

**Session of Lisbonne - 1995**

**Problems Arising from a Succession of Codification  
Conventions on a Particular Subject**

*(First Commission, Rapporteur : Sir Ian Sinclair)*

*(The English text is authoritative. The French text is a translation.)*

*The Institute of International Law,*

*Considering* that the mandate of the First Commission is to study the problems arising from a succession of codification conventions on a particular subject,

*Considering* that these problems include *inter alia* questions of the law of treaties and questions pertaining to the relationship between treaty and custom,

*Having examined* the reports of the First Commission together with the comments and conclusions attached thereto,

1. *Recommends* that the negotiators of any codification convention relating to the same subject-matter as that of an earlier codification convention should incorporate provisions in that convention regulating the relationship between it and the earlier convention ;

2. *Adopts* the Conclusions annexed to this Resolution.

**Conclusions**

**I. General**

*Conclusion 1 : Terms Used*

For the purposes of these Conclusions :

a) the expression “codification convention” means any multilateral convention containing provisions intended to codify or progressively to develop rules of general public international law ;

b) the expression “general codification convention” means a codification convention that is normally open to participation by States irrespective of the regional group or groups to which they may belong ;

c) the expression “regional codification convention” means a codification convention concluded at the regional level, which may reserve participation to the States belonging to the regional group concerned. Such a regional codification convention may contain provisions which codify or progressively develop rules of general public international law or rules of public international law applicable only as between States within the region.

#### *Conclusion 2 : Effect of Codification Provisions*

A codification convention may contain provisions (hereinafter referred to as “codification provisions”) which are declaratory of customary law, or which serve to crystallise rules of customary law, or which may contribute to the generation of new rules of customary law in accordance with the criteria laid down by the International Court of Justice.

#### *Conclusion 3 : Scope of the Conclusions*

These Conclusions apply to a succession to the codification provisions of general codification conventions relating to the same subject-matter, and also apply to a succession to the codification provisions of regional codification conventions relating to the same subject-matter where this raises the same problems as those raised by a succession to the codification provisions of general codification conventions of this nature.

#### *Conclusion 4 : Provisions Regarding jus cogens*

These Conclusions are without prejudice to the application of Articles 53 and 64 of the Vienna Convention on the Law of Treaties of 1969.

## **II. Treaty Law**

#### *Conclusion 5 : Treaty-Law Consequences of a Succession of Codification Conventions Relating to the Same Subject-Matter*

The consequences, as a matter of the law of treaties, of a succession to the codification provisions of codification conventions relating to the same subject-matter flow from the provisions of Article 30 of the Vienna Convention on the Law of Treaties dealing with priorities in the application of successive treaties of this nature. Where appropriate, the provisions of Articles 40, 41 and 59 of that Convention should also be borne in mind, these provisions constituting in many respects a codification of existing customary law on the matters which they cover.

*Conclusion 6 : Provisions Regarding Consequences of Breach*

Conclusion 5 is without prejudice to the application of Article 60 of the Vienna Convention on the Law of Treaties in a case where the content of a later codification convention constitutes a breach of an obligation in the earlier convention. It is equally without prejudice to the other legal consequences of breach of such an obligation deriving, for example, from the rules of the law of State responsibility.

*Conclusion 7 : Rules or Practices of an International Organization*

In the case of successive codification conventions relating to the same subject-matter adopted within an international organization which has rules or practices regulating the relationship between successive conventions of this type, Conclusion 5 is without prejudice to the application of any such rules or practices.

*Conclusion 8 : Priority to be Given to Treaty Provisions Regulating Relationship Between Successive Codification Conventions*

Conclusion 5 applies to a succession to the codification provisions of codification conventions relating to the same subject-matter even in cases where the earlier or later codification convention embodies a provision specifically regulating the relationship between the two conventions ; in such a case that provision will, to the extent that it is applicable in the particular circumstances, prevail.

*Conclusion 9 : Special Case of a Later Codification Convention Regulating in Greater Detail Part of the Ground Covered by an Earlier Codification Convention*

Where the object and purpose of a later codification convention are to regulate in greater detail a matter or matters already regulated by an earlier codification convention and where two States are parties to both conventions, there may be room in the interpretation and application of the two conventions to apply the distinction between the *lex specialis* and the *lex generalis*. In appropriate cases and unless the later convention provides otherwise, where there is incompatibility between the provisions of the two conventions, the *lex specialis* should prevail.

### **III. Relationship Between Treaty and Custom**

*Conclusion 10 : As Sources of International Law*

Treaty and custom form distinct, interrelated, sources of international law. A norm deriving from one of these two sources may have an impact upon the content and interpretation of norms deriving from the other source. In principle, however, each retains its separate existence as a norm of treaty law or of customary law respectively.

*Conclusion 11 : Hierarchy of Sources*

There is no *a priori* hierarchy between treaty and custom as sources of international law. However, in the application of international law, relevant norms deriving from a treaty will prevail between the parties over norms deriving from customary law.

*Conclusion 12 : The Effects of Repetition of a Norm in Successive Codification Conventions*

The repetition in two or more codification conventions of the substance of the same norm may be an important element in establishing the existence of that norm as a customary rule of general international law.

*Conclusion 13 : State Practice in Relation to the Process of Generation of Customary Law by Codification Convention*

In assessing the element of State practice in the process by which a rule of customary law may be generated through a codification convention, the practice of both parties and non-parties should be taken into account. In the case of conduct of a party to the codification convention in its relations with another party or with a non-party, the significance of the practice will be substantially enhanced if it is established that the State concerned acted in the conviction that the practice was required by a rule of customary international law independently of the applicability of the convention.

*Conclusion 14 : Effect of Judicial Pronouncements*

A judicial pronouncement to the effect that a particular provision of a codification convention is or is not declaratory of customary law, or has or has not crystallised as, or has or has not generated, a rule of customary law states the law as at the date upon which that pronouncement was made.

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(1<sup>st</sup> September 1995)