ouplaw.com.
[161] Ibid
[162] Ibid
[163] Ibid

to exercise self-defence during the interwar period, with a view to moderating the exercise of the right. It is incontrovertible that an acceptance of the possibility of multiple, unspecified bases for the use of force other than armed attack would swallow up the 'occurrence of armed attack' limit and render pointless the singularity of its enumeration.[164] There is therefore a strong basis to argue that the fifty original member States to the Charter, (as subsequently accepted by acceding States) consciously reformulated the right of self-defence, so that the reference to the inherent right of self-defence is the self-defence that is consequential upon the occurrence of armed attack as spelt out in article 51. This view is strongly supported by the observation that nothing in the *travaux préparatoires* suggests that the plain language of article 51 does not convey precisely the meaning that was intended.[165] There are thus sufficient reasons to conclude that article 51 was deliberately drafted to avoid the self-defence pitfalls of the interwar years with and attendant effect on the CIL of the period and we do believe that the codification of the CIL on self-defence 'signals that state practice prior to the convention has been left behind'.[166]

As for the continuous relevance of the CIL principles of necessity and proportionality, it is important to tamper any seemingly wide understanding with the fact that the question of proportionality speaks not to the circumstances in which the exercise of self-defence is permitted in the Charter but to the weapon for prosecuting that right. It is technically not at the level of the 'occurrence of armed attack' as is, for instance, anticipatory self-defence which potentially cancels out the effect of that phrase. In our view, 'proportionality' speaks more to *jus in bellum* than it is to *jus ad bellum*. Necessity sits on the 'occurrence of armed attack' to complement and not to displace the Charter rule.[167]

Post Charter CIL

There is also the post-charter postulations tending towards whether the Charter 'has established a new customary rule or changed customary law' for the enlargement of the

[164] Ian Brownlie, *International Law and the Use of Force by States* 26/278 (Oxford University Press, 1963)
[165] Ibid, p. 278
[166] Schachte, note 73, p 70
[167] See the *Nicaragua case*, note 91, p. 27-28, para 34, 35

content of the right of self-defence.[168] In fact, relying on the ICJ's acceptance in the *Nicaragua case* that the reference to an inherent right is a reference to CIL, Akande and Johnston argued that the said custom is not a reference to a static 1945 custom, but to a dynamic custom, which changes over time.[169] In categorical terms, Akande and Johnston argued that '…as the customary law of self-defence changes, the Charter accommodates those changes since the Charter rule on self-defence is given content by the customary law on self-defence.'[170]

These postulations are not without basis, given that there are instances of use of force that tend towards pre-charter CIL, and have been called in aid for that purpose. Some scholars have relied on such instances to argue that a new CIL has emerged;[171] and some scholars have used those instances to argue that the Charter rule has fallen into desuetude;[172] and others argue that they show that States are not meeting their Charter obligation. [173] Those who rely on those instances as the basis for post-Charter CIL need bear in mind that even if the instances were more numerous than they actually are, they would not preclude an examination of whether, they, in the aggregate, can be regarded as settled practice, nor suffice in themselves to constitute the *opinio juris* that the practice is rendered obligatory by the existence of a rule of law requiring it[174] to make it binding on the majority of Charter parties. It has never been a function of the frequency, or even habitual character of the acts, as such in itself.[175] Put differently, customs do not depend, 'merely on a piling up of a large number of instances' – 'its external manifestation'[176] without establishing that those instances are backed by 'belief'. In fact, to acknowledge this difficulty, despite its findings in the *Fisheries case* that the rule sought to be established had been adopted by

[168] Dapo Akande and Katie A. Johnston, 'Implications of the Diversity of the Rules on the Use of Force for Change in the Law', 32(2) The European Journal of International Law, 679, 684 (2021)
[169] *Ibid*, Akande and Johnston, p. 687
[170] *Ibid*, p. 687-688
[171] Gray, note 131
[172] Glennon, note 138; Arthur M. Weisburd, *Use of Force: The Practice of States Since World War II* (University Park, PA: Penn State University Press, 1997) (Weisburd counted 100 interstate wars between 1945 and 1997); see also Kalevi J. Holsti, *The State, War, and the State of War* (Cambridge: Cambridge University Press, 1996), 24 (Holsti counted 38 between 1945 and 1995); Meredith Reid Sarkees, 'The Correlates of War Data on War: An Update to 1997' (2000) 18 *Conflict Management and Peace Science* 123, 135 (the Correlates of War Project counted 23 between 1945 and 1997); Herbert K. Tillema, 'Risks of Battle and the Deadliness of War: International Armed Conflicts: 1945–1991', unpublished manuscript, 16 Apr 1996 (quoted in Peter Wallensteen, 'New Actors, New Issues, New Actions' in Peter Wallensteen (ed), *International Intervention: New Norms in the Post-Cold War Era?*(1997), 5, 6 (Tillema counted 690 overt foreign military interventions between 1945 and 1996)
[173] Secretary-General's High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', Report of the Secretary General's High-Level Panel on Threats, Challenges and Change, A/59/565 (2 Dec 2004), para 186.
[174] 44, 77; *Military and Paramilitary Activities in und against Nicaragua*, note 91, p. 97-98, para 184
[175] *Legal Consequences of The Separation of The Chagos Archipelago From Mauritius*, note 28, p. 131, para 149
[176] Dissenting Opinion of Judge Chagla in *Right of Passage*, note 45, p. 120

certain States, both in their national law and in their treaties and conventions, and had even been applied as between the States by certain arbitral decisions, the ICJ was not convinced that the rule had attained the status of general international law, insofar as some other States had adopted a different limit. [177] Instructively, the discussions that usually follow such instances of 'self-defence' show that 'states have differing views of the law'.[178] It will therefore be safer to argue that instances of the use of force under some incoherent and disparate CIL justification are inconclusive, and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifested in such circumstances, as would justify the inference that such use of force amounts to a mandatory rule of customary international law.[179]

Unfortunately, the ICJ also has not been very consistent. When it comes to the UNCLOS, for instance, the ICJ readily abandons its *Nicaragua case* approach in favour of the UNCLOS, without giving to CIL, the place it accorded it in the *Nicaragua case*. Whereas, compared to the prohibition of the use of force, CIL on the use of the sea could be said to have had a firmer foundation pre the UNCLOS. And in the same way that the Charter modified the right of self-defence, so did the UNCLOS modify several aspects of CIL on the use of the sea, but there is no reported case in which the ICJ held that pre-existing customs continue to exist on a different direction to an UNCLOS rule. In fact, the cases show that the ICJ has had no difficulty applying the UNCLOS in a matter that shows that it supersedes and overshadows all pre-existing CIL.

Majoritarian Treaty and CIL

In the preceding part, we argued that there really was no comprehensive pre-UN Charter regime on the prohibition of the use of force but admitted that self-defence is a natural and inalienable right. We also took the view that the right of self-defence is never left at large in any system without a form of moderation, which is the essence of proportionality and necessity, and that article 51 further moderated the right to bring it in consonance with the prohibition regime of the UN Charter.

[177] *Fisheries case, (United Kingdom v. Norway),* 195I ICJ Rep 116, 131
[178] Akande and Johnston, note 168, p. 684
[179] *North Sea Continental Shelf cases,* note 35, p. 43 para 79

We now wish to use this part to discuss the reason we hold the view that it is not possible to have a rule of CIL in the entire area of the use of force other than that that crystalised upon the coming into force of the Charter and have developed under the control of the Charter. This view, which also bears on the paradox identified by Baxter, is based on the majoritarian character of the Charter, which differentiates it from a bilateral treaty or a multilateral treaty that does not have a significant majority of States. It is indisputable that parties to the latter types of treaties (non-majoritarian treaties) remain bound by the CIL provisions[180] on the same subject and are generally subject to its subsequent development, independent of the treaty. Similarly, parties to a majoritarian treaty remain bound by CIL predating the treaty even when the rule is incorporated in the treaty and rule is not contrary to the treaty rule. The decision of the ICJ in *Nicaragua* would, perhaps, have been in order had it been just the Charter of the Organisation of American States that was involved in the case. The UN Charter and even the UNCLOS are by reason of their majoritarian character on a different pedestal to multilateral treaties that are not subscribed to by a significant number of States.

It is our view that if the well-established rule that the States relevant to the formation of CIL from a treaty are States that are not parties to the treaty is given its true meaning and application, it would follow that there must be non-parties to a treaty to sustain pre-existing CIL and its subsequent development on a different path to the provisions of the treaty. The point therefore is that whatever state practice is touted to support a change or further development of any sort of CIL that could be relied upon in violation of article 2(4) under the guise of self-defence, must be that of States that are not parties to the Charter. To assume that the State parties to the Charter could replicate state practice for CIL is to 'overstep the limits which international law places upon [their] jurisdiction';[181] this, as already said, would simply be a violation of the Charter, if the invocation of the said CIL rule violates the Charter, as does anticipatory self-defence.

[180] *Nicaragua case*, note 91, para 43, p. 31

[181] *SS Lotus*, note 26; Schachter, *International Law in Theory and Practice*, 178 Recueil Des Cours 5, 381, cited in Weisburd, id, p. 30. See also Louis B Sohn, 'The International Law of Human Rights: A Reply to Recent Criticism', 9 Hofstra L. Rev. 347, 349-350 (1981) (arguing that 'when norms are regarded as meriting high priority, it does not make sense to treat them as 'paper rules' because they are violated from time to time.'); Anthony D'Amato, 'The Concept of Human Rights in International Law', 82 Colum. L. Rev. 1110, 1126 (1982).

It is not in doubt that a violation of a treaty rule by the parties is incapable of changing the treaty rule, unless such a treaty had fallen into desuetude. Akande and Johnston agree with the view that a change in the CIL would not of itself change the Charter prohibition, and that the Charter prohibition would remain unchanged unless the Charter were to be amended or interpreted differently using the rules of treaty interpretation.[182] If their view is based on the assertion of the existence of a pre-charter CIL, that charts a different course from the Charter, it would lack basis and thus be erroneous. Such error is evident in the *Nicaragua case* where the court even vaguely admitted that the existing CIL could be in conflict with the Charter, when it reasoned that 'even if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for a court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm'.[183]

Having made clear that it is not possible to have a duplicate CIL that is contrary to the Charter, it is important to acknowledge the alternative view provided by some authority who command respect in international law. One of such authority is Weisburd. Weisburd observed that considerable authority exists for the proposition that desuetude, long-standing and consistent practice by parties to a treaty inconsistent with the treaty, can have the effect of not merely modifying but actually terminating the treaty. Nevertheless, he argued that 'dismissing acts of practice contrary to a purported customary rule as mere violations do not work. It begs the question by characterizing acts arguably of a legislative character as violative of a rule'.[184] Weisburd further queried:

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

[182] Akande and Johnston, note 168, p. 688
[183] *Nicaragua case*, note 91, p. 95, para 177
[184] Weisburd, 'Customary International Law', note 76, p. 31.

> of customary law moving in a direction opposite that of preexisting treaties because of developments in state practice. [185]

Making a similar point, Buga argued that conflicting norms of customary and conventional law can co-exist or derogate from each other, and sought to show that it is possible for a new treaty to derogate from preexisting CIL while the customary norm remains binding for non-treaty parties.[186] Also, that it is not inconceivable for a customary norm to be more specific than a treaty norm or for a 'particular' customary rule binding a small number of States to conflict with a multilateral treaty with many more parties, in which case the customary rule will derogate from the treaty as lex specialis.[187] Citing Waldock, Buga further argued there are two sources of subsequent customary law that can come to modify a treaty: 'treaty-related' subsequent practice of the parties that eventually diverges from the treaty (which coincides with the process of modification by subsequent practice), or their subsequent practice in relation to a conflicting 'external' customary norm that initially comes into existence through the practice of States outside of the treaty regime, but is eventually taken up by the parties.[188] Buga also argued that Treaty modification by subsequent customary law is taken to refer to a situation whereby a non-identical, conflicting norm of CIL emerges in respect of the subject matter covered by a pre-existing treaty, and the parties intend for it to be overriding. [189]

First, we do not consider Weisburd's observation that 'it begs the question by characterizing acts arguably of a legislative character as violative of a rule' to be of general application, as the number of States engaged in the violation in relation to the entire treaty parties, the possibility of infrequency and inconsistency of violation cannot be so easily wished away. It will offend all decent principles of international law to allow a minority to alter a convention obligation by developing conflicting CIL by way of disobedience. It cannot, for instance, be accepted that 'a sufficiently large number of states is required to cause the Court to imply *opinio juris* concerning any treaty provision sufficient to turn it

[185] Weisburd, ibid, p. 11
[186] There is difficulty in this premise if not qualified. Indeed, with the exception of jus cogens, a few (or even two) states can by treaty derogate from CIL, but that derogation will only be between themselves and give no right of derogation from the treaty re the wider international community. I Buga, 'The Impact of Subsequent Customary International Law on Treaties: Pushing the Boundaries of Interpretation?' https://tricilawofficial.wordpress.com/wp-content/uploads/2024/04/trici-law-paper-013-2022-buga.pdf; p. 8-9 or 69/2 NILR 241 (2022). No authority or example was cited for this proposition.
[188] Buga, ibid, p. 13 citing Waldock, Third Report on the Law of Treaties, p. 34
[189] Buga, Ibid, p. 12

into customary international law'[190] and in the extreme, accept the opposite that *opinio juris* of a few State parties to a convention would suffice.[191]

Equally crucial is the perspective of the violating State. As seen with the Charter provisions on the use of force, if a violating State seeks justification within the treaty itself, it is challenging to see how such conduct could logically serve as the basis for developing CIL. By ratifying or acceding to a treaty, particularly a multilateral one, a State explicitly expresses its commitment to be bound by its terms, making violations within the treaty framework unlikely grounds for forming new CIL. Consent to a treaty demonstrates the will of State parties, 'free of the ambiguities and inconsistencies characteristic of the patchwork of evidence of State practice that is normally employed in proving the state of international law'.[192]

Importantly, it will be untenable to ascribe legislative character to acts of violations if, notwithstanding such violations, the treaty continued to attract new members by accession. The attraction of new States to its fold would go to confirm the continued validity of the rules contained in the convention and disprove any claim to the development of a contrary CIL by violations. The story of majoritarian treaties like the Charter is even sweetened by the fact that there are no non-parties to generate practice dehors the Charter that the practice of the Charter parties will have to fuse outside the Charter regime, even if it was possible for us to concede that the Charter prohibition of force was an obligation owed only to members.

As for the 1958 Convention on the High Sea cited by Weisburd and Buga, we acknowledge that CIL evolved after the 1958 Convention, but we differ on the interpretation of the context surrounding this evolution. Helpfully, Weisburd cited the ICJ' opinion in the 1974 *Fisheries Jurisdiction* case. In addition to Weisburd's acknowledgement of the role coastal States' overwhelming acceptance of the 200-mile zone concept might have played in the decision of the ICJ, as at 1974, there had already been the 1960 conference with

[190] Scott & Craig, note 70, p. 85
[191] It cannot sit well with law and logic to theoretically accept that State practice of a minority of States dehor a treaty should be given the ability to create CIL. This, in the opinion of 'seems non-sensical' as such would give a small percentage of the world's states should be able to create law for the entire system' (Scott & Craig, (ibid, p. 86). In theory, the premium placed on the incapacity of a few States to create law for the majority has never been mistaken. See Meron, note 9, p. 247
[192] Baxter, 'Treaties and custom', note 9, p. 36.

broader participation than the 1958 Convention. Additionally, the third Law of the Sea Conference had commenced, attracting double the number of States from the 1958 conference and double the number of States (52 in total) that ratified the 1958 Convention as of 1974. This expanding engagement by both parties and non-parties must be considered in assessing CIL's evolution. This perhaps underlaid why the ICJ declared 'on the basis of state practice as reflected by votes in international conferences that did not result in treaties and by certain bilateral and multilateral treaties' that CIL had developed outside the 1958 Conventions.[193] In any event, the 1958 Convention on the High Sea does not fall into the class of majoritarian treaty; there was therefore ample room for CIL to develop dehors the Convention.[194]

One way to gauge the intention of the State parties to the 1958 Convention that participated in the crystallisation of new rules of law relating to the sea, is through the provisions agreed to by the parties in the UNCLOS on the relationship between the two Conventions.

To understand the intentions of the State parties to the 1958 Conventions in shaping new maritime law, one effective approach is to examine the provisions they agreed upon in UNCLOS regarding the relationship between the different Conventions. These provisions can reveal how the parties viewed the evolution and integration of legal norms from the 1958 Conventions into the broader framework established by UNCLOS, highlighting their commitment to updating and harmonizing maritime law. Importantly, article 311 of the UNCLOS clearly states that the UNCLOS provisions prevail 'as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958'. The article emphasises that while UNCLOS does not change the rights and obligations of State Parties arising from other agreements, any such agreements must be compatible with UNCLOS and must not interfere with other States Parties' rights or obligations under it. The example cited by Buga, regarding the practice relating to Spanish Fishermen, aligns with UNCLOS requirements and does not contradict it. If further clarity is needed, the preamble of UNCLOS can provide additional guidance on the relationship between the

[193] Wesiburd, note 76, p. 18. It is readily accepted that in appropriate instances, the negotiation of international agreements can readily develop new norms of international law. See Louis Sohn, The Law of the Sea: Customary International Law Developments, American University Washington College of Law Edwin A. Moors Lecture (Oct. 11, 1984), 34 AM. U.L. Rev. 271 (1985)

[194]Meron, note 9, p. 247 (arguing that '[t]he fewer the number of parties to … treaties, the greater the space left for the development of customary law'.)

two regimes. A provision of the preamble clearly noted 'that developments since the United Nations Conferences on the Law of the Sea held at Geneva in 1958 and 1960 have accentuated the need for a new and generally acceptable Convention on the law of the sea'.

It is at this point essential to distinguish the *North Sea Continental Shelf cases* and the *Nicaragua case* on the basis of the quantum of parties to the relevant treaties. As at the time the *North Sea Continental Shelf cases* were decided, there were less than seventy State parties to the 1958 Continental Shelf Convention, whereas as at its inception in 1945, the Charter had fifty State parties and as of 1969, it already had well over a hundred State parties. This difference is even sufficient basis for criticising the ICJ for relying on the *North Sea Continental Shelf cases* in reaching some of the conclusions it reached in the *Nicaragua case*.

We do agree with the court that there is a parallel CIL on the use of force, but that CIL is one which came into existence simultaneously with the Charter in virtue of the number of States (which was the vast majority then) involved in its making. The ICJ has had occasions to affirm the maturation of embryonic rules and modification of existing rules of CIL that arise from discussions and consensus at the negotiation of Conventions. In *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea,* the court recalled that the applicable law between the Parties is CIL. The court noted that by the time UNCLOS was concluded, the concept of the exclusive economic zone (EEZ) had already received widespread acceptance by States. This we believe is the basis for the 1985 declaration by the court that it is incontestable that the institution of the EEZ had become a part of customary law.[195] The ICJ even ascribed the same effect to the 1960 Convention that never was. This was in the *Fisheries Jurisdiction*, where the court deduced CIL from a proposed Convention that was never adopted. The court reasoned that the 1960 Conference failed by one vote to adopt a text governing the two questions of the breadth of the territorial sea and the extent of fishery rights, yet the court took the firm view that 'after that Conference the law evolved through the practice of States on the basis of the debates and near agreements at the Conference'. Based on this, the court declared that

[195] Note 2, p. 297, para 56-57, citing *Continental Shelf*, note 27, p. 33, para. 34)

the concept of the fishery zone and that of the preferential rights of fishing in adjacent waters in favour of the coastal State in a situation of special dependence on its coastal fisheries have crystallised as customary law in recent years arising out of the general consensus revealed at that Conference. [196]

The ICJ also had in fact invoked the aura of the majoritarian character of the Charter when, based on the fifty original parties to the Charter, it recognised a unique status for the UN, declaring that:

> Fifty states, representing the vast majority of the members of International community, had the power in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to bring international claims.[197]

By the same token, this same majority was capable of modifying, and did modify CIL that simultaneously came into being with the Charter in its modified form and is actually a slave to the Charter.

This immediately brings us to articles 2(4) and 51 of the UN Charter and to the fact that there are a total of 193 State parties to the Charter, which is the sum total of all fully functional States as at today. Importantly, there is no record that any of these States made any form of reservation to articles 2(4) and 51 nor did any State deposit any interpretative declaration. What this means is that the parties accepted the provisions as worded. In effect, the same States that are relevant to the creation of CIL are the States that have agreed to set conditions on the exercise of self-defence by way of new rules set out in the Charter. Bearing in mind that the Charter provisions are products of negotiation and agreements by the original parties (to which the international law of the time could well be credited), the Charter provisions also became the custom, through a merger of any surviving pre-existing CIL with the new rules adopted in the Charter. As a result, all other

[196] Note 34, p. 23 para 52
[197] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Rep, 1949, 174, 185

CIL rules of self-defence were left for dead, and they did die, since there were no States outside of the Charter parties to sustain the customs.

This view is supported by the flipside of the decision of the ICJ in the *Asylum case,* where the role the number of States that ratified a Convention plays in the CIL status of the provisions of the convention came to light. In the case, Colombia argued the Montevideo Convention of 1933 merely codified principles which were already recognised by Latin-American custom, and that it is valid against Peru as proof of CIL. In its decision, the court took the view that 'the limited number of States which have ratified the Convention reveals the weakness of this argument'.[198] When you flip this over, there will be no difficulty in coming to the conclusion that a convention subscribed to by a significant majority of States is 'of a fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law',[199] its contractual character, notwithstanding. [200]

In any event, the *lex specialis* principle sets the Charter provisions over and above any CIL that would have been, unless there is an indication that the parties intended to abandon the Charter provision and it has fallen into desuetude.[201] The relevance of the *lex specialis* principle here is that the parties to the Charter are the same parties to which the parallel CIL applies under article 38(1)(b) of the Statute of the ICJ, in the event of a dispute. However, if it were a less subscribed treaty, as the 1958 Geneva Convention on the Continental Shelf that was in issue in the *North Sea Continental Shelf cases*, the *lex specialis* principle would be irrelevant in a dispute between a treaty party and a non-treaty party. In such a case, the court will be precluded from seeking the applicable law in article 38(1)(a) of its Statute, which explains the search for applicable rule between Denmark and the Netherlands (parties to the convention) on one hand, and Germany (a non-party), on the other hand, in article 38(1)(b) of its Statute. It is not the same thing with the Charter – as there is no State that is not a party, the court is bound to seek the applicable law in article 38(1)(a), unless expressly excluded by reservation to jurisdiction as it was in

[198] Note 33, p. 277
[199] *North Sea Continental Shelf*, note 35
[200] Ibid.
[201] Akande and Johnston, note 168, p. 685

the *Nicaragua case*. Though not precluded from drawing from CIL, the court must be careful not to admit of the existence of a contrary parallel CIL in the same field.

This status also extends to the UNCLOS, to which the status of a majoritarian convention is merited by the sheer number of States (169)[202] that are parties thereto. It is on this score unclear why the court felt obliged to mention 130 instances of establishment of an EEZ by States as the basis for acknowledging that the EEZ provisions in the Convention were also CIL in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*.[203] This is even after the ICJ had declared that the EEZ was CIL. It would have been great to know what percentage of the 130 instances were carried out by third States, and whether those States did so with the belief that it was mandatory. It is only through this analysis that the observation that third States have declared EEZ would have been relevant to CIL formation in the light of the decision of the court in the *North Sea Continental Shelf Cases*.[204]

However, the case signifies the first attempt to evaluate state practice in relation to the EEZ, given that in other instances that the ICJ pronounced on the normative status of the EEZ, it did this without providing any evidence of state practice, aside conference consensus, to justify the declaration as did the tribunal in this case. This cannot but also highlight the complication that the approach of the court in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* introduced to area – did EEZ crystallise as CIL upon the entry into force of the UNCLOS or did UNCLOS provisions on EEZ subsequently give rise to CIL? Contrary to the view previously taken by the ICJ, the court's recent approach seems to suggest that the material for determining the CIL status of the EEZ must be sort in the practice of States post the UNCLOS.

The fact that the ICJ considered the EEZ to have been crystallised by the UNCLOS is supported by several decisions. In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*,[205] the ICJ acknowledged the operation of the Convention on the Continental Shelf of 1958, between the parties and the fact that as at the conclusion of

[202]https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&clang=_en#1
[203] *(Nicaragua v. Colombia)*, note 2, p. 297, para 56
[204] Note 35
[205] Note 19

that Convention, no problem of determining boundaries for the waters superjacent to the continental shelf had yet arisen. In this context, the court referred to 'the 1982 United Nations Convention on the Law of the Sea, which is not yet in force, and which is intended to endorse the institution of an exclusive economic zone'.[206] The court found concurrence of views between the parties on the general international law status of the EEZ. In the court's opinion, the relevant UNCLOS provisions, even if in some respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question.[207] The court reaffirmed the position in the *Continental Shelf case*,[208] where it declared that the EEZ 'may be regarded as part of modern international law', without explaining what it meant or providing any reason for that proposition. Though it appears the court was concerned with the law governing delimitation of maritime boundaries in *Maritime Delimitation in the Area between Greenland and Jan Mayen*, it is difficult to argue that the court's declaration that the 'law governing the boundary of the exclusive economic zone … is customary law',[209] has no bearing on the EEZ.

Given the court's departure from its previous approach, a more comprehensive explanation would have been valuable. This could have shed more light on how provisions of multilateral conventions might evolve into CIL. A thorough analysis from the court would have clarified whether the state practice it considered was those of parties to the Convention or that of third States. Such details would significantly enhance the understanding of how CIL can develop in alignment with, or diverge from, existing treaty frameworks

As the court did not directly use the supposed CIL status of the EEZ to contradict UNCLOS provisions on the subject, this subtlety might easily go unnoticed. However, as parties to majoritarian treaties cannot act in dual capacities of adherent to the particular treaty and as creators and adherent to a contrary CIL in the field covered by the treaty, subject to the point already made above, their conducts are partially relevant to the sustenance of such CIL, which, in any event, they cannot do without violating their obligations under the

[206] Ibid, p. 291, para 84
[207] Ibid, p. 294, para 94
[208] *Continental Shelf (Tunisia v. Libya),* ICJ Rep 1982, 18, p. 74 para 100
[209]*Maritime Delimitation in the Area between Greenland and Jan Mayen,* (Denmark v. Norway) ICJ Rep 1993, 38, 59, para 47

majoritarian treaty. Article 103 of the Charter plays a pivotal role here, acting as a gatekeeper to ensure that Charter obligations remain paramount. It is clear from this provision, that if States cannot explicitly alter their Charter commitments via treaties, they certainly cannot do so implicitly through customary practices.[210]

It is here important to acknowledge that there are numerous instances in which State parties to the Charter have sought justification from CIL against the restrictive provision of article 51. It is indeed not possible to ignore the fact, as we see with articles 2(4) and 51, that instances where parties act either in conformity with, or in violation of, their obligations under the articles necessary have the effects of rendering the true position of CIL uncertain. This is because conformity with the treaty in clear disobedience of preexisting rule is antithetical to disobedience of treaty rule which firms up CIL position. But insofar as the treaty is still in force and the disobeying States are yet parties, the correct way to view their conducts is violation of the Charter, rather than as norm-creating conducts.

VI. Are the Provisions of Majoritarian Treaties Frozen?

If this discussion concludes on the note that CIL can develop only within the provisions of a majoritarian treaty (such as the Charter) and to the extent to which the treaty permits, it will simply mean that such a treaty is a dead and not a living law. Every law, insofar, as it is impossible to anticipate all possible eventualities, such could not have been possible in 1945, anyway, has an interpretative latitude that allows the law to breath and expand to cover its subject, as it develops, 'through interpretation by subsequent practice'. [211] It is therefore difficult to quarrel with the view that article 2(4) of the UN Charter 'is also intended to be perpetually evolving as the seemingly static norms are applied to practical situations through an essentially political process operating to solve real crises, instance by instance'.[212] Consequently, the part of the practice that is relevant to expanding the scope of the Charter is that which qualifies as the subsequent practice of the parties.

[210] Akande and Johnston, note 121, p. 686 (arguing that 'if the parties cannot change their Charter obligations expressly by treaty, it would be incongruent with, and totally defeating of, article 103 for them to be able to amend the Charter implicitly, by custom')
[211] Ibid, p. 685; I Buga, note 186, p. 2 - subsequent practice provides a key tool for treaty change as an element of treaty interpretation in the VCLT.
[212] Thomas Franck, 'Interpretation and Change in the Law of Humanitarian Intervention', in J.L. Holzgrefe and R.O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, 205 (2003) cited in Olivier Corten 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate' 16 EJIL (2005), 803 , 807

This requires a decoupling of the practice of States with a view to classifying them into those relevant to the formation of CIL and those falling into subsequent state practice. Therefore, by the participation of all States in the Charter, articles 2(4) and 51 would automatically reflect the practice of the States in the field of the use of force. Such decoupling enables us to see the possibility of an expansive interpretation of the Charter to align with the manner the parties apply it to changing situations, thereby avoiding the error of ascribing CIL to the practice.

Indeed, for subsequent state practice, unlike the development of CIL from treaty, it is the practice of the parties to the treaty that is relevant here. In the same way that parties to a treaty cannot develop the treaty into CIL for non-parties (where they exists) are non-parties unable to provide the subsequent practice to expand the treaty. The faculty of parties to modify a treaty by subsequent practice,[213] is recognised in article 31(3)(b) of the VCLT. This article mandates the courts to consider, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. Subsequent practice under article 31(3)(b), it has rightly been confirmed, must be 'in the application of the treaty' and subsequent conduct which takes place regardless of a treaty obligation is not 'in the application of the treaty'.[214] Making a similar point, Akande and Johnston, argued that to interpret a treaty norm through subsequent practice, the agreement of parties must be as to the interpretation of that treaty, not some other international law norm of a different source. It is not sufficient that a State accepts that international law generally should contain the particular rule.[215]

The jurisprudence of the ICJ supports the view that parties may by their subsequent practice expand the frontiers of a convention. In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, the court affirmed that '[t]here is…nothing to prevent the parties to a convention – whether bilateral or multilateral – from extending the rules contained in that convention to aspects which it is less likely that customary international law might govern.'[216] And, as noted by the ICJ in *Dispute regarding*

[213] Corten, ibid, p. 806
[214] ILC Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Document A/CN.4/671, by Mr. Georg Nolte, Special Rapporteur, 2014, para 7
[215] Akande and Johnston, note 168, p. 684, citing *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, ICJ Rep, 2014, 226, 257, para. 83
[216] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, note 19, p. 298, para 82

Navigational and Related Rights, 'subsequent practice' of the parties, within the meaning of article 31(3)(b) VCLT, can result in a departure from the original intent of the parties on the basis of a tacit agreement. The court however stressed the role assigned to the intention of the parties in this regard. Accordingly:

> On the one hand, the subsequent practice of the parties, within the meaning of Article 31(3)(b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.[217]

For this view, the court heavily relied on its reasoning in the earlier case of *Aegean Sea Continental Shelf*,[218] to hold that certain terms in the Treaty of 15 April 1858 between the parties in the *Navigational and Related Rights* case were generic terms that were intended to change with evolution in international law. Similarly, in *Aegean Sea Continental Shelf*, the court accepted that the expression 'the territorial status of Greece' used in Greece's instrument of accession to the General Act of 1928 was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. Therefore, that the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.

It would follow that generic words give rise to a presumption that the parties intended the words to have an evolving meaning and this in turn gives impetus to the presumption that

[217] Note 61, p. 242, para 64
[218] *(Greece v. Turkey)* ICJ Rep 1978, p. 3

they intended the treaty provisions to evolve through the subsequent practice of the parties and in line with evolution in the meaning of the words overtime.

The court does not readily accept that subsequent practice has altered obligations for the parties. In *Pulp Mills on the River Uruguay case*,[219] the court had to determine whether the parties had abandoned a procedure that was provided for in a treaty by way of an 'understanding' between the foreign ministers of Argentina and Uruguay on how to further proceed in the matter. The court held that the 'understanding' did not have the effect of relieving Uruguay of its obligations under article 7 of the 1975 Statute, if that was the purpose of the 'understanding', because Uruguay did not comply with the terms of the 'understanding'.[220] It is important to mention the caution advised by Judge Sir Gerald Fitzmaurice in *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter),*[221] that:

> The argument drawn from practice, if taken too far, can be question begging. However, no one would deny that practice must be a very relevant factor. According to what has become known as the "principle of subsequent practice", the interpretation in fact given to an international instrument by the parties to it, as a matter of settled practice, is good presumptive (and may in certain cases be virtually conclusive) evidence of what the correct legal interpretation is – a principle applied by the Court on several occasions. But where this is the case, it is so because it is possible and reasonable in the circumstances to infer from the behaviour of the parties that they have regarded the interpretation they have given to the instrument in question as the legally correct one, and have tacitly recognized that, in consequence, certain behaviour was legally incumbent upon them.[222]

Given the mandate of the ICJ to 'specify its [international law's] scope and sometimes note its general trend',[223] the ICJ has a fundamental role to play, though it does appear from the decisions in the *Legal Consequences of the Construction of a Wall in the*

[219] *(Argentina v. Uruguay)*, ICJ Rep 2010, 14,
[220] Ibid, p. 63, para. 131.
[221] Advisory Opinion of 20 July 1962 : I.C. J. Reports 1962, p. 151
[222] Separate Opinion Fitmaurice, p. 201
[223] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep, 1996, 226, 237, para 18

Occupied Palestinian Territory,[224] and *DRC v. Uganda*,[225] that the court understands its role to be quite restrictive. In the cases, the court was strenuously urged to accept an expansive interpretation of article 51, based on UNSC Resolutions 1368 and 1373, but it refused the invitation.

There is however the possibility of conflating and falsely ascribing subsequent practice to CIL formation to satisfy the desire to cloth practices of States with CIL. Otherwise, such extension, when carried out exclusively by the parties to a convention, is ordinarily incapable of creating CIL that would be binding on non-parties to the convention. This naturally flows into the fundamental distinction between obedience to treaty provisions in fulfilment of the obligations of the parties under the treaty, and the application of rules that originated from a treaty to non-parties to the treaty, by way of CIL. Where non-parties apply such a rule, the obligation of the rule, if they apply it as law, must be sought outside the obligatory regime of the treaty. Unless the obligation is rested on CIL, the application of the rule by non-parties would lack legal foundation.[226]

A majoritarian treaty can therefore not become frozen by the exclusion of the creation of a parallel CIL, as the treaty continues to breathe through the subsequent practice of the parties. If the subsequent practice of the parties is accepted by third States, nothing stops the development of CIL in that regard insofar as such practice merely expands but not contradict the relevant treaty provision.

Conclusion

The key takeaway here is that when States or scholars claim that a treaty provision reflects CIL, or when a court makes this assertion, it serves a singular purpose: the establishment of a universal rule within the sway of the rule. However, this becomes redundant when a significant majority of States have already committed to that norm through a treaty. Such a treaty forms a self-contained regime, binding its parties to the treaty's mandatory provisions, leaving no room, in strict legal terms, for the parties to be at liberty to pick and choose. Consequently, the existence of a separate CIL on the matter is unlikely, other

[224] Advisory Opinion, ICJ Rep 2004, 136
[225] Separate Opinion of Judge Kooljmans, note 135, p. 313 para 25 and p. 315 para 35
[226] See the *North Sea Continental shelf cases*, note 35

than that which comes into being simultaneously with the treaty and, just as the ICJ stated in *Military and Paramilitary Activities in and against Nicaragua*, and develops under the influence of the treaty.[227]

This context brought particular relevance to some arguments presented by the United States in the *Nicaragua case*. The U.S. contended that that '… Nicaragua's claims styled as violations of general and customary international law merely restate or paraphrase its claims and allegations based expressly on the multilateral treaties'. Especially when considered alongside Nicaragua's admission that its 'fundamental contention' is that the conduct of the United States is a violation of the United Nations Charter and the Charter of the Organization of American States. [228] It became clear—as the U.S. observed—that the court could not assess Nicaragua's claims under customary and general international law without interpreting and applying the UN Charter, [229] given its pivotal role in shaping CIL on the use of force. While we respect the ICJ's decision to reject the U.S. argument in this regard, we find some of the court's reasoning unpersuasive, as we have shown.

Having laid out our reasoning, we wish to reiterate that the purpose of this work has never been to question the place of CIL in the hierarchy of legal sources or to deny that a treaty and CIL can coexist on the same subject without the treaty freezing the CIL. Nor do we dispute the existence of CIL on the use of force. Our objective, which we believe we have achieved, was to properly interpret the principle established in the *North Sea Continental Shelf* cases: that the practice of non-parties is crucial to the creation and maintenance of parallel CIL independent of a treaty.

However, that as majoritarian treaties leave only a few or no state outside its fold, it is not possible for a contrary CIL to emerge from state practice dehors the treaty in respect of the field covered by the treaty. We used this to challenge certain arguments that have been forcefully made respecting the regime of the prohibition of the use of force in the UN Charter. We argued that it is not possible for there to exists a parallel CIL that conflicts

[227] Note 91, p. 96, para 181
[228] *Military and Paramilitary Activities in and against Nicaragua*, note 42, p. 392, 422-423 para 69; p. 424, para 73
[229] *Ibid*

with the Charter provisions. We do however accept that subsequent practice of the Charter parties provides the needed oxygen for the Charter to breath and expand.

We have shown that because majoritarian treaties encompass nearly all relevant States, it is impossible for a conflicting CIL to arise outside the treaty's framework on the same subject matter. This argument specifically challenged the view that there exists a broader CIL right on the use of force dehors the Charter on the ground that it is not possible for there to exist parallel CIL that contradicts the Charter provisions due to its majoritarian status. However, we acknowledge that the evolving practices of Charter parties are essential for the Charter's dynamic interpretation and growth, providing it with the necessary 'oxygen' to adapt and expand over time.