

On Treaties and Custom: A Commentary on The *Draft Restatement**

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I. Introduction

The relationship between customary international law and prior treaties—specifically whether treaties enjoy any intrinsic superiority over custom as a source of international law or vice versa—has attracted little notice before international tribunals and in international legal scholarship.¹ Only a few decisions have indirectly discussed this question, and most legal scholars have confined themselves to laconic and unsupported assertions.² This dearth of authority exists because until well into this century, customary international law was largely a set of fixed, immemorial rules. Multilateral treaties provided the basic means for further creative development of international law. Whether a new customary rule might supersede a prior treaty was at most an academic question unlikely to arise under the circumstances prevailing at that time.

The state of affairs has changed drastically.³ Theories have arisen which

*This comment is a revision of a paper presented to the Ad Hoc Committee on the ALI Restatement of the Foreign Relations Law of the United States, Section of International Law and Practice of the American Bar Association, on July 27, 1981.

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¹See *infra* notes 47–50 and accompanying text.

²See *infra* notes 37–40 and accompanying text. “An examination of the literature does not create the impression that the subject of hierarchy did much to disturb the peace of mind of writers.” Bos, *The Hierarchy among the Recognized Manifestations (Sources) of International Law*, in 1 ESTUDIOS DE DERECHO INTERNACIONAL: HOMENAJE AL PROFESSOR MIAJA DE LA MUELA, 363, 368 (Madrid 1979).

³Professor Bos emphasizes the new significance of the source hierarchy in the light of recent developments in international organizations and *jus cogens*. Bos, *supra* note 2, at 374.

make new customary international law far easier to create.⁴ Moreover, an expanded concept of customary law may serve as a vehicle for special interest groups to establish new international law based on assertions contained in treaties between limited numbers of states or made before international organizations, or even to avoid treaty obligations.

The changing scope of customary international law in legal theory is, of course, of great concern to the United States. Any expansion or revision of the authority of customary international law at the expense of treaty obligations—even if initially only in theory—must be viewed critically in the light of possible consequences for United States foreign relations. Moreover, it is arguable that United States courts may apply international law in derogation of prior domestic law.⁵ The application of customary norms to many sensitive domestic issues may result since the scope of international law itself has expanded far beyond the regulation of relations between states to areas such as human rights and economic codes of conduct.⁶

The leading authority for the interpretation of international law in the courts of this country is the *Restatement of the Law (Second); Foreign Relations Law of the United States* (1965) (the “Restatement 2d”) published by the American Law Institute (ALI).⁷ In applying international law, a United States court often looks to the Restatement 2d as the best authority. In recent years the ALI has undertaken to revise the Restatement 2d in light of the many substantive developments since its publication.⁸ The final draft

⁴A well-known example is the “instant law” theory of Bin Cheng. See Cheng, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?* in CHENG, ed., *INTERNATIONAL LAW: TEACHING AND PRACTICE*, 237, 260 (London 1982).

⁵See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION*, 221–224 (Mineola 1972) (undecided whether courts would apply newly developed customary international law in disregard of earlier statute, treaty, or executive action).

⁶L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS*, 8–9 (St. Paul 1980); FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 67–71 (New York 1966); Fenwick, *International Law: The Old and the New*, 60 AM. J. INT’L L. 475, 481–83 (1966).

⁷The American Law Institute is a self-selected group of approximately 1,800 eminent American practitioners, jurists and scholars. The ALI’s principal function is the production and adoption of RESTATEMENTS on various legal areas. Many of the *Restatements* are regularly used by courts to guide them. In the area of international law, the *Restatement of Foreign Relations Law of the United States* has been particularly influential since many judges—whose focus has been primarily domestic law—have little experience or training in this subject. Courts and policymakers of other countries have also relied on the *Restatement 2d* for explanations of the U.S. position on international law topics. “The previous *Restatement of the Foreign Relations Law of the United States [Restatement 2d]* was developed during 1955–62, adopted by the Institute in 1962, and finally promulgated, with revisions, in 1965.” See “Introduction to the Revised Restatement” in ALI, *Restatement of Foreign Relations Law of the United States (Revised)*, Council Draft No. 5, at intro. 1 (September 14, 1983). The drafts are generally obtainable in most law libraries. Despite its designation and citation, the *Restatement 2d* is in fact the first and only restatement of foreign relations law.

⁸See *id.* The revision process commenced in 1980. Reporters for the project are the draftsmen of the various Council drafts, and are assisted by a group of advisors. The Chief Reporter for the

of this Restatement (revised), therefore, will be regarded not as an academic treatise but as a primary source of international law. The opinions adopted by the Restatement Reporters will have such broad authority in practice that before any new legal ground is broken, the reporters should give full consideration to the political and legal consequences of the new Restatement.

On April 1, 1980, the ALI published Parts I and III of Tentative Draft No. 1, Restatement of the Foreign Relations Law of the United States (Revised) (the "Draft Restatement"). The Draft Restatement's black-letter rules and its accompanying comments and explanatory notes⁹ contain statements regarding new customary international law and its authority over prior treaty obligations which diverge from the position taken in the past by the ALI and by the United States. This Comment describes the Draft Restatement's position, examines what support it finds in international law and scholarship, and shows that, at the present state of development of international law, cogent reasons argue against its adoption.

II. The Draft Restatement Position

A. SECTION 102

Section 102 of the Draft Restatement defines the sources of international law:

- (1) A rule of international law is one that has been accepted as such by the international political system
 - a. in the form of customary law;
 - b. by international agreement; or
 - c. by derivation from general principles of law common to the major legal systems of the world.
- (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.¹⁰

This Section is new to the Draft Restatement. The Restatement 2d did not discuss the sources of international law.

Section 102 does not openly rank the sources listed. Custom is, however, listed first—a departure from the traditional order of sources in Article 38(1)

revision is Louis Henkin; the Associate Reporters are Andreas F. Lowenfeld, Louis B. Sohn and Detlev F. Vagts. These drafts have been appearing since 1981 and are discussed and voted on by the ALI membership at its annual meetings.

⁹The Draft Restatement is presented under three categories: black letter rules, comments and Reporters' notes. As will be indicated, the interaction and hierarchy of these categories are not always clear. Presumably, the rules are elucidated by the commentary, and the notes are used by the Reporters to indicate trends, personal opinions, dissenting views, etc. There may be a tendency by readers of the Draft Restatement and perhaps the Reporters themselves to merge the three or at least to not distinguish the significance of information contained under a particular category.

¹⁰Draft Restatement No. 1 at 24.

of the Statute of the International Court of Justice (ICJ Statute).¹¹ This ordering is particularly significant because Note 1 to Section 102 states that the Section “draws on” Article 38(1) of the ICJ Statute. Moreover, Comment j to Section 102 states:

Customary law and law made by international agreement have equal authority as international law. . . . [U]nless particular states have evinced a contrary intention, a new rule of customary international law will supersede any inconsistent obligations created by earlier agreement.¹²

Reporters’ Note 4 to Section 102 seems to both narrow and expand Comment j.¹³ In restricting it, Note 4 states that customary international law and law made by international agreement have equal authority. This seems to limit the amending force of subsequent customary international law under Section 102 to international agreements which create general international law, thus contradicting Comment j which allows new custom to overrule “any inconsistent obligations created by earlier agreement.” Note 4, in a different sense, broadens the scope of Section 102 by making explicit that new customary international law may become binding on signatories to a treaty through mere acquiescence.

To summarize, Section 102 departs from both the ICJ Statute and the Restatement 2d in its treatment of customary international law. The comments and notes to Section 102 evidence that the ALI endorses the position that customary international law may terminate or modify a treaty.

B. SECTION 135

The position of Section 102 on customary international law is repeated and reinforced by Section 135, dealing with conflicts between international and domestic law. Once again, the treatment of conflicts between custom and treaty is not clear from the Draft Restatement text itself. Section 135(1) reads:

¹¹Article 38 of the ICJ Statute reads:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. . . . , judicial decisions and the teaching of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

¹²Draft Restatement No. 1 at 28.

¹³*Id.*, at 33.

(1) A rule of international law or a provision of an agreement that becomes effective as law in the United States supersedes any inconsistent law of the several states of the United States, as well as any inconsistent pre-existing provision in the law of the United States.¹⁴

Comment b to Section 135, however, restates Section 102:

In international law, customary law is equal in authority to law made by international agreement and in case of inconsistency between a rule of customary law and a provision in an international agreement the latter prevails (unless otherwise agreed). Section 102, Comment j. An international agreement of the United States would supersede an earlier inconsistent rule of customary law of the United States. By the same principle a rule of customary international law which developed after, and is inconsistent with, an earlier statute or international agreement of the United States, should prevail as the law of the United States but that has never been authoritatively determined.¹⁵

Thus, Comment b carries Section 102 a step further by declaring that the Section 102 position is itself a rule of international law. It does, however, acknowledge there is no United States precedent for a custom superseding a treaty. Note 1, however, to Section 135 is ambiguous, stating that subsequent custom should supersede prior treaty "in principle" (but apparently not as a rule of international law), but admitting that this issue has never arisen in this country and that the position of the Restatement 2d is not unopposed.¹⁶

Section 135, therefore, only increases the uncertainty. It accepts that customary international law may be applied by United States courts in derogation not only of prior treaty obligations but also of domestic law, without dealing with the difficult questions this disturbing possibility raises.

III. Customary International Law

Before discussing the consequences of the views adopted by the ALI in the Draft Restatement, a brief discussion of contemporary customary international law is appropriate. Customary international law originally made up all "general" international law—those international legal obligations binding upon all civilized states. The only other significant source of obligations was treaties creating obligations for the signatories. Multilateral treaties establishing rules of international law binding upon all states were at first exceedingly rare.¹⁷ Since this time, the treaty steadily grew as the preferred

¹⁴*Id.*, at 64–65.

¹⁵*Id.*, at 66.

¹⁶*Id.*, at 68.

¹⁷Nevertheless it was recognized very early that treaties could also be a source of international law. First, a multilateral treaty could make explicit declarations on international law, and if all states adhered to that treaty, a rule of international law would result. Second, states not parties to a treaty might act in accordance with the interpretation of international law that treaty contained and thus consent to the creation of a rule of customary international law.

means of developing new international law until the present day, even though a reversal of this trend may now be occurring.¹⁸ The following discussion necessarily only skims the surface of the developing customary international law debate.

A. DEFINITION

The authoritative definition of customary international law is Article 38(1) of the Statute of the International Court of Justice¹⁹ which defines "international custom" as "evidence of a general practice accepted as law." This definition has admittedly caused confusion, because a "general practice accepted as law" is evidence of the existence of a custom, i.e., of a rule of customary international law, and not the other way around.²⁰ Still, the definition makes clear that two elements are necessary to create customary international law. First, there must be a practice, i.e., actions, statements or inaction of one or more states. Second, the practice must be accepted as law. This requirement is traditionally stated as *opinio juris sive necessitatis*, usually defined as a conclusion or belief by the acting state that a certain action is permitted, required or forbidden by international law.²¹

As previously noted, custom was originally the exclusive source of international law, and its rules were viewed, rightly or wrongly, as established from time immemorial. Only in this century has a variety of new customary law been noticed or alleged, particularly in areas previously not governed by international law because of prior technological impossibility (e.g., air rights, continental shelf and sea bed mining rights) or because of more restrictive past views on the scope of international law (e.g., human rights, multinational corporate conduct). This new flowering of customary international law in legal theory has confused what once were sharp definitional outlines. Today it is very difficult to determine what customary international law is at any one moment since "[n]o definition of customary international law has received universal agreement."²²

1. Practice

The first element of customary international law is practice. Normally, practice implies a succession or series of individual acts. Indeed, most authorities require a series of acts to establish a practice; others, however,

¹⁸See Gamble, *The Treaty/Custom Dichotomy: An Overview*, 16 TEX. INT'L L. REV. 305, 314-15, 319 (1981) (interpretation of new treaties will be fertile ground for growth of new custom).

¹⁹*Supra* note 11. While the ICJ Statute is often used to indicate what are the sources of international law, it is perhaps important to note that it is arguably binding only on the ICJ and parties in cases before it.

²⁰WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW*, 26-28 (Breslau, 1964).

²¹Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 31 (1974-75).

²²Draft Restatement, § 102 at 30.

consider that under special circumstances only one act may suffice to establish a practice.²³ Nor is there consensus on whether a practice must be continuous or how long a duration it must have had before it gives rise to a customary rule. Some authorities maintain that interruptions are permitted, and others assert that under appropriate circumstances a practice may give rise to customary international law almost instantaneously.²⁴

The nature of the practice necessary to establish customary international law is also uncertain. It is unclear which acts of which representatives of a state may contribute to a practice. Must the acts be those of the policy-making representatives of the state or may acts of lower ranking officials or even of private citizens be considered? It has been stated that all relevant acts of all relevant parties may be considered in determining whether a "practice" exists.²⁵

Besides direct acts of states, there are arguably further sources of customary international law which might at first glance appear unlikely. For instance, some authorities maintain that resolutions and acts of international organizations may give rise to customary international law. Thus, these authorities assert that if a state votes for a resolution declaring a rule of customary international law, or fails to protest such a resolution, then a rule of customary international law thereby arises binding upon that state and possibly all others.²⁶

2. *Opinio Juris*

The second element of a rule of customary international law is also subject to confusion. *Opinio juris* is usually defined as a belief or state of mind of the acting state that it is legally compelled to follow the practice it contributes to. This is obviously difficult to determine in dealing with the state of mind of an abstract entity, such as a state. Therefore, most authorities look to official statements which accompany acts of a state as best evidence of that state's *opinio juris*.²⁷ An example of a frequently encountered official statement is the protest disputing another state's right to take an action and thus contesting an alleged rule of customary international law.²⁸ Some authorities, however, assert that no statements are necessary, but that only consent—even by presumed acceptance through failure to protest—to another state's action is necessary for *opinio juris*.²⁹ Some even deny that *opinio juris* is necessary at all. At least in international legal scholarship, the evidence for

²³WOLFKE, *supra* note 20, at 68; Akehurst, *supra* note 21, at 13–14.

²⁴WOLFKE, *supra* note 20, at 67–69.

²⁵WOLFKE, *supra* note 20, at 65–66; *cf.* Akehurst, *supra* note 21, at 53.

²⁶See the discussion under Draft Restatement § 102 at 31–33.

²⁷Akehurst, *supra* note 21, at 36–37.

²⁸See, e.g., OFFICE OF THE LEGAL ADVISER, U.S. DEPT. OF STATE, PUB. NO. 8865, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, 302 (1973).

²⁹WOLFKE, *supra* note 20, at 58.

and nature of *opinio juris* is subject to no less controversy than the existence of a practice.³⁰

Section 102 does not adequately address the problems outlined above. On its face, its definition of international customary law seems to clarify and restrict the definition of Article 38(1) of the Statute of the International Court of Justice. A practice must be "general" and "consistent," and *opinio juris* is defined as the following of a practice by states "from a sense of legal obligation." The comments and notes to Section 102, however, make clear that this language is fully compatible with the broadest interpretations of international customary law. Comment b to Section 102 states that a practice constituting international customary law may be of comparatively short duration, "relatively consistent" and "general even if it is not universally followed."³¹ *Opinio juris* may simply be inferred from practice.

In conclusion, the mere difficulty of determining the content of customary international law must be taken into consideration in determining what authority this law should have, especially in relation to fixed and relatively clear treaty obligations. Customary international law may have been a relatively stable code of rules; however, it is steadily becoming a broader and more formless concept. Current thinking even raises the disturbing possibility that even individual acts of subordinate officials may give rise to rules of international law binding upon the officials of that state and all others as well.³²

IV. Treaty Obligations and Customary International Law

Under the Draft Restatement, a subsequent rule of customary international law overrides prior treaty obligations. This is stated alternatively as either a rule of customary international law itself or simply a "principle."³³ A review of the sources of international law is necessary to determine what acceptance the view of the Draft Restatement has gained in actual international practice.

Professor Akehurst has outlined the three means used in domestic law to resolve conflicts between laws.³⁴ First, a law later in time may prevail over an

³⁰See generally A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW*, 66-72 (1971); Scott and Carr, *The International Court of Justice and the Treaty/Custom Dichotomy*, 16 *TEX. INT'L L.J.* 347, 349-50 (1981).

³¹Draft Restatement No. 1 at 25.

³²See D'Amato, *supra* note 30, at 91-98; Akehurst, *supra* note 21, at 12-15. For acts of subordinate officials as possibly creating custom, *Cf.* Draft Restatement, § 102, Comment b at 25 (diplomatic acts and instructions, governmental measures or inaction).

³³Compare Draft Restatement No. 1, § 135, Comment b, at 66 with § 135 note 1, at 68.

³⁴Akehurst, *The Hierarchy of the Sources of International Law*, 47 *BRIT. Y.B. INT'L L.* 273 (1974-75). The Draft Restatement relies on this article for its conclusions on the authority of customary international law. Draft Restatement No. 1 § 102 at 33.

earlier law. Second, a specific law may prevail over a general provision. Third, a superior law may prevail over a law having intrinsically less authority. We must examine which of these methods of analysis may govern the treaty-custom relationship.

A. THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

Any analysis of the relationship between treaty and custom begins with the definitions contained in the ICJ Statute.³⁵ As previously noted, Article 38(1) of the ICJ Statute lists treaties as the first source of international law to be consulted by the court. The committee draft of Article 38(1) provided that the court must consult these sources "in successive order."³⁶ The meaning of this phrase and the reasons for its subsequent deletion remain unclear despite much discussion in legal scholarship.³⁷

From a very early period some jurists took the position that the Statute established a hierarchy. A treaty would thus take precedence over an international custom, whether that custom arose prior to, subsequent to, or contemporaneously with the treaty rule.³⁸ Some authorities state this position as a rule of law, others as merely a rule of practice but one of such force that a deviation from the order of Article 38(1) is virtually impossible.

Other jurists, however, hold that the Statute was not intended to state a hierarchy, but only represents a listing of the sources of law in the self-evident order in which a judge would consider them. These authors conclude that customary international law and treaty obligations are of equal

³⁵This is not merely because this language has received some significant attention over the years from international jurists. The Statute is appended to Article 92 of the United Nations Charter, which further declares the Statute to be an integral part of the Charter, a multilateral treaty to which the United States is a party. 59 Stat. 1031, 1051 and 1055, 1060. (June 26, 1945). Therefore, if the language of the Statute does in fact create a hierarchy of treaty over custom, such an interpretation would be binding upon the United States when it is before the International Court of Justice.

³⁶Permanent Court of International Justice—Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee*, Annex 1 at 730 (1920) (*en ordre successif*).

³⁷See, e.g., Akehurst, *supra* note 34, at 274; SORENSON, *LES SOURCES DU DROIT INTERNATIONAL* 237-38 (Copenhagen 1946); WOLFKE, *supra* note 20, at 96-98.

³⁸See, e.g., Fedozzi, Consultation "Pro Veritate," *Publications de la Cour Permanente de Justice Internationale* Series C. No. 13-11, 386 (Leyden, 1927); *Right of Passage Case*, [1960] I.C.J. REP. 6, 90 (Moreno, dissenting); H. LAUTERPACHT, 1 *INTERNATIONAL LAW* 86-87 (E. Lauterpacht, ed. 1970) ("Treaties must be considered as ranking first in the hierarchical order of the sources of international law." *But cf. id.*, at 88); SORENSON, *id.*, at 249-51 (judicial treatment of Article 38 supports hierarchy); G. SCHWARZENBERGER, 1 *INTERNATIONAL LAW* 9, 16 (London, 1949); WOLFKE, *supra* note 20, at 98-99 (Hierarchy of Article 38(1), while derived from practical, not theoretical considerations, is in practice conclusive for a court). See also, Scott and Carr, *supra* note 30, at 348. ("Most writers agree that the order of listing in the Statute gives treaties a slight priority as a source of international law, with custom a close second.")

authority.³⁹ In any case, it is clear that although a majority of scholars favor the position that Article 38(1) does not preclude the position that subsequent international customary law may override a prior treaty obligation, there remains an important division of opinion on this subject.⁴⁰

The opinions of the scholars of international law are not in themselves a source, but only evidence of international law.⁴¹ To determine whether the Draft Restatement's view of customary international law is itself international law we must look to treaties, customary international law, and the other sources set forth in Article 38(1). We will not, however, discuss general principles of law under Article 38(1), since no one rule of reconciling conflicts between laws has gained acceptance in a national legal system. A combination of methods is employed depending on the nature of the laws in question.

B. INTERNATIONAL TREATIES

The Vienna Convention on the Law of Treaties⁴² does not resolve the treaty-custom question. Article 38 of the International Law Commission's 1966 Draft Articles on the Law of Treaties, however, did address the treaty-custom conflict:

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.⁴³

This was deleted by a majority vote of the participants at the conference which approved the final treaty text. A majority of the states which spoke in favor of deletion felt this Section was undesirable, and many felt it was in violation of international law. The present text of the Vienna Convention does not, therefore, provide for the termination or amendment of treaty provision by practice or by a new rule of customary international law.⁴⁴

³⁹See, e.g., Akehurst, *supra* note 34, at 275; Heilborn, *Les Sources du Droit International*, 11 RECUEIL DES COURS 5, 29 (1926); Strupp, *Les Regles Generales du Droit de la Paix*, 47 RECUEIL DES COURS 263, 330 (1934); Capolari, *L'Extinction et la Suspension des Traites*, 134 RECUEIL DES COURS 427, 516 (1971); Cheng, *On the Nature and Sources of International Law* in CHENG, ed., *supra* note 4, at 231-32. (But "operational hierarchy" corresponding to Article 38 may also exist). See also (VAN HOOFF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 151-53 (Deventer 1983)).

⁴⁰See Gamble, *supra* note 18, at 307 n.6; Schrader, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 COL. L. REV. 751, 754-55 n.25 (1982) (order of listing of sources in ICJ Statute suggests hierarchy, but point is disputed).

⁴¹Article 38(1) of the ICJ Statute defines the opinion of scholars as a subsidiary means of determining rules of international law, which have other sources. See Schrader, *id.*, at 755 n.25; Scott and Carr, *supra* note 30, at 350-51.

⁴²U.N. Doc. A/CONF. 39/27, at 289 (1969), reprinted in 8 I.L.M. 679 (1969). The Convention was intended as a codification of the customary international law of treaties. The United States has not yet ratified it.

⁴³S. ROSENNE, *THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* 247 (Leyden 1970).

⁴⁴Akehurst, *supra* note 34, at 377.

The logic of Articles 56 and 64 of the Vienna Convention dealing with *jus cogens* reinforces an interpretation of the Convention which views it as rejecting the position adopted by the Draft Restatement. *Jus cogens* is a recent concept designating those norms of international law having preemptory character, i.e., which cannot be modified or abolished by treaty. If a new rule of *jus cogens* arises in customary international law any treaty obligations to the contrary are overridden. Today this concept has little meaning or reality. First, no one knows what a rule of *jus cogens* is. Second, whether rules of *jus cogens* can be replaced or modified at all, or by new rules of *jus cogens* remains uncertain. Thus, the exact scope of *jus cogens* as a modifier of prior treaty obligations is subject to even more uncertainty than modification by subsequent rules of international law.⁴⁵

The Vienna Convention's treatment of *jus cogens*, however, does seem to indicate that a new rule of customary international law would not otherwise override prior treaty obligations. If this were not so, why was it then necessary to specifically provide that *jus cogens* customary rules override prior treaty obligations?

The Vienna Convention, even if not yet ratified by the United States, is usually regarded as declaratory of existing customary international law on the interpretation of treaties. It provides no direct support for the Draft Restatement's position on customary international law. Moreover, it strongly indicates that present customary international law also does not support the Draft Restatement's position.

C. CUSTOMARY INTERNATIONAL LAW

Customary international law itself contains no rule regarding a hierarchy of sources. No authority—except possibly the Draft Restatement—states that subsequent customary international law takes precedence over prior treaty law by virtue of a rule of customary international law. Akehurst asserts that a rule of customary international law corresponding to the position of Section 102 may arise in the future; but this certainly suggests that such a rule is not part of customary international law now.⁴⁶

D. DECISIONS OF INTERNATIONAL TRIBUNALS

Judicial and arbitral decisions applying international law are, at least in theory, not independent sources of international law, but only evidence thereof. These decisions provide almost no support for the proposition that

⁴⁵Cf. Draft Restatement § 339, Comment a, at 163–64; D. O'CONNELL, INTERNATIONAL LAW, 244–45 (2d ed. 1970).

⁴⁶Akehurst, *supra* note 34, at 277. Akehurst here seems to acknowledge that the Vienna Convention raises difficulties but does not *preclude* a position analogous to that of the Draft Restatement. *Id.*

a new rule of customary international law may supersede a prior treaty obligation. Several decisions have, however, arguably held that subsequent practice between the parties to a treaty may modify or even supersede the treaty.

In 1861 the Senate of the free city of Hamburg, deciding an arbitration case, ruled that a treaty could be modified by subsequent conduct between the parties.⁴⁷ The decision required, however, express antecedent actions by the party against whom the treaty was invoked to show that the parties in effect had substituted a custom for a treaty.⁴⁸

A more recent and important decision is the *Air Transport Services Agreement Arbitration* of 1963.⁴⁹ At issue was the interpretation of a treaty between France and the United States which regulated flights originating in the United States which stopped in France and then continued to third countries. Following the conclusion of the treaty, lower French officials had permitted American airlines to operate routes other than those assigned to them in the treaty. The arbitration involved the validity of those routes. The arbitration tribunal ruled that the practice of France—as performed by subordinate officials—was not only relevant to the *interpretation* of the treaty but also might indicate a *modification* of its terms by the practice of the parties. Since the decision upheld the American right to the new routes, the tribunal decided that such a modification had indeed occurred.

Neither of these decisions states that new international customary law may override a prior treaty obligation. Rather, they hold that the subsequent conduct of the parties may not only be relevant to the interpretation of a treaty, but also may modify the provisions of the treaty. This rule is far narrower than the Draft Restatement's position. Subsequent conduct which may modify a treaty is limited to practice between the parties to the treaty. New custom, in contrast, may arise from the acts or even the declarations of states or organizations not necessarily a party to the treaty.

In contrast, earlier cases have held a treaty to have superseded prior international customary law. Some authorities cite these to support a hierarchical superiority of treaties over custom, but others note that the decisions could rest on other grounds, such as the greater specificity or subsequent ratification of the treaty.⁵⁰

E. OPINIONS OF JURISTS

The only real source, then, for the Draft Restatement is the opinions of international legal scholars. These are not in themselves a source of interna-

⁴⁷*Affaire Yuille, Shortridge et Cie* (October 21, 1861), LAPRADELLE and POLITIS, 2 RECUEIL DES ARBITRAGES INTERNATIONAUX 78 (1923).

⁴⁸See O'CONNELL, *supra* note 45, at 266.

⁴⁹*Air Transport Services Agreement Arbitration*, 38 I.L.R. 182, 249, 253 (1969).

⁵⁰E.g., SCHWARZENBERGER, *supra* note 38, at 16, and Akehurst, *supra* note 34, at 274-75.

tional law, but are only evidence thereof.⁵¹ On the question of the possible primacy of subsequent customary law over treaties, there is no unity.

1. Supporting Section 102

The arguments supporting Section 102 may be reduced to a single logical proposition. Customary international law and treaties are universally acknowledged as having equal obligatory force. Therefore, using generally valid principles of interpretation, a custom later in time should govern over an earlier treaty. This conclusion has undeniable logical simplicity. It naturally appeals, moreover, to a minority of scholars who argue for the primacy of custom over treaty obligations.⁵² To determine whether Section 102 is valid, however, its usefulness and applicability, as well as logical proofs, should be examined.

2. Arguments Supporting the Primacy of Treaty Obligations

a. Conflict with Prior United States Precedent

The strongest argument against the Draft Restatement's position is its evident conflict with United States precedent on the sources of international law. *The Paquete Habana*⁵³ held that to ascertain a rule of international law "where there is no treaty, and no controlling legislative act or judicial decision, resort must be had to the customs and uses of civilized nations. . . ."⁵⁴ The Supreme Court further emphasized that the rule of international law applied in that case was binding upon courts "in the absence of any treaty or public act of their own government in relation to the matter."⁵⁵ The Supreme Court thereby clearly established that treaties entered into by the United States have absolute priority over conflicting rules of customary international law. Moreover, this priority derives from the nature of the sources, not from their relationship in time, and applies regardless of whether the customary rule of international law arises prior or subsequent to the treaty or law.⁵⁶

Subsequent decisions have emphasized the continuing validity of *The*

⁵¹Article 38(1)(d) of the ICJ Statute, *supra* note 11.

⁵²*E.g.*, De Visscher, *Cours General du Droit International Public*, 136 RECUEIL DES COURS 1, 79 (1972); *see also* Gamble, *supra* note 18, at 313-15.

⁵³175 U.S. 677, 20 S. Ct. 290, 44 L. Ed. 320 (1900).

⁵⁴*Id.* at 700.

⁵⁵*Id.* at 708.

⁵⁶*See Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 373 F. Supp. 1161, 1178 (E.D. Pa. 1980). The court there, citing *The Paquete Habana*, stated that "international law must give way when it conflicts with or is superseded by a federal statute or treaty" (emphasis added). This seems to answer the query of Professor Henkin who interpreted prior precedent as having left unresolved whether a subsequent custom overrides a prior treaty. Henkin, *supra* note 5, at 221.

Paquete Habana. Indeed, *Filartiga v. Pena-Irala*, in endorsing the description of sources set forth in *The Paquete Habana*, viewed Article 38 of the ICJ Statute as having confirmed the approach of the Supreme Court.⁵⁷ At least one court thus seems to have acknowledged that both *The Paquete Habana* and Article 38(1) of the ICJ Statute establish a hierarchy of sources and that both state a similar rule—namely, the priority of treaties over custom. The Draft Restatement’s position on the relationship of custom and treaty seems difficult to reconcile with this precedent.

b. *Opinio Juris*

To supersede a prior treaty obligation, a custom must possess all the elements of customary international law. But how can a state act in the belief that its actions are mandated by international law when it violates the express provisions of a treaty it has entered into with another party? Observance of treaties is mandated by the most ancient and fundamental principle of international customary law, *pacta sunt servanda* (obligations entered into must be fulfilled). It is difficult to imagine how a state could become subject to a new international customary law when its protest against the rule is already manifested in a provision of an earlier treaty diverging from the later practice allegedly evidencing the new rule.⁵⁸ A treaty is a much clearer and more carefully considered statement of a state’s “beliefs” or “convictions” on the legality of a particular act than any other source. Therefore, the difficulty of showing *opinio juris* when a state acts in contravention of an earlier agreement (absent express agreement by all other parties) may be fatal to any attempt to establish a new rule of customary international law in derogation of the prior treaty.

c. Evidence

The argument is quite old that treaties invariably take precedence over custom simply by virtue of far greater ease of proof and certitude. Given the amorphous nature of customary international law, at least under present theories, it would be almost impossible to discern at any one moment what customary international law is. This contrasts with the relative ease of determination of treaty terms. According to this reasoning (even if the hierarchical superiority of treaty over custom is only an evidentiary rule), the need for certainty, in effect, transforms this relationship into a binding

⁵⁷630 F.2d 876, 880–81 n. 8 (2d Cir. 1980). See also *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, *supra* note 56, 494 F. Supp. 1161, 1178; *Centre for Independence of Judges v. Mabey*, 19 Bank. R. 635, 646–47 (D. Utah 1982) (court’s analysis indicates priority of treaty over custom); and the summary of 38 C.J.S. INT’L LAW, sec. 4 at 7–8.

⁵⁸The United States has consistently taken the position that a treaty may only be modified by processes agreed upon by the parties to the treaty. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES, 1516 (2d ed. 1945).

hierarchy. Thus, for reasons of legal clarity, it would seem that an existing treaty should take precedence over subsequent customary international law.⁵⁹

d. Stability

This consideration is closely related to that immediately preceding, but addresses issues of internal and external judicial order, rather than problems of application. The effect on the international political order of the adoption of the theory set out in Section 102 may be profoundly disruptive. Parties to a treaty could avoid their obligations by alleging abolition or modification by new rules of customary international law derived from United Nations resolutions, isolated acts of lower officials or of parties not signatories to the treaty, or other questionable sources of new customary international law.

The use by United States courts of such a doctrine is also a disturbing possibility. It would be very unwise to permit private litigants or possibly even foreign governments to litigate interpretations of treaties allegedly modified or even abolished through practice, e.g., in the tax field.⁶⁰

e. The "Lower Official" Problem

Once the Pandora's box of customary international law is opened, other disturbing consequences become apparent. If state practice can be contributed to by *any* person, it might become possible in the United States for subordinate officials to in effect overturn the decision of the president and the Senate in ratifying a treaty. *Air Transport Services Agreement Arbitration*⁶¹ raised this problem and the discussions leading to the Vienna Convention indicate that this was a decisive reason for refusing to recognize a section authorizing modification of treaties by international practice.

⁵⁹See WOLFKE, *supra* note 20, at 98–99; LAUTERFACHT, *supra* note 38, at 86–87.

⁶⁰This situation may indeed already exist in the area of international human rights. At Schrader, *supra* note 40, 82 COL. L. REV. 751, 762–68, the author outlines disturbing trends regarding the determination and application of customary international law in United States federal courts.

These recent cases have often failed to search for or to examine rigorously evidence of actual state practice, relying instead on treaties not directly binding upon the litigants or their home countries as primary evidence of customary international law. *Id.* at 762.

The author warns that:

A recent willingness on the part of certain federal courts to find international custom in resolutions and declarations of multilateral bodies, even in the absence of either actual practice or *opinio juris*, combined with a tendency to view natural law as the ultimate source of international rules, presages an era in which American courts take the lead in defining new rules of international law. Such a development would reverse the traditional and well-founded judicial reluctance to interfere with foreign relations and violate the accepted methodological principles of international law.

Id. at 783.

⁶¹*Supra* note 49, at 249, 253.

f. Hierarchy of Sources and
Hierarchy of Authority

Akehurst points out that the established hierarchy of sources in domestic law corresponds to a hierarchy of authority.⁶² In the international area, however, the same authority, the state, is the source of both treaty and customary law, while the precise rank of authority of international organizations is unclear. Akehurst and other authors have, therefore, concluded that no hierarchy of treaty over customary international law is possible. Still, all is not that simple. For example, in domestic law one authority may issue "laws" and "orders" of differing authority. The president (executive) enters into both treaties and executive agreements, which are not ranked in order of appearance. Similarly, a court issues not only decisions on both facts and law but also a wide variety of orders. The United States Internal Revenue Service issues both public and private rulings, having different authority. In short, determining that the same authority is responsible for both treaty and custom does not end the inquiry of whether one source is superior to another. The position is perfectly acceptable that different sources of law issued by the same authority may have a different priority in application by reason of the conditions laid down by the issuing authority.

g. Modification of Treaties

The question of whether a treaty may be modified or rendered obsolete by subsequent practice of the parties is conceptually distinct from modification or termination by subsequent customary international law. As we have seen, there is very little support for the former proposition and virtually none outside of legal scholarship for the latter. Since earlier legal theory required a much more general and lengthy practice to establish customary international law, it is understandable that modification by practice and by customary international law would merge.⁶³

The crucial distinction is that modification or termination of a treaty through subsequent practice may be effected only by the *parties* to the treaty. A new rule of international law, however, may in contemporary theory arise by acts of states, individuals or organizations not parties to the treaty affected.

Authorities supporting the priority of subsequent customary international law over prior treaties use a very restrictive definition of customary international law. Akehurst states that even if a rule of customary international law is established by other states, only the *practice followed by the parties to a treaty* is relevant in determining whether a treaty has been superseded. The evidence must be extremely clear and convincing to show

⁶²Akehurst, *supra* note 34, at 273.

⁶³*E.g., id.*, at 276-77.

termination or modification of a treaty by practice or custom. *Affirmative, abundant and consistent* practice by the parties will be required.⁶⁴

The Draft Restatement does not adequately reflect these serious qualifications which scholars basically supporting its position have imposed on customary international law. Rather, in Sections 102 and 135 it makes sweeping statements, apparently permitting all international customary law to supersede prior treaty obligations regardless of the actual practice of the parties to the treaty. True, Comment b and Note 4 to Section 102 permit the parties to maintain a treaty even in the face of new customary international law. That transfers, however, the burden to the treaty parties to show inapplicability of the new rule.

Moreover, the Draft Restatement adopts a contradictory position by excluding the possibility of modification or amendment of a treaty by subsequent practice of the parties in accord with the final text of the Vienna Convention. Section 343 of the Draft Restatement⁶⁵ provides only for modification of a treaty by express agreement of the parties, and Note 1 thereto⁶⁶ admits the strong United States opposition to modification by subsequent practice. The Draft Restatement thus seems to sanction the paradoxical result that while the parties to a treaty may not amend or terminate it solely by their affirmative subsequent practice, the practice of other states and organizations not parties to the treaty may terminate or amend that treaty if the parties do not expressly agree to maintain it.

V. Conclusion

The position of Section 102 on treaties and customary international law may be attractive from a logical standpoint. The Draft Restatement position, however, finds no direct support in treaty law, international customary law or judicial decisions, and the opinions of international legal scholars on that position are divided. Moreover, against its adoption are a whole group of arguments that demonstrate the uncertainties the application of Section 102 will cause. These should be addressed and satisfactorily answered if such a proposition is to be acceptable. Since that burden has not yet been met, the ALI should consider the reordering of Section 102 and the revision of the comments to that Section and Section 135.

⁶⁴Akehurst, *supra* note 34, at 276.

⁶⁵Draft Restatement, § 343, at 173-74.

⁶⁶*Id.* note 1, at 175.

