



THE CUSTOMARY STATUS OF THE MONTREUX CONVENTION: A LEGAL BASIS FOR REGIONAL STABILITY AND ITS INTERNATIONAL IMPLICATIONS

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Abstract

This study examines whether the Montreux Convention Regarding the Regime of the Straits has acquired normative status under customary international law, focusing on its role in regional stability and its broader legal implications. The research employs a legal-analytical framework grounded in the jurisprudence of the International Court of Justice (ICJ), assessing the two foundational elements of customary international law—state practice (*usus*) and *opinio juris*. The analysis draws on nearly ninety years of consistent implementation by both party and non-party states, including NATO, the EU, and the US, as well as treaty interpretations, diplomatic notes, and scholarly discourse. The study demonstrates that the Montreux Convention has evolved beyond a treaty-based regime into a customary norm, particularly at the regional level. Key provisions, such as warship passage restrictions, tonnage limitations, and notification requirements, reflect entrenched and stable state practice accompanied by a belief in their legal obligation. Despite partial doctrinal objections and conflicts with UNCLOS, the Convention's widespread adherence supports its recognition as a regional customary rule. The Montreux Convention's customary character ensures its enduring validity, even in the event of termination. Its core principles contribute to regional maritime security and the predictability of international law, reinforcing its dual role as both a treaty and a customary regime.

Keywords: *Montreux Convention, Customary International Law, International Straits*

JEL Classification: *K33, F55, N40*

MONTRÖ SÖZLEŞMESİ'NİN ÖRFİ STATÜSÜ: BÖLGESEL İSTİKRARIN HUKUKİ TEMELİ VE ULUSLARARASI ETKİLERİ

Öz

Bu çalışma, Montrö Boğazlar Sözleşmesi'nin uluslararası örf ve âdet hukuku kapsamında normatif bir statü kazanıp kazanmadığını incelemekte ve sözleşmenin bölgesel istikrar ile uluslararası hukuk düzenindeki etkilerini değerlendirmektedir. Çalışma, Uluslararası Adalet Divanı (UAD) içtihatları doğrultusunda örf ve âdet hukukunun iki temel unsuru olan devlet uygulamaları (*usus*) ve *opinio juris*'i analiz ederek, sözleşmenin yaklaşık doksan yıllık uygulama sürecini taraf/taf olmayan devletlerin (NATO, AB, ABD) pratikleri, diplomatik notalar ve akademik görüşler ışığında değerlendirmektedir. Montrö Sözleşmesi'nin, savaş gemilerinin geçiş kuralları, tonaj sınırlamaları ve bildirim yükümlülükleri gibi temel hükümlerinin, yazılı metin olmanın ötesinde örfi nitelik kazandığı tespit edilmiştir. Evrensel örfi hukuk statüsüne ilişkin tartışmalara rağmen, Karadeniz'e kıyıdaş devletler ve bölgesel aktörlerin uzun süreli uyumu, sözleşmenin en azından bölgesel örf ve âdet hukuku düzeyinde bağlayıcılık kazandığını göstermektedir. Montrö rejimi, sözleşmenin feshi durumunda dahi örfi niteliği sayesinde geçerliliğini koruyabilecek bir hukuki yapı sunmaktadır. Bu durum, Türkiye'nin boğazlar üzerindeki egemenlik haklarını güvence altına alırken uluslararası güvenliğinin istikrarını da desteklemektedir.

Anahtar Kelimeler: *Montrö Boğazlar Sözleşmesi, Örf ve Adet Hukuku, Uluslararası Boğazlar*

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1. Introduction

In the international legal system, customary rules emerge as fundamental normative sources through the consistent and long-term practices of states, accompanied by their belief in the legal bindingness of these practices. The established jurisprudence of the ICJ requires that the elements of general state practice and *opinio juris*² be present together for a rule to acquire the status of customary law. In this context, whether written agreements can acquire the status of customary law over time constitutes an important topic of discussion in international law doctrine.

The 1936 Montreux Convention Regarding the Straits presents a distinctive case in this context. Having been implemented continuously for nearly ninety years, the Convention has acquired a *de facto* binding character within the international community. Fundamental provisions of the convention, such as the regulations on the passage of warships, tonnage limitations, and notification obligations, are also meticulously implemented by NATO member states and non-Black Sea coastal powers. This situation raises the question of whether the Montreux regime has transcended its treaty-based foundations and evolved into a customary norm within international law.

Existing scholarship on the Montreux Convention has predominantly focused on its historical development, security implications, and legal status as a treaty regime (Saribeyoğlu-Skalar and Cecanpınar, 2021; Şener, 2014; Doğru, 2013; Segell, 2022; Tütüncü, 2017). While these studies provide valuable insights into the Convention's operational framework and geopolitical significance, they often overlook the critical question of its potential customary law character, particularly in the event of its termination. A limited number of studies (Demir, 2018; İnan, 1995; Karan, 2017) have explicitly argued that Montreux's core provisions could transition into universal customary international law³ upon denunciation. However, these analyses suffer from two significant omissions. First, they overlook the critical role of *erga omnes*⁴ treaties in the development of customary law, despite Montreux's objective regime status affecting third states. Second, they neglect the emerging concept of regional customary law⁵, which provides a more appropriate framework for analyzing Montreux's unique position in the Black Sea regional order.

This study fills this gap by offering a rigorous, theory-driven examination of the Montreux Convention through the lens of customary international law. Unlike prior works, our analysis is grounded in concrete evidence, including: ICJ jurisprudence on the interplay between treaties and custom (e.g., North Sea Continental Shelf Cases), state practice (e.g., compliance by NATO, the US, and non-party states), institutional positions (e.g., EU resolutions, diplomatic notes), and doctrinal debates on regional vs. universal customary norms (e.g., D'Amato, 1969; Byers, 1999).

The main objective of this study is to systematically analyze whether the Montreux Convention can be evaluated within the framework of customary international law. In this context, the theoretical foundations of the formation of customary law will first be outlined, followed by a detailed examination of the Montreux regime in terms of the material element and *opinio juris*. The analysis will demonstrate that while Montreux may not qualify as universal customary law due to conflicts with UNCLOS, its regional customary status is firmly established—a nuanced conclusion that advances the literature beyond binary assertions. Finally, the broader implications of this status for post-termination scenarios and regional stability will be discussed, offering a forward-looking perspective absent in existing studies.

² Denotes the consistent and general practice of states, forming one of the two essential elements of customary international law.

³ Comprises legal norms that arise from the consistent practice of states accompanied by a sense of legal obligation (*opinio juris*), even if not codified in treaties.

⁴ A Latin term meaning "toward all"; refers to obligations that a state owes to the international community as a whole.

⁵ Customary rules that have developed and are accepted within a particular geographical area or among a specific group of states, rather than universally.

2. The Normative Framework and Scope of the Montreux Convention

Due to its position as the only maritime passage connecting the Black Sea and the Mediterranean, the Turkish Straits have held strategic and political importance throughout history (Saribeyođlu-Skalar and Cecanpınar, 2021:58). For this reason, they have attracted the interest not only of regional actors but also of global powers. The absolute control established by the Ottoman Empire over the Straits following the conquest of Istanbul in 1453 came to an end with the signing of the Treaty of the Dardanelles (Kale-i Sultaniye) with the United Kingdom in 1809. Subsequently, the London Straits Convention of 1841 and the Treaty of Lausanne of 1923 significantly restricted the sovereignty and authority of the Turkish state over the Straits (Şener, 2014:467). Although the Republic of Turkey's initial efforts in 1930 to restore full sovereignty over the Straits failed, developments such as Hitler's rise to power in Germany in 1933 and his rejection of the Treaty of Versailles, Italy's invasion of Abyssinia in 1935, the United Kingdom's desire to preserve the existing status quo, and the support of the Soviet Union for Turkey eventually led to success. As a result of these developments, the Montreux Convention Regarding the Straits was signed on 20 July 1936.

According to Article 26 of the Montreux Convention, the treaty was to enter into force following the ratification by the sixth signatory state. In line with this provision, the Convention entered into force on 9 November 1936, after being ratified by and notified to the French government by Bulgaria, the United Kingdom, Australia, France, Japan, Romania, the Soviet Union, Turkey, Greece, and Yugoslavia. Japan ratified the Convention later, on 19 April 1937 (United Nations Treaty Collections, n.d.). Although not an original signatory, Italy ratified the Convention on 2 May 1938, pursuant to Article 27, which allowed states party to the Treaty of Lausanne to accede to the Convention (Saribeyođlu-Skalar and Cecanpınar, 2021:64).

Except for Article 1 of the Convention, titled "Freedom of transit passage⁶ and navigation through the Straits," the remaining articles were arranged for a period of 20 years. From the date the Convention entered into force, the treaty may be terminated within two years following a notice of denunciation sent to the French government by any of the parties starting from the end of the 18th year (Art. 28). However, since no state has submitted a notice of denunciation to date, the Convention remains in force today with all its articles.

This situation demonstrates not only legal continuity but also that the parties adopt a political approach prioritizing the preservation of the balance established by the Montreux regime. The parties consider maintaining the balance, predictability, and stability provided by the Montreux regime to be more advantageous than the uncertainty that a potential revision might cause. The continued validity of the Convention reflects the common interest of the Black Sea littoral states' security concerns as well as the need for a regular and controlled regime governing global maritime navigation through the Straits.

Furthermore, it can be stated that the new states emerging after the dissolution of the Soviet Union and Yugoslavia have continued to be parties to the Convention (Saribeyođlu-Skalar and Cecanpınar, 2021:65). Consequently, today the Montreux Convention can be considered to have the following parties: Bulgaria, the United Kingdom, Australia, France, Romania, Turkey, Greece, Russia, Ukraine, Belarus, Moldova, Estonia, Latvia, Lithuania, Georgia, Armenia, Azerbaijan, Kazakhstan, Turkmenistan, Uzbekistan, Kyrgyzstan, Tajikistan, Slovenia, Croatia, Bosnia and Herzegovina, North Macedonia, Serbia, Montenegro, and Kosovo.

However, the Montreux Convention Regarding the Straits is not merely an international legal document binding only the contracting parties; it also constitutes a treaty creating an objective regime. The provisions regarding passage through the Straits are designed to produce legal effects not only among the parties but for the entire international community. In this respect, the Montreux regime functions as a normative arrangement that defines the legal status of a specific

⁶ A regime under the United Nations Convention on the Law of the Sea (UNCLOS) allowing vessels and aircraft to pass through straits used for international navigation without hindrance.

geographical area. In international law, treaties creating objective regimes establish rules that bind not only the parties but also third states concerning a particular region or legal regime. The Antarctic Treaty and 1961 Vienna Convention on Diplomatic Relations are examples of such instruments. Similarly, the Montreux Convention has established a regime regulating maritime passage through the Turkish Straits that applies to all states. It is widely accepted in international law that such treaties exert *erga omnes* effects, binding even third states that are not parties to the treaty. Therefore, the provisions governing the passage of commercial and warships are binding not only on the signatory states but on all states. The Montreux Convention not only determines the legal status of the Straits but also secures the stability and predictability of international maritime law. In this context, the *erga omnes* effect of the Montreux Convention is not limited to binding third states that are not parties. It also creates both horizontal and vertical effects by preventing parties from enacting domestic laws contrary to its provisions and by obliging states to act in conformity with the regime in their international responsibility relations. This dual binding nature reinforces the normative authority of the Convention within international maritime law.

The Montreux Convention Regarding the Straits provides an exceptional legal framework granting Turkey extraordinarily broad powers over the Turkish Straits compared to other international strait regimes. Unlike the international straits regime established by the 1982 United Nations Convention on the Law of the Sea (UNCLOS), Montreux is exempted from application under Article 35 of that Convention and creates a unique regime of passage for the Turkish Straits. According to UNCLOS, all states have the right of transit passage through international straits by ships and aircraft (Art. 38), and the coastal state cannot restrict this right under any circumstances (Art. 44). Coastal states may enact regulations solely for purposes of security, fishing, environmental protection, and maritime traffic control; however, these regulations must not hamper or impede transit passage (Art. 42). The Montreux Convention, on the other hand, provides different regimes of passage for merchant and warships during times of peace and war, and also regulates the passage of civilian aircraft over the Straits within specific rules.

According to the Montreux Convention, merchant vessels have the right of transit passage day and night during peacetime, without any charges unless pilotage or other specific services are requested (Art. 2). In wartime, if Turkey is not a party to the conflict, merchant vessels retain their right of transit passage as stipulated in Article 2 (Art. 4). If Turkey is involved in the war, merchant vessels of the belligerent state have the right of transit passage according to Article 2, provided they do not assist the enemy (Art. 6). Warships, on the other hand, may transit during peacetime without paying fees or charges, subject to the special conditions regarding tonnage and ship type specified in Articles 11 and 12, and only upon notifying Turkey eight days prior to passage (Arts. 11, 13). Additionally, the tonnage of warships that non-Black Sea states may deploy in the Black Sea during peacetime is limited, and such vessels may remain in the Black Sea for a maximum of 21 days (Art. 17). In wartime, if Turkey is not a belligerent, the passage of warships belonging to the belligerent states is prohibited; however, warships of non-belligerent states may transit freely in accordance with the rules set out in Articles 11 and 13. Only warships of Black Sea littoral states involved in the conflict are permitted to return to their home ports (Art. 19). If Turkey is a party to the war or perceives itself under threat of war, the provisions regarding warships shall not apply, and Turkey shall have the discretion to regulate the passage regime for warships as it sees fit (Arts. 20, 21). Furthermore, under the Montreux Convention, civilian aircraft may freely fly along the designated routes between the Mediterranean and the Black Sea (Art. 23). The Convention does not regulate the passage of military aircraft, which remains subject to Turkey's sovereign discretion under general international law.

A careful examination of the provisions of the Convention clearly shows that Montreux is not merely a narrowly focused passage agreement regulating maritime technicalities. This Convention is a structural document that considers the Turkish Straits system, including the Dardanelles and Istanbul Straits as well as the Sea of Marmara, together with the Black Sea, thereby establishing a

permanent and multifaceted maritime regime for this geographical unity. Although the Montreux regime provides different rules for wartime and peacetime, it not only guarantees freedom of navigation but also constructs a security architecture that exerts a decisive influence on the balance of power in the region. Notably, the existence of provisions limiting the naval power projection of non-Black Sea littoral states through regulations on tonnage, duration of stay, and notification requirements demonstrates that this Convention is more than a mere regime of passage; it is a status treaty prioritizing regional security. While safeguarding Turkey's sovereign rights, Montreux also functions as a stability mechanism aimed at preventing military tensions in the Black Sea basin. In this respect, it retains its importance not only for the parties to the Convention but also as a historical document directly concerned with regional peace and security.

3. Customary International Law and Treaties: A Theoretical Approach to the Montreux Convention

The Montreux Straits Convention has long been regarded as one of the fundamental pillars of Turkey's maritime sovereignty regime, playing a stabilizing role both nationally and regionally in terms of security. However, recent years have witnessed intense public debate over the future of Montreux, particularly in the context of the Kanal İstanbul project. In this framework, the statement made in 2021 by then Speaker of the Turkish Grand National Assembly, Mustafa Şentop, that "If the President wishes, he can also denounce Montreux" (BBC Turkish, 2021), heightened concerns about Turkey potentially withdrawing from the Convention and drew responses from the security bureaucracy, including a warning declaration by 104 retired admirals. These developments, combined with claims that Kanal İstanbul could bypass the Montreux regime, demonstrate that the regime governing the Straits has evolved into a political as well as a legal issue (Meriç, 2021; Yeşiltaş, 2021; Bozkaya, 2022).

Similarly, Turkey's 2021 withdrawal from the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) created a public perception that international treaties could be terminated according to domestic political agendas (Saribeyoğlu-Skalar and Cecanpınar, 2021:59). This situation has also raised concerns about the future of treaties of central importance to Turkey's national security, such as Montreux. However, according to Prof. Dr. Ersan Şen, the Montreux Straits Convention is more than a treaty that can be simply denounced under the law of treaties; it exhibits a tendency to form a regional customary regime through stable and widespread practice over many years (Elmacioğlu, 2021). Furthermore, İsmail Demir (2018: 350) argues that Montreux has effectively transformed into customary international law today. Therefore, the question of whether Montreux possesses the character of customary international law is no longer merely theoretical. The increasing political debates in recent years, particularly calls for denunciation or revision, make it necessary to reconsider this issue together with its practical and legal dimensions. In this regard, first, the structural elements and formation process of customary international law will be explained; then, the way treaties may evolve into this normative structure will be conceptually addressed. Thus, evaluations regarding whether the Montreux Convention has transformed into customary law will be constructed on a theoretical basis.

3.1. The Conceptual Framework of Customary International Law

In the international legal system, customary international law constitutes a normative and primary source as specified in Article 38(1) of the ICJ Statute, despite not being established by written rules. It emerges from the repeated practices of states and their recognition of these practices as legally binding. As confirmed in many ICJ decisions, two fundamental elements must be present for a rule to acquire customary character: a general and consistent state practice (material element, *usus*) and the belief that such practices are carried out as a legal obligation (*opinio juris*) (Shaw, 2017:74; ILC, 2018:124).

The first of these elements concerns the continuous and consistent conduct of states. However, mere repetition of behavior at the factual level is insufficient to constitute customary law. States must demonstrate a belief that these patterns of conduct are legally binding. In this respect, *opinio juris* indicates that states act not merely out of pragmatism but within a normative commitment (Leopard, 2010:117; Aras).

When these two essential elements of customary law are considered together, it becomes clear that state behavior contributes to the formation of international law. Particularly in some cases, the adoption and widespread practice of multilateral treaties can lead to the emergence of general and binding norms not only for the parties but for all states. This process reflects the dynamic whereby treaties may gradually acquire customary law status (Akehurst, 1974:37; Kunz, 1953:667).

Therefore, understanding customary law requires more than focusing solely on state practice; it necessitates a comprehensive evaluation of the multifaceted factors that contribute to the emergence of norms. Concepts such as the material element, *opinio juris*, and the process by which treaties acquire customary character become clearer when examined through illustrative cases.

3.1.1. Material Element

The first of the two core elements that play a foundational role in the formation of customary international law is the material element, which is based on the consistent and uniform conduct of states. These patterns of behavior must be repeated over time, gradually forming a practice that gains relative stability in interstate relations. However, such practices alone, in the form of repeated actions, are not sufficient to constitute a rule of international law. Whether a state practice meets the criteria for the material element is closely related to its duration and generality. This section will examine in detail these two key components of the material element: the duration of the practice and its generality.

3.1.1.1. Duration of the Practice

In the formation of customary international law, the duration of practice is directly related to how long and with what degree of continuity states exhibit a specific pattern of behavior. For a particular conduct to acquire customary character under international law, it must evolve from a spontaneous or temporary reaction into a consistent and established practice over time (Leopard, 2010:225–228).

However, duration alone is not a determinative criterion. There is no absolute temporal threshold required for the formation of customary law. As acknowledged by the ICJ in the *North Sea Continental Shelf* cases (1969: para. 74), “the passage of only a short period of time is not necessarily a bar to the formation of a customary rule,” and the required duration “cannot be determined in the abstract”. Therefore, in some cases, intense and homogeneous practices lasting only a few years may lead to the formation of a customary norm, whereas in others, inconsistent and sporadic practices over decades may fail to do so (ILC, 2018:125).

What matters in assessing duration is whether the practice demonstrates a general consistency and continuity over a given time frame. This persistence in state behavior also helps provide a foundation for other elements, particularly *opinio juris*. For this reason, duration in the context of customary international law is viewed less as a quantitative measure and more as a qualitative indicator of continuity (Mendelson, 1998:370; Kunz, 1953:670).

In this regard, duration plays a significant role in the construction of customary norms through the prolonged and stable conduct of states. When a particular practice becomes embedded in the long-term foreign policy behavior of states, it ceases to be accidental or temporary. In areas such as straits regimes, maritime jurisdiction, or the continental shelf, sustained and stable state practice over time is among the principal indicators contributing to the development of customary international law. Here, duration reflects not merely the passage of time, but the embeddedness and perceived consistency of state behavior as observed by the international community.

3.1.1.2. Generality of the Practice

The degree to which a given practice becomes widespread among states is as critical as the duration of that practice in the formation of customary international law. In this context, generality refers to the adoption of a particular practice not merely by a handful of states but by a broad and diverse group of states across different geographical, cultural, and political contexts (Akehurst, 1974:17).

ICJ has emphasized not only the existence of state practice but also whether that practice reflects a sufficient level of generality and representativeness in the formation of customary norms. In the *Asylum Case* (1950: 14), the Court concluded that the alleged right of diplomatic asylum was limited to Latin American states and had not gained sufficient acceptance in other regions, thus failing to meet the requirements for customary international law. Accordingly, practices with narrow geographical scope were deemed insufficient to satisfy the requirement of generality. Similarly, in the *North Sea Continental Shelf Cases* (1969: para. 74), the Court stated that for customary rules to emerge, state practice must be "extensive and virtually uniform" and that the conduct of only a few states is not enough to establish a customary rule.

However, generality should not be confused with numerical majority. It is not necessary for all states to adopt a given practice. The ICJ considers a "widespread and representative" pattern of conduct to be sufficient for the formation of a customary rule. In particular, the participation and consistent behavior of states that are most affected by the norm, such as coastal states, states with naval power projection capabilities, or regional actors, can serve as evidence of generality (Tams, 2015:9).

Moreover, not only active support but also passive acquiescence by states may be part of this element. Non-objection to a rule, and its acceptance without protest, can serve as important indicators of the level of generality. Therefore, generality must be assessed not only based on the number of affirmative actions but also on the overall attitude of the international community.

3.1.2. Opinio Juris

The second fundamental element in the formation of customary international law is *opinio juris*, that is, the belief that a certain practice is carried out as a legal obligation. This is the most critical component that defines the normative structure of international law from the perspective of customary sources. This element must demonstrate that the relevant practices are not merely performed as habits or for political convenience, but rather because they are considered to be legally binding rules. No matter how widespread and consistent the practice is, without *opinio juris*, such behavior does not constitute a customary rule (Tams, 2015:10; Kunz, 1953:665).

In this sense, *opinio juris* is related to the attitudes and intentions of states. It is not directly observable but can be inferred through indirect evidence. Various sources such as international court decisions, official state statements, diplomatic correspondence, United Nations documents, or voting behavior can be used to analyze the legal intentions of states (Goldsmith and Posner, 1999:1118). For example, in the *Nicaragua case*, the ICJ (1986: para. 188) interpreted the behavior of not only the United States but also other states avoiding the use of force as being based on *opinio juris*, and thus recognized the existence of customary international law.

Furthermore, *opinio juris* is not only an element that accompanies existing practices but also plays a decisive role in the emergence of new norms. This can be seen in cases where the legal language of multilateral treaties is gradually accepted as binding by non-party states, thereby contributing to the formation of customary norms. For instance, even non-parties to the Vienna Convention on Diplomatic Relations have adopted its provisions domestically, reflecting an evolving *opinio juris* that supports the emergence of new customary rules. In this context, state declarations during treaty negotiations, as well as domestic incorporation of treaty provisions, serve as strong indicators of normative commitment—an approach also confirmed by the

International Court of Justice in the North Sea Continental Shelf Cases (1969, para. 73), where the Court emphasized the formative role of *opinio juris* in developing customary law through treaty-based practice

In conclusion, *opinio juris* demonstrates that customary international law is not solely based on state practice, but rather grounded in a normative framework. The repetition of state behavior alone is not sufficient. It must be shown that such conduct is carried out with the belief that it is legally required. Therefore, in order for a rule to be assessed as part of customary international law, the existence of *opinio juris* must be supported by concrete, consistent, and persuasive indicators.

3.2. Treaties and Customary International Law

When evaluating the relationship between treaties and customary international law in international law, a fundamental distinction must be made regarding the nature of the norms contained in treaties.

The first type of treaties function primarily as codifications of rules that are already part of customary international law. In these cases, the treaty only formalizes existing norms in written form and does not create new norms. Therefore, the inclusion of customary law-based provisions in such treaties does not raise legal controversy. Here, the treaty serves merely as a clear and stable confirmation of a customary norm. For example, regulations concerning diplomatic immunity, protection of prisoners of war, or certain principles of humanitarian law in armed conflicts are reflected both in written treaties and customary law.

However, the second type of treaties do not simply codify existing customary rules but introduce new normative arrangements that initially apply only between the parties and create positive legal effects. At this point, whether the provisions of such treaties have become customary international law over time is a significant issue in evaluating the normative sources of international law. For these treaties to acquire customary status, it is not enough that the rules are included in a written text; they must be assessed alongside the two fundamental elements of customary international law, state practice and *opinio juris*.

In general, it is accepted that treaties do not directly constitute customary international law but serve as strong evidence and reference points in its formation. According to Scott and Carr (1996:75-76), the existence of treaties does not itself generate an obligation; rather, the degree to which states adopt and normatively engage with the treaty provisions is a determining factor in the customary transformation. Similarly, Weisburd (2021:23-25) states that a treaty is binding only on its parties, but if the parties show a belief that they will abide by these rules even without the treaty, then the practice gains significance in terms of *opinio juris*. Therefore, a treaty can become customary international law not because it is written but because states adopt it with a normative binding effect beyond the text. This means that customary law transforms through the practice and normative acceptance of treaties, not through the treaties themselves.

ICJ decisions also clearly demonstrate the role treaties can play in the transformation process into customary international law. The Court places great importance not only on written legal sources but also on state practice and accompanying legal beliefs. In the North Sea Continental Shelf Cases (1969: para. 71), the ICJ stated that for a treaty provision to become a customary rule, mere repetition of the text is not sufficient; the practice must be widely and consistently adopted and regarded as legally binding by states. The Court explicitly said, "a treaty provision can become a customary rule; however, this requires widespread acceptance and *opinio juris*."

Similarly, in the *Libya v. Malta Continental Shelf* case (1985: para. 27), the Court accepted that multilateral treaties can play important roles in determining customary international law. The decision noted that such treaties sometimes record and define existing customary law rules and sometimes play a role in developing these norms. The Court also considered the wide acceptance

of the 1982 United Nations Convention on the Law of the Sea as a strong indicator that its provisions have become customary. This approach supports the idea that treaty provisions may become part of customary international law when accepted by a broad community of states, whether party or not (Kaya, 2023).

However, there are different approaches in the literature regarding the transformation of treaties into customary international law. Particularly noteworthy is Anthony D'Amato's view. According to D'Amato (1969; 1988), some multilateral treaties can directly create customary law if their provisions are accepted by the international community as a whole and not just by the parties. This view sees treaties not only as reflections of state practice but also as starting points for new customary norms.

D'Amato's perspective is especially important regarding the distinction between general customary law and regional customary law. According to him, even treaties accepted by a limited geographic area or specific group of states may, under certain conditions, become special customary rules within that region. A relevant example is the law of asylum in Latin American countries. Here, treaties bind only a limited number of states but have also facilitated the emergence of regional customary law norms. In this context, D'Amato (1969) argues that customary law rules are not only the result of state practice but sometimes arise directly from written texts.

In international law literature, it is often stated that multilateral treaties have the potential to acquire customary status. Such treaties can affect not only the parties but the entire international community if their norms become universally accepted. Especially in areas such as environmental law, human rights, and the law of the sea, widely accepted multilateral treaties may contribute to the formation of customary law as non-parties also adopt these norms. However, this depends not only on the content of the treaty but also on state practice and the normative meaning attached to these practices.

Within this theoretical framework, the question of whether the Montreux Convention qualifies as customary international law will be assessed in terms of its long-standing practice and the normative acceptance of states. The following section analyzes whether the Montreux regime has a customary character based on the criteria of state practice and *opinio juris*.

4. The Practice and Normative Acceptance of the Montreux Convention: An Analysis of Its Customary Law Character

The Montreux Convention Regarding the Regime of the Straits has regulated civilian and military maritime passage through the Turkish Straits for nearly a century. It functions as a maritime legal regime that has been effectively recognized not only by its state parties but also by third states. In this context, considering both the formal continuity of its application and its normative impact, the question of whether the Montreux regime shows characteristics consistent with the formation of customary international law has become increasingly debated among scholars and practitioners. Particularly in the event of its termination or suspension, the issue of which legal framework would govern the Straits is not only relevant to Turkey's sovereign rights but also vital for the stability of international maritime law.

This section examines whether the Montreux Convention possesses the characteristics of customary law by analyzing state practice and *opinio juris*. In addition, it assesses whether the Convention is binding upon third states and explores its role in regional security.

4.1. The Material Element of the Montreux Convention as Customary Law: Duration, Continuity, and Practice of Implementation

One of the two fundamental elements of customary international law, the material element, refers to the consistent, stable, and prolonged practice of a particular behavior by states. In the case of the Montreux Convention, this element appears to be fulfilled, as the Convention has been

implemented almost without interruption since 1936. This implementation has been reinforced not only through Turkey's domestic legal and administrative practices but also through the compliance of a significant number of states, both parties and non-parties, with the regime governing the Straits.

Throughout nearly a century of implementation, the Montreux Convention has not faced any serious suspension, invalidation, or attempt to establish an alternative passage regime. Despite the increasing geopolitical importance of the Black Sea during the Cold War period, a high level of adherence to the provisions of the Convention was maintained. Warships passed through the Straits in accordance with the rules on tonnage, duration, and prior notification, which indicates that Montreux has become not only a written text but also a de facto and established regime of practice.

The passage of the Soviet aircraft carrier *Kiev* through the Straits in 1976 constitutes a significant example of the continuity of this practice. Despite claims by Western states that this passage violated the Montreux Convention, the Soviet Union justified the transit by classifying the ship differently based on its technical characteristics. This incident demonstrates that, despite differing interpretations, the boundaries of the Montreux regime have continued to be respected by the parties, and no clear violations have occurred that would undermine its customary character.

Although Turkey's compliance with the Montreux Convention is rooted in treaty obligations, the sustained and consistent application of its provisions across successive governments and geopolitical crises invites a broader inquiry into whether this behavior also reflects an emerging *opinio juris*. However, treaty compliance alone does not necessarily indicate customary status; what matters is whether such practice is accompanied by a belief in legal obligation beyond the treaty itself. In this regard, Turkey's unwavering enforcement of rules such as notification requirements and tonnage restrictions gains relevance only when considered in conjunction with similar adherence by non-party states and the absence of persistent objection.

One significant challenge to the continuity and normative acceptance of the Montreux Convention occurred between 1946 and 1953, when the Soviet Union formally sought to revise the regime. In a diplomatic note dated 7 August 1946, the Soviet government proposed the establishment of a joint Turkish-Soviet defense mechanism for the Straits, along with a new regime excluding non-Black Sea powers from any control or participation (Knight, 1975, pp. 459–460). These proposals were widely interpreted as an attempt to replace the Montreux regime entirely, rather than to reform it.

Turkey firmly rejected the Soviet demands, and the ensuing diplomatic standoff continued until 1953, when the USSR formally withdrew its revisionist stance. During this seven-year period, although the Montreux Convention remained technically in force and its provisions were not openly breached, the very existence of such revisionist pressure raises critical questions regarding the nature of compliance by the parties. As Knight (1975) notes, U.S. officials viewed the Soviet proposals as a strategic attempt to dominate Turkey and gain control over a key geopolitical corridor. The Truman administration responded decisively by aligning American foreign policy with Turkish sovereignty, marking a turning point in U.S. engagement in the region.

This episode demonstrates that compliance with Montreux during this period was driven less by legal conviction than by power balancing and strategic containment. The absence of formal denunciation or breach does not automatically translate into *opinio juris*. Rather, it underscores the complexity of interpreting prolonged state practice under conditions of geopolitical tension. If compliance persists primarily due to deterrence and *realpolitik*—as was arguably the case between 1946 and 1953—then the normative value of that compliance remains ambiguous.

Therefore, any assessment of the material element of custom in the context of the Montreux regime must account for the existence of such exceptional periods of political strain. The Soviet

revision attempt, although unsuccessful, illustrates that the continuity of practice cannot be equated with uninterrupted normative consensus.

In this context, despite historical periods of political tension and revisionist pressure—particularly the Soviet proposals between 1946 and 1953—the Montreux regime has demonstrated a remarkable degree of resilience and functional continuity. Further supporting evidence of consistent practice can be found in more recent developments. During the 2008 Georgia crisis, U.S. Navy ships delivering humanitarian aid to Georgia transited the Turkish Straits in full compliance with Montreux’s quantitative restrictions, despite the high-intensity regional conflict (Daly, 2008). Similarly, following the outbreak of the Russia–Ukraine war in 2022, Turkey invoked Article 19 of the Convention to prohibit the passage of warships belonging to belligerent states—a decision that was widely respected and met with no formal objection, including from Russia and NATO members (Dönmez, 2022). Another example is the 2021 HMS Defender incident, after which the United Kingdom explicitly stated that the vessel’s transit complied with Montreux rules (Kiselyova and Macaskill, 2021). These examples demonstrate that even under crisis conditions, both regional and extra-regional powers acknowledge and apply the Convention’s rules, reinforcing its *de facto* authority. NATO exercises in the Black Sea are consistently conducted through time-limited naval deployments; the passage of U.S. destroyers adheres to the tonnage and notification requirements; and Russia’s Black Sea Fleet based in Sevastopol continues to operate in compliance with the Convention’s provisions. These developments suggest that, over time, the regime has gained *de facto* binding force not only for the original parties but also for global military actors engaging with the Black Sea. While past episodes such as the Soviet challenge complicate a purely linear understanding of customary consolidation, the broader trajectory of state practice and compliance still provides substantial evidence in support of the material element of custom. Therefore, it can be concluded that the long-standing, generally consistent, and widely observed implementation of the Montreux Convention supports its recognition as a rule of customary international law—at least in its regional dimension.

4.2. Examining the *Opinio Juris* Element in the Montreux Regime

In determining whether the Montreux Straits Convention falls within the scope of customary international law, not only the actual practices of states but also the accompanying normative belief, namely the element of *opinio juris*, play a decisive role. According to the established jurisprudence of the ICJ, for a rule to become customary law, it is not sufficient for states merely to comply with it; they must also act out of a belief that such compliance is legally obligatory.

In the case of Montreux, states comply with the regime not merely because they are parties to the treaty, but due to a belief in its legal bindingness. Notably, successor states of dissolved entities and even non-party actors have adhered to Montreux’s rules, indicating that the regime is not limited to the treaty text alone but has undergone an internalization process grounded in *opinio juris*.

Nevertheless, this internalization process has not been without ambiguity. For example, while the Soviet Union formally adhered to the regime throughout the Cold War, its 1946–1953 revisionist demands suggest that compliance may have stemmed from strategic necessity rather than normative conviction. Similarly, in a 1994 diplomatic note, the United States emphasized that Montreux constitutes a regional arrangement rather than a universal legal norm, thereby revealing the limitations of fully consolidated *opinio juris*.

In this context, the formation of *opinio juris* is influenced not only by the conduct of states party to the treaty but also by the attitudes of third states and international organizations. While treaties are by definition normative instruments, the consistent behavior of non-party actors can contribute to the emergence of customary law when accompanied by expressions of legal obligation. For instance, NATO’s consistent adherence to Montreux’s provisions—such as the 21-day rule, tonnage limits, and notification obligations—may suggest more than operational

convenience if it reflects an underlying sense of legal commitment (Segell, 2022). Similarly, the European Parliament's 2021 resolution (para. 69), which warns that Turkey's denunciation of Montreux "would jeopardize international peace and stability," may indicate a perception of Montreux as part of a broader normative order. While such statements do not in themselves prove *opinio juris*, they can serve as supplementary indicators when evaluated alongside consistent practice and the absence of contrary claims.

In addition to NATO and the European Parliament, other institutional and regional actors have also contributed to the development of *opinio juris* surrounding the Montreux Convention. For instance, the Organization of the Black Sea Economic Cooperation (BSEC) has consistently referenced Montreux in its official documents, portraying it as a foundational framework for regional security and cooperation (Isachenko, 2023). Furthermore, Ukraine has repeatedly invoked the Convention during critical periods, such as the 2014 Crimea crisis and the 2022 invasion, as a legal basis for demanding restricted naval access to the Straits (Duvarenglish, 2022). These examples indicate that Montreux is not only observed in practice but is also regarded as a legitimate legal framework by both regional and global institutions, further strengthening the normative character of the regime.

The ICJ also attaches importance not only to explicit declarations but to indirect indicators when determining the existence of *opinio juris*. In the 1986 *Nicaragua v. United States* judgment (para. 188), the Court characterized the abstention from the use of force by states as a customary rule based on the belief in legal obligation, thereby demonstrating that intent can be inferred from patterns of behavior. As further elaborated in *Temple of Preah Vihear* (1962: para. 23), the ICJ recognized that long-term inaction or silence may indicate tacit acquiescence⁷, provided it occurs under circumstances that reasonably warrant protest. This notion becomes particularly relevant when evaluating the compliance of non-party states with Montreux's regime despite the absence of formal obligation. Similarly, in the *Asylum Case* (1950: 14), the Court emphasized that the mere existence of widespread practice is insufficient and that the accompanying normative intent is also required. A similar approach could be accepted with regard to the Montreux Convention's transit provisions.

On the other hand, in the *Temple of Preah Vihear* (1962: para. 23) and *Frontier Dispute* (1986: para. 30) cases, the Court noted that acquiescence and long-term absence of protest may also constitute manifestations of *opinio juris*. In the context of the Montreux Convention, for example, the fact that non-party actors such as the United States have long complied with tonnage and duration restrictions on warship passage without objection indicates that even states outside the treaty consider this regime legally binding.

However, this inference should be approached with caution. While tacit compliance may support the existence of *opinio juris*, statements by actors such as NATO and the U.S.—which have occasionally described Montreux as a special regional regime—suggest that this belief may not be universally held. Thus, the presence of *opinio juris* should be interpreted as regionally concentrated rather than globally uniform.

In conclusion, it can be asserted that the Montreux Convention constitutes not only a practice maintained in fact but also a regime sustained on the basis of normative belief. The adherence of states to this regime with a sense of legal obligation confirms the existence of *opinio juris*, the second fundamental element that reinforces Montreux's character as customary international law.

4.3. General Assessment: Legal Implications of Montreux's Customary Status

The question of whether the Montreux Straits Convention falls within the scope of customary international law is not merely a theoretical inquiry but a practical debate with direct legal

⁷ Implies acceptance of a legal situation through silence or inaction, particularly when a state fails to protest a practice it would otherwise be expected to oppose.

consequences in the event of denunciation or suspension. As analyzed in detail in the preceding sections, the passage regime established by the Convention appears to have transformed into customary law rules, both in terms of the material element and *opinio juris*.

Over a practice period spanning nearly a century, many states, both parties and non-parties, have complied with the provisions of Montreux not merely because of written treaty obligations but based on a belief in their legal bindingness. This suggests that the Montreux regime may have evolved beyond being solely a treaty arrangement and shows signs of becoming a customary regime internalized within the common legal consciousness of the international community and established as a behavioral norm.

The historical conditions under which the Montreux Convention emerged also call into question the extent to which it reflects a genuine normative consensus. As some scholars have noted, the Convention was not the result of a multilateral consensus freely developed among equals, but rather a political compromise driven by the strategic necessity of key actors in the interwar period. The fact that the Convention was shaped primarily in line with Turkey's vital security concerns and geopolitical positioning during a period of increasing global instability points to the presence of coercive circumstances, rather than a voluntary convergence of legal will. In this sense, the Montreux regime's foundational logic is closer to a pragmatic settlement than a manifestation of universally accepted normative commitments.

The customary nature in question is clearly reflected through the three core criteria of duration, generality, and *opinio juris*. Provisions such as notification obligations, tonnage, and time limitations have been adopted not only by the parties but also tacitly accepted by third states. NATO's acceptance of restrictions on naval exercises, the supportive stance of the European Union and the European Parliament toward the Montreux regime, and the longstanding practical compliance by non-party states like the United States all indicate that Montreux could be affirmed as customary international law.

Moreover, as Anthony D'Amato has argued, some treaties may not only contribute to customary international law through their practice but also contain norms that possess a directly customary character. Although the International Court of Justice has not explicitly endorsed this approach, it has generally refrained from declaring treaty provisions as directly constitutive of customary norms without clear evidence of consistent state practice and *opinio juris*. For instance, the 1961 Vienna Convention on Diplomatic Relations, the 1958 Geneva Conventions on the Law of the Sea (notably provisions concerning the continental shelf), Article 2(4) of the United Nations Charter prohibiting the use of force, and certain provisions of the 1963 Outer Space Treaty have been characterized as customary international law rules due to the large number of parties, the consistency of state practice, and the principle of acquiescence.

However, Michael Byers (1999) argues that treaties signed by a limited number of states can only create special or regional customary international law, and the rules arising from such treaties cannot be regarded as universal customary law. Weisburd (2021) also notes that the United States considers the Montreux Convention as *lex specialis*⁸ and does not view it as having evolved into universal customary law. Furthermore, although the US complies with the Montreux Convention rules, it stated in its 1994 diplomatic note that Montreux constitutes a regional arrangement concerning the security of the Black Sea. NATO Secretary General Jens Stoltenberg similarly mentioned in a 2016 NATO press briefing that Montreux is important for Turkey's sovereign rights and regional stability, but is not fully compatible with NATO's global naval operations.

Therefore, although there appears to be no practical issue in the application, there are nonetheless some faint criticisms regarding *opinio juris*. Considering the statements of the United States (1994) and NATO, Montreux is often described not as a universal customary international

⁸ A legal doctrine whereby a more specific rule overrides a more general one when both apply to the same subject matter.

law but rather as a treaty that creates a regional status. Under normal circumstances, the continuity of practice and the general acceptance of *opinio juris* (despite the faint objections from the US and NATO) are considered sufficient for the formation of customary international law. However, the existence of the 1982 UNCLOS poses a greater challenge to Montreux's claim to universal customary law status.

Although Article 35 of UNCLOS permits special regimes in straits, such as the specific regime established by Montreux, the recognition of this special regime as universal customary international law is incompatible with UNCLOS provisions. In particular, UNCLOS Article 38 guarantees warships the right of transit passage without restrictions, a principle already accepted as customary international law, which conflicts with the limitations imposed by Montreux. Unlike Montreux, which imposes quantitative restrictions on the passage of warships, UNCLOS Article 38 guarantees an unrestricted right of transit passage through straits used for international navigation. This normative tension underscores why Montreux cannot be deemed universally customary, despite its regional acceptance. At this point, the existence of a more universal and subsequently developed customary rule (*lex posterior derogat legi priori*⁹) constitutes an obstacle to Montreux's claim to universal customary international law status.

The limited number of parties to the Montreux Convention stems from a structural feature of the treaty. It was explicitly designed only for the states that were parties to the 1923 Treaty of Lausanne. This reflects not a lack of willingness to participate but an objective limitation on the scope of participation. Therefore, Byers' (1999) argument does not apply to the Montreux Convention. However, it should be noted that even if the treaty were open to wider participation, two key factors would still prevent it from acquiring universal customary international law status. First, its direct conflict with provisions of UNCLOS, especially Article 38 regulating transit passage, which have since become universally accepted customary rules. Second, its preservation of a special regime applicable to a specific geographical region. Consequently, although Montreux meets the criteria of state practice and *opinio juris*, it can only be regarded as creating customary international law at a regional level.

A brief comparison with other strategic waterways—such as the Panama and Suez Canals—further contextualizes the Montreux regime. Unlike Montreux, which is rooted in a multilateral treaty conferring control to a coastal state, the Panama Canal was historically governed by a bilateral treaty between the United States and Panama (1903–1977) and is now fully administered by Panama under a regime guaranteeing neutrality and non-discrimination (1999 Panama Canal Neutrality Treaty). The Suez Canal, on the other hand, is governed by the 1888 Constantinople Convention, which ensures free and open access in times of peace and war, irrespective of belligerent status (Shaw, 2017). These regimes differ from Montreux, which imposes quantitative restrictions on warship passage and grants significant discretionary authority to Turkey. Thus, while all three straits serve global navigation, Montreux represents a unique regional security arrangement, distinguished by its hybrid normative and strategic rationale.

Moreover, the continued application of the Montreux Convention in contemporary geopolitics might not always stem from a strong legal conviction but rather from a recognition of its political utility. Several states may comply with its provisions not out of a sense of legal obligation but because any attempt to revise the regime would trigger instability in a strategically sensitive region. Therefore, Montreux's apparent legal resilience may partially reflect the absence of viable alternatives, rather than a robust and unanimous *opinio juris*. However, as discussed in Section 4.2, repeated invocations of Montreux by actors like the European Parliament, BSEC, and Ukraine indicate the presence of a shared normative expectation, suggesting that *opinio juris* may not solely stem from strategic inertia. This raises the broader question of whether legal stability in this

⁹ A principle of legal interpretation meaning that a later norm prevails over an earlier one in case of conflict between two norms of equal rank.

case is genuinely grounded in customary law or is instead a function of political inertia and strategic caution.

Indeed, the long-standing and consistent practice by the Black Sea littoral states and closely related actors such as the United States and NATO members can be regarded as an indication that the Convention has acquired the status of regional customary law.

According to ICJ jurisprudence (e.g., *Asylum Case*, 1950 and *Right of Passage Case*, 1960), customary rules formed within a specific geographic region or among a group of states may be binding for those states or region even if they lack universal character. In this context, the nearly century-long uninterrupted application of the Montreux Convention by (a) the Black Sea littoral states (Russia, Ukraine, Bulgaria, Romania, Georgia), (b) naval powers present in the region (the US, NATO members), and (c) the original parties to the Convention indicates the emergence of a regional *opinio juris*. Indeed, NATO's compliance with tonnage and duration limitations for warship passages, Russia's deployment of its Black Sea fleet in accordance with these rules, and Turkey's consistent practice all support the existence of a regional customary regime. While not *erga omnes* in the strict legal sense, Montreux functions as an objective regime whose provisions are consistently observed by all naval powers operating in the Black Sea. In this light, it can be argued that Montreux constitutes *de jure*¹⁰ a regional customary law and *de facto*¹¹ enjoys universal effect. Nevertheless, this universality stems less from formal legal consensus than from strategic alignment and geopolitical necessity—a distinction that must not be overlooked when evaluating Montreux's normative force. Thus, while Montreux's universal customary status remains contested, its long-standing implementation, regional adherence, and strategic indispensability reinforce its character as a regional customary regime with *de facto* global relevance.

5. Conclusion

The Montreux Convention Regarding the Regime of the Straits stands out not only as a treaty text but also as a regime that has acquired customary characteristics within the dynamic framework of international law. Its nearly century-long consistent practice, the adherence of both parties and non-parties to its provisions, and the underlying belief in legal obligation demonstrate that Montreux can be regarded within the scope of international customary law. The regime governing passage is not merely a set of written rules but has transformed into a normative structure shaped by long-term and consistent state behavior. The compliance of actors such as NATO, the US, and the EU with rules governing warship passage reveals that this regime is not limited to treaty parties but enjoys broad international acceptance.

Montreux's customary law character is particularly evident at the regional level. States bordering the Black Sea and global actors directly connected to the region have effectively adopted the core rules of the Convention and regard them as legally binding. The International Court of Justice's jurisprudence recognizes that practices emerging within specific geographic areas may constitute regional customary law. In this context, it can be argued that the Montreux regime holds a customary status within the Black Sea basin. However, certain provisions of the UNCLOS, which regulate universal transit passage, conflict with Montreux and prevent it from being recognized as general customary international law. Nevertheless, the Convention's regional impact and the consistency of state practice strengthen its character as at least a Black Sea-specific customary norm.

The customary nature of the Montreux Convention implies that, even in the event of its possible termination, the fundamental rules governing passage would likely retain their validity. Under international law, the termination of a treaty does not automatically nullify rules embraced as customary law. Provisions such as the right of innocent passage, tonnage limitations, and prior

¹⁰ Meaning "by law"; refers to something that is legally recognized or established, regardless of whether it exists in practice.

¹¹ Term meaning "in fact"; refers to something that exists or operates in reality, even if it is not legally recognized or formally established

notification requirements may now be seen not merely as treaty rules but as components of established international practice. This situation indicates that Turkey can safeguard its sovereign rights over the Straits while also relying on Montreux's normative legacy to ensure the security of international maritime traffic. In conclusion, the Montreux Convention remains a cornerstone for both regional stability and the predictability of international maritime law, maintaining its normative effect independent of the treaty's legal status.

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