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## VII | Treaties

CONTRACTUAL engagements between states are called by various names—treaties, conventions, pacts, acts, declarations, protocols, to name just a few. Several of these terms are used in multiple ways. For example ‘protocol’ is a word with many meanings in diplomacy, denoting the minutes of the proceedings at an international conference, or the formalities used in addressing dignitaries. But a Protocol may also be a supplementary addendum to another treaty, e.g. the Kyoto Protocol of 1997 which is linked to the United Nations Framework Convention on Climate Change, or the Additional Protocols to the 1949 Geneva Conventions for the protection of victims of war. Similarly, a Declaration may be attached to a variety of texts and statements which cannot be seen as encompassing legal rights and obligations, or it may constitute a legally binding engagement, such as the St Petersburg Declaration of 1868, a treaty by which the signatory parties renounced the use of certain exploding bullets in time of war between themselves. In short treaties are given a variety of titles, and the position is sometimes further confused by the deliberate avoidance of the word ‘treaty’, in order to side-

step certain constitutional requirements before a ‘treaty’ can enter into force.<sup>1</sup>

### § 1. When is an agreement a treaty?

From the perspective of international law, whatever label a treaty is given, if it is indeed a treaty it will be covered by the law of treaties. The following definition has been suggested to illustrate the main elements of a treaty: ‘an *agreement*, of a suitable *formal character*, designed to give rise to *legal rights and obligations*, operating *within the sphere of international law*, and concluded between two or more parties possessing *legal personality under international law*.’<sup>2</sup>

1. See the discussion at the ILC of the first report by Brierly as ILC Special Rapporteur of the on the law of treaties, I *Yearbook of the ILC* (1950) at 64–90, and esp. at 70 where UN ASG Kerno explains that the agreement concerning the UN headquarters and the United States was entitled ‘agreement’ rather than ‘treaty’ so as to be able to pass by simple majority in the Congress rather than by a two-thirds majority in the Senate. The US nomenclature for binding international agreements is explained by Trimble who succinctly covers the history and implications of the President choosing a particular procedure: submission to the Senate under Article II of the Constitution (a ‘treaty’); congressional authorization ‘congressional-executive agreements’; executive agreements deriving their authority from an Article II treaty; and ‘presidential-executive agreements’ based on the President’s foreign relations power. *International Law: United States Foreign Relations Law* (New York: Foundation Press, 2002) at 113–40. All four procedures result in international agreements binding on the United States in international law. The effects in internal law will, however, vary: see *ibid* 132–40 and 152–77.

2. I. Roberts (ed.), *Satow’s Diplomatic Practice*, 6th edn, (Oxford: OUP, 2009) ch. 35 (F. Berman) at 535. Cf P. Reuter ‘A treaty is an expression of concurring wills attributable to two or more subjects of international law and intended to have legal effects under the rules of international law.’ P. Reuter, *Introduction to the Law of Treaties*, J. Mico and P. Haggemacher (trans.), 2nd edn (London: Kegan Paul, 1995) at 30.

The notion of legal personality here would clearly cover intergovernmental organizations entitled to enter into treaty obligations; similarly certain rebel groups have also been considered as having entered into binding international agreements.<sup>4</sup>

British practice stresses that a 'Memorandum of Understanding' is a term used for an instrument which is not usually a treaty

3. The fascinating topic of the limits to international legal personality highlights the tension between those competing for change and stability in international law. The temptation to embark on an excursus on the 'subjects' of international law will be resisted here. The reader is referred to two book-length treatments of the way in which this debate has evolved: and R. Portmann, *Legal Personality in International Law* (Cambridge: CUP, 2010); J. E. Nijman, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law* (The Hague: T.M.C. Asser Press, 2004). Suffice it to note that Brierly explained that his original proposed articles on the law of treaties prepared for the ILC differed 'from any existing draft in recognizing the capacity of international organizations to be parties to treaties'. Although the Harvard draft considered agreements of international organizations abnormal and *sui generis*, Brierly concluded: 'It is now, however, impossible to ignore this class of agreements or to regard the existence as an abnormal feature of international relations.' II *Yearbook of the ILC* (1950) at 228. The issue was eventually dealt with in a separate treaty concluded in 1986, the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations. For an introduction to the other entities entitled to enter into treaties see Reuter (above) at 32–3.

4. Report of the International Commission of Inquiry on Darfur to the UN Secretary-General, 25 January 2005, at paras 76, 168–74. See further A. Cassese, *International Law*, 2nd edn (Oxford: OUP, 2005) at 127–8. Cf O. Corten and P. Klein, 'Are Agreements between States and Non-State Entities Rooted in the International Legal Order?' in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (Oxford: OUP, 2010) 3–24. In the present chapter the parties to treaties are usually referred to as states parties but of course this is simply to keep the prose as clear and unencumbered as possible; it should not be seen as implying that the only parties to treaties are necessarily states.

and does not as such have binding legal effects.<sup>5</sup> States and international organizations resort to such memoranda for multiple reasons: they may wish to avoid being in a situation where a breach of the obligations could be met with a hearing before a court of law or with countermeasures; they may wish to keep the entire arrangement secret; they may consider the issues too fluid or open-ended to be concretized in a treaty; there may be doubts about the international personality of the other party; or they may not want to go through the internal procedures which might be necessary for a treaty to enter into force.<sup>6</sup>

Disputes do arise as to whether a single text or an exchange of notes (sometimes also called an exchange of letters) should be considered an agreement giving rise to binding rights and obligations in international law. Two cases before the International Court of Justice (ICJ) illustrate how the issue has been approached. In the *Aegean Sea Continental Shelf Case* the Court was faced with a claim by Greece that a joint press communiqué by the Prime Ministers of Greece and Turkey was a legally binding agreement which could be used to establish the jurisdiction of the ICJ with regard to a continental shelf dispute between the two states. The Court noted that the Communiqué 'does not bear any signature or ini-

5. Again the situation is confusing as some memoranda of understanding (MoUs) are designed as treaties and operate as treaties. For example the UN adopts MoUs with its member states and with other international organizations and considers and registers these as binding agreements.

6. See A. Aust, *Modern Treaty Law and Practice*, 2nd edn (Cambridge: CUP, 2007) ch. 3, and *Satow's Diplomatic Practice* (above) at 538–41. An MoU that is not a treaty may have legal consequences even though it is not legally binding see Aust at 52–7, *contra* J. Klabbers, *The Concept of Treaty in International Law* (The Hague: Kluwer, 1996) at 111–19.

tials', and the Turkish Government claimed that in order to be an international agreement it would have to be 'ratified at least on the part of Turkey'.<sup>7</sup> With regard to the question of form the Court observed that:

it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement... Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form—a communiqué—in which that act or transaction is embodied.<sup>8</sup>

The Court went on to determine the nature of the act embodied in the Communiqué by examining 'its actual terms and... the particular circumstances in which it was drawn up'.<sup>9</sup> The Joint Communiqué stated in part: 'They decided [*ont décidé*] that those problems should be resolved [*doivent être résolus*] peacefully by means of negotiations and as regards the continental shelf of the Aegean Sea by the International Court at The Hague'.<sup>10</sup> The Court found that Turkey, in the run up to the Brussels meeting, 'was ready to consider a *joint* submission of the dispute to the Court by

7. *Greece v Turkey* (1978) at para. 95.

8. *Ibid* para. 96.

9. *Ibidem*.

10. *Ibid* para. 97.

means of a *special agreement*'.<sup>11</sup> The Court therefore stated that, having regard to the terms and the context of the Communiqué, it 'can only conclude that it was not intended to, and did not, constitute an immediate commitment' by the two governments to submit the dispute to the Court.<sup>12</sup>

In another dispute the Court had to determine the nature of, first, an exchange of letters, and second, Minutes of a meeting between the Foreign Ministers of Qatar and Bahrain in the presence of the Foreign Minister of Saudi Arabia.<sup>13</sup> The parties agreed, and the Court concluded, that the exchange of Notes constituted a binding international agreement. And the Court found that the Minutes of the subsequent meeting: 'enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement'.<sup>14</sup> The Court then went on to see if these agreements constituted consent to the jurisdiction of the Court and concluded that they did. The Foreign Minister of Bahrain had stated that 'at no time did I consider that in signing the Minutes I was committing Bahrain to a legally binding agreement'.<sup>15</sup> But the Court did not consider the intentions of the Foreign Ministers; it focused on the text and the context in which it was agreed.

For present purposes, the significance of these two cases decided by the ICJ is that an agreement binding in international law

11. *Ibid* para. 105.

12. *Ibid* 107.

13. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and admissibility)* ICJ Rep. (1994) p. 114.

14. *At* para. 25.

15. *At* para. 26.

(treaty) need not necessarily be signed. Such an agreement will contain international rights and obligations, and is capable of being objectively determined to exist—even in the presence of later protestations that one of the parties did not intend the agreement to be legally binding.<sup>16</sup> States are not above the law of treaties; they cannot pick and choose when to be bound by this law.

## § 2. When is an international text not a treaty?

First, an international agreement is not a treaty when it is clear that the agreement is not supposed to be legally binding. As we have just seen, Courts will take into account the context and the content of the agreement. Anthony Aust, a former Deputy Legal Adviser of the British Foreign Office, has experienced various 'misunderstandings' with regard to the status of different texts after they have been finalized. He suggests in his book on treaty law and practice that, in order to avoid any such confusion, the state that intends the instrument to be non-binding write to the other government as follows: 'all the necessary legal requirements having been completed, the instrument will now come into operation on the understanding that it does not constitute a treaty and neither side will publish it as a treaty or register it as a treaty with the United Nations.'<sup>17</sup>

16. For a stimulating examination of the minimal role given to intent in determining the existence of a treaty see Klabbbers (above) whose examination of the case-law leads him to conclude there is a 'presumption that agreements are intended to be legally binding'. At 257.

17. Aust (above) at 37.

Furthermore, the sort of dispute mechanism built into the agreement may also point to its intended legal effects. Inserting an agreement to submit differences to an international tribunal or arbitrator, and to be bound in international law by the ruling, would obviously suggest that the text is a treaty. Aust's template for a (non-binding) Memorandum of Understanding includes the following paragraph to remove any ambiguity: 'Any dispute about the interpretation or application of this Memorandum will be resolved by consultations between the Participants, and will not be referred to any national or international tribunal or third party for settlement.'<sup>18</sup>

In short, those wishing to avoid the legal effects of any instrument they are negotiating would be best advised to explain this in the text, exclude the procedures normally used for the entry into force for treaties, and be exhaustively clear who has the authority to settle disputes over the text and whether any such ruling is legally binding on the parties.<sup>19</sup>

A second instance where an international agreement will not be a treaty is when the agreement does not take effect under international law—but rather in national law.<sup>20</sup> The representatives of

18. Ibid 492.

19. Aust includes a table of comparative treaty and MoU terminology to assist drafters in distinguishing legally binding treaties from other agreements. Ibid 496. On occasion states are quite clear about the type of text they are adopting. Consider the title of the 'Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests' adopted in Rio in 1992 at the UN Conference on Environment and Development; cf the Helsinki Final Act which includes a paragraph stating that the text 'is not eligible for registration under Article 102 of the Charter of the United Nations', see further § 6 below.

20. See the definition of a treaty in the Vienna Convention on the Law of Treaties (1969) Art. 2(1)(a) and the Commentary of the ILC II Yearbook ILC (1966) at 188, para. 6.



two states may sign an agreement to lease some premises, or for the simple purchase of certain goods, and intend any such agreement to be a normal contract generating no international rights or obligations for the parties. Again it may not always be easy to determine whether the parties intend the agreement to be governed by international law or not. By the time this comes to be determined by a judge it means that the parties are in dispute as to what was their intention, and an objective finding will be problematic.<sup>21</sup>

### § 3. Formation of treaties and the issue of coercion

International law has no technical rules for the formation of treaties. In most respects the general principles applicable to private contracts apply; there must be consent and capacity on both sides, and the object must be legal; though naturally, rules peculiar to a special system of municipal law, such as the Common Law rules about consideration, have no application.<sup>22</sup> Previous editions of this book highlighted 'one startling difference' between contract law and treat-

21. M. Koskeniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge: CUP, 2005) at 333–45.

22. In the Common Law a valid contract requires that one side offers something of value and that this is met with consideration by the other side doing something in return. This can be a simple sale of an item for money, or services in return for a fee, or a promise to do something in return for the other side not doing something and so on. A treaty may create an obligation for a state even in the absence of anything of value (a consideration). The origin of this condition for contracts under the Common Law stems from the time when contracts were oral and judges sought a way to distinguish them from gifts. Treaties may be oral but would still not require consideration. Under US law oral international agreements have to be submitted in writing and notified to Congress, Aust (above) at 39–40.

ties. They unambiguously stated: 'Duress does not invalidate consent, as it does in the private law of contract. A dictated treaty is as valid legally as one freely entered into on both sides.' This position is no longer tenable. Indeed already in 1963, the same year as the publication of the last edition of this book, Sir Humphrey Waldock, as the International Law Commission's Special Rapporteur on the law of treaties, included in his second report on the law of treaties two proposed articles on duress and coercion. In the first, Waldock proposed that: '[i]f coercion, actual or threatened, physical or mental, with respect to their persons or to matters of personal concern, has been employed against individual representatives of a State...in order to induce such representative to sign, ratify, accept, approve or accede to a treaty, the State in question shall be entitled' to declare the representative's act to be nullified and the treaty to be void from the beginning.<sup>23</sup>

The second draft Article provided that a state could similarly consider the treaty void if it 'is coerced into entering into a treaty through an act of force, or threat of force, employed against it in violation of the principles of the Charter of the United Nations'.<sup>24</sup> Waldock rejected the idea that states would be able to allege coercion simply to avoid their treaty obligations, stating that as long as coercion was limited to the use of force, rather than economic coercion, there could be an objective determination of whether force had been used or threatened, and the subjective element would be reduced. He also rejected both the argument that such a rule would lead to general uncertainty about the status of peace

23. II *Yearbook ILC* (1963) at 50.

24. *Ibid* 51.

treaties, and the argument that peace should take precedence over 'abstract justice'. Waldock argued that, starting from the time when the use of force became prohibited in international law, and considering that such use of force had been declared to be criminal by the Nuremberg and Tokyo Tribunals, one had to question whether a treaty resulting from such acts could be considered valid. These proposals and arguments were accepted in the International Law Commission (ILC) and the eventual Vienna Convention on the Law of Treaties (1969) adopted two articles along similar lines and confirmed that coercion against a state leads to the invalidity of the treaty in its entirety.<sup>25</sup>

Three important questions arise. First, at what point did the prohibition on the use of force crystallize into a rule of international law so that coercion would render a resulting treaty null and void? Second, to what extent can the use of force be interpreted as covering economic pressure? Third, might there not be situations where an aggressor state ought to be coerced into accepting a peace treaty or agreeing to pay reparations? All these questions were addressed in the context of the process leading to the adoption of the Convention on the Law of Treaties, and we will briefly discuss them here, as they sit on the fault line of a fundamental shift in international law in the twentieth century.

The ILC explained its understanding of the law: 'a peace treaty or other treaty procured by coercion prior to the establishment of the modern law regarding the threat or use of force' would remain valid. However, the Commission considered it would be 'illogical

25. Arts 51, 52, and 44(5); note with regard to a multilateral treaty the non-coerced parties will still be bound by a valid treaty: Art. 69(4).

and unacceptable to formulate the rule as one applicable only from the date of the conclusion of a convention on the law of treaties'. The Commission determined:

whatever differences of opinion there may be about the state of the law prior to the establishment of the United Nations, the great majority of international lawyers to-day unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force. The present article, by its formulation, recognizes by implication that the rule which it lays down is applicable at any rate to all treaties concluded since the entry into force of the Charter.<sup>26</sup>

An amendment, successfully tabled by Czechoslovakia and others at the Vienna Conference,<sup>27</sup> adjusted the wording of what became Article 52 to refer to the 'use of force in *violation of the principles of*

26. II *Yearbook of the ILC* (1966) at 247. The rule has been affirmed by the ICJ as part of 'contemporary international law' in *Fisheries Jurisdiction (UK v Iceland)* Jurisdiction (1973) but the Court found that the Exchange of Notes had been 'freely negotiated by the interested parties on the basis of perfect equality and freedom of decision on both sides'. At para. 24.

27. *Official Records of the Vienna Conference*, first session, at 271, 2 May 1968. On the effects of the threats of the use of force on the 1939 treaty signed by the President of Czechoslovakia creating a German protectorate over Bohemia and Moravia and on the 1938 Munich Agreement see *Oppenheim's International Law*, 9th edn at 1290-1, nn1 and 8. It is worth noting that the October 1968 treaty between Czechoslovakia and the USSR allowing for the presence of Soviet forces can also be considered invalid; for details of the events leading up this treaty see N. Stürchler, *The Threat of Force in International Law* (Cambridge: CUP, 2007) at 184-9.

*international law embodied* in the Charter of the United Nations. The Delegation of Czechoslovakia explained that it shared the opinion of the ILC that the rule applied retroactively, and the main purpose of their amendment aimed at the time element. They also agreed, however, that the Convention could not 'specify on what precise date an existing general rule in another branch of international law had come to be established'.<sup>28</sup>

Turning to our second question, the ILC's Commentary reveals that '[s]ome members of the Commission expressed the view that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion'.<sup>29</sup> Yet the Commission eventually preferred to leave the issue to be determined by an interpretation of the concept of the use of force as found in the Charter. Several states sought to have the draft changed before and during the Vienna Diplomatic Conference. An amendment proposed by 19 states at the Conference sought to define force as including economic and political pressure.<sup>30</sup> Economic pressure was argued to be a form of neo-colonialism imposed on the newly independent states.<sup>31</sup> According to negotiators from the United States delegation it was 'clear that if the amendment were put to the vote it

28. See at 179.

29. Ibid 246.

30. Afghanistan, Algeria, Bolivia, Congo (Brazzaville), Ecuador, Ghana, India, Iran, Kenya, Kuwait, Mali, Pakistan, Sierra Leone, Syria, Tanzania, United Arab Republic, Yugoslavia, and Zambia.

31. See also M. Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire', in M. Craven and M. Fitzmaurice (eds), *Interrogating the Treaty* (Nijmegen: Wolf, 2005) 43–80.

would carry by quite a substantial majority. On the other hand, in private discussions it had been made quite clear to the proponents that adoption could wreck the conference because states concerned with the stability of treaties found the proposal intolerable.<sup>32</sup> In the end a compromise was reached whereby the attempted amendment of the article would be abandoned in return for the adoption by the Conference of a: 'Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties', which formed part of the Final Act of the Conference.<sup>33</sup>

Thirdly, Waldock was concerned that invalidating treaties procured through the use of force should not upend the possibility of peace treaties imposed on defeated aggressor states. In his words: 'Clearly, there is all the difference in the world between coercion used by an aggressor to consolidate the fruits of his aggression in a treaty and coercion used to impose a peace settlement upon an aggressor'.<sup>34</sup> In part this problem is met by the prohibition of the

32. R.D. Kearney and R.E. Dalton, 'The Treaty on Treaties', 64 AJIL (1970) 495–561, at 534. Sinclair explains the 'intense misgivings' of those 'delegations concerned to preserve the security and sanctity of treaties'. 'Acceptance of the concept that economic pressure could operate to render a treaty null and void would appear, if these sweeping views as to the dominant position of developed countries were accepted, to invite claims which would put at risk any treaty concluded between a developing and a developed country.' *The Vienna Convention on the Law of Treaties*, 2nd edn (Manchester: MUP, 1984) at 178.

33. Para. 1 reads: 'Solemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.' For the implications of the Declaration with regard to the interpretation of Article 52 see M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Nijhoff, 2009) at 638–57.

34. Second Report on the Law of Treaties, II *Yearbook of the ILC* (1963) at 52.



*illegal* use of force in the definition of coercion,<sup>35</sup> but there was the additional fear of 'one party unilaterally characterizing another as an aggressor for the purpose of terminating inconvenient treaties'.<sup>36</sup> The concern to preserve the idea that a treaty could impose obligations on an aggressor state was, in the end, met with a savings clause in Article 75 which states that the Vienna Convention is without prejudice to: 'any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression'.<sup>37</sup>

Answering these questions has highlighted how international law can radically change direction, and how such change may sometimes be brought through individuals arguing for one solution over another. Until the articulation of the rule invalidating treaties procured through coercion, it was assumed that priority should be given to peace, stability, and the effectiveness of international law, even if this meant that powerful states could profit from their illegal use of force and historical coercion. In prioritizing justice and the prohibition on the use of force, law is elevated to something which is more than an instrument for states, something

35. So a peace settlement could be valid even if coerced, as long as the coercion follows from a peace enforcement operation authorized by the Security Council, or as the result of force used in self-defence. But a transfer of territory would remain invalid; see Ch. V § 2 above.

36. Draft Articles with Commentary by the ILC, II *Yearbook of the ILC* (1966) at 268.

37. The concrete effect of this provision is unclear, perhaps the import lies in the idea that 'an aggressor State should not be able to gain any profit (in this case in the form of the provisions of the Convention) from the aggression it has committed'. Villiger (above) at 918.

over and above a convenient medium for interaction. Moreover in this example, international law's apparent lack of legislative and executive branches is contradicted first by recourse to the UN Charter as universal law, and second by alluding to the role of the Security Council as the entity entitled to authorize the use of force and impose obligations on states that violate the fundamental rule prohibiting aggression.<sup>38</sup>

We have also seen that treaty law is not just contract law applied to states. In contract law any use of force against another party (duress) would nullify the contract. In treaty law it is only the *illegal* use of force that makes the treaty void. So where the Security Council authorizes force to be used against a state, and the state

38. Brierly's frustration with this topic may therefore have been partially addressed. In his fifth edition he wrote at this point: 'the change to which we ought to look forward is not the elimination of the use of coercion from the transaction, but the establishment of international machinery to ensure that when coercion is used it shall be in a proper case and by due process of law, and not, as at present it may be, arbitrarily. The problem of treaties imposed by force is therefore in its essence not a problem of treaty law, but a particular aspect of that much wider problem which pervades the whole system, that of subordinating the use of force to law.' At 245. See also his much earlier dissatisfaction: 'It is not within the powers of international lawyers to bring about a change in the law in this respect, but it is within our powers, when we are stating what the law is, to clear our heads of cant; and if we do so we shall surely say that no shred of sanctity attaches to a treaty into which one party has been coerced, nor is good faith in the least engaged in its observance. Such a treaty creates a purely factual relation between the parties, though one which the law must at present uphold, and moral sentiments are singularly out of place in the discussion of it. Let us recognize candidly the existence of a blot upon the system, and admit that here, not as a matter of morality, but for practical utilitarian reasons, *la force prime le droit*.' 'Some Considerations on the Obsolescence of Treaties' paper read before the Grotrius Society, 24 March 1925, in *The Basis of Obligation in International Law and Other Papers*, 108-16 at 115.

then enters into a treaty obligation as a result, the state cannot later claim the treaty was void due to coercion or lack of consent.<sup>39</sup>

#### § 4. Signature and ratification

Ordinarily there are two stages in the making of a treaty, its signature by 'plenipotentiaries' of the contracting states, and its ratification by or on behalf of the heads of those states.<sup>40</sup> There are good reasons why this second stage should be necessary before a treaty, at any rate an important treaty, becomes actually binding. In some states, constitutional law vests the treaty-making power in some organ which cannot delegate it to plenipotentiaries, and yet that organ cannot itself carry on negotiations with other states. For

39. Aust (above) offers an illustration: 'The Agreement concerning the restoration of the Government of President Aristide, signed in Port au Prince on 18 September 1994 by the provisional President of Haiti and ex-US President Jimmy Carter on behalf of US President Bill Clinton, might at first sight appear to have been obtained by the threat of unlawful force, since at the time US bombers were in the air on their way to Haiti. However, the Security Council had adopted on 16 October 1993 Resolution 875 which authorized the use of force to restore the legitimate government of Haiti.' At 318. Compare the discussion of the use of force by the United States against Haitian representatives in 1905, and against Cuba in 1903, in the Harvard Research Draft Convention on the Law of Treaties *AJIL Special Supplement* (1935) 'Duress', at 1148–61, esp. 1157–9. See also I. Sinclair (above) at 180 who points out that 'the sanction of nullity will not apply to a treaty imposed by the United Nations, in the course of enforcement action, upon a State guilty of an act of aggression'.

40. A plenipotentiary is literally someone with full powers. The 1969 VCLT defines full powers in Art. 2(1)(c) as the document from the competent authority authorizing the relevant acts. Today it is assumed that the Foreign Minister, the Head of Government, and the Head of State all have full powers to adopt, sign, or consent to be bound by, a treaty: see Art. 7(2), Art. 46 (discussed in § 8 below).

example, in the United States the treaty-making power is vested in the President, but subject to the advice and consent of the Senate for certain treaties.<sup>41</sup>

But apart from such cases where national law demands that a political body approve the treaty, it may be that the interests with which a treaty deals are so complicated and important that it is reasonable that there should be a further opportunity for considering the treaty as a whole.<sup>42</sup> A democratic state must consult public opinion, and this can hardly take shape while the negotiations, which may be largely confidential, are going on.

Ratification is not, however, a legal requisite for all treaties. There are many agreements of minor importance in which ratification would be an unreasonable formality, and normally the treaty itself states, either expressly or by implication, whether it is to become binding on signature or only when it has been ratified.

States which have not taken part in the negotiation of a treaty, and so were not in a position to sign the treaty following its adoption, are sometimes invited by the negotiating states to become parties by 'acceding' to the treaty.<sup>43</sup> This expression is employed

41. For an explanation as to which procedure is appropriate in the United States see Trimble (above). For speculation as to why the parties to an agreement might prefer that it be subject to the advice and consent of the Senate see J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (New York: OUP, 2005) at 91–5.

42. For the UK constitutional practice see Aust (above) at 189–94. See now section 20 of the Constitutional Reform and Governance Act 2010; J. Barrett, 'The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Reforms', 60 *ICLQ* (2011) 225–45.

43. Although accession may be used simply to denote the way in which parties become bound where the treaty does not provide for signature and ratification. E.g. the Convention on Privileges and Immunities of the United Nations (1946).

because they are not engaged in ratifying their signature, but simply becoming parties to the treaty in a one-step process. Other expressions which are used to denote the equivalent step are adhesion, acceptance, and approval.<sup>44</sup>

The treaty should specify when it is to enter into force. For a treaty merely requiring signature this could be immediately. In the case of a complex multilateral treaty it may be specified that the treaty enters into force for the parties once a fixed number of states have become parties. For example the Genocide Convention entered into force on the 90th day following the 20th state becoming a party.

## § 5. Reservations

In accepting a treaty, a state sometimes formulates a 'reservation'; that is to say, it proposes a new term which limits or varies the application of the treaty.<sup>45</sup> When a treaty has only two parties, the matter is simple; if the other party does not accept the tendered reservation the treaty will fall. If the other party accepts the

44. See further *Satow's Diplomatic Practice* (above) at 583–9.

45. It may be convenient here to reproduce the composite definition of a reservation included in the ILC's Guide to Practice on Reservations to Treaties (2011) (ILC Guide) reproduced in UN Doc. A/66/10: 1.1 "Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization. For 'interpretive declarations' see paras 1.3, and 2.4 and the Commentaries thereto.

reservation, we are in the presence of an amended text, and for this reason it is more usual to speak of amendments, or offers to renegotiate, in the context of bilateral treaties.<sup>46</sup> But when there are numerous parties the matter becomes more complicated, for some of these other parties may be willing to accept the reservation and others may not. And some may be willing to see the reserving state become a party to the treaty and others may not.

With regard to reservations to such multilateral treaties there is an underlying policy factor at play: is it better to have a maximum number of states join the treaty, albeit with reservations which adjust their obligations and the rights and obligations of all the other parties? Or is it preferable to see the treaty regime in terms of uniform rights and obligations, even at the expense of excluding those states who wish to join with reservations? We can see here the need to bear in mind two principles. First, we have 'the desirability of maintaining the integrity of international multilateral conventions'. And here the desire is not merely to maintain integrity for integrity's sake, but due to the role played by multilateral conventions: 'It is to be preferred that some degree of uniformity in the obligations of all parties to a multilateral instrument should be maintained. One of the ways in which international law is developed is by a consistent rule of general application being laid down in multilateral ... conventions.' 'Frequent or numerous reservations by States to multilateral conventions of international concern hinder the development of international law by preventing the

46. See further the ILC Guide Commentary to 1.6.1 'Reservations' to bilateral treaties. The United States practice is to communicate 'reservations' to its bilateral partners; these are then usually incorporated into a fresh text and agreed.

growth of a consistent rule of general application.' 'Secondly, and on the other hand, there is the desirability of the widest possible application of multilateral conventions. It may be assumed, from the very fact that they are multilateral, that the subjects with which they deal are of international concern, i.e., matters which are not only susceptible of international regulation but regarding which it is desirable to reform or amend existing law. If they are to be effective, multilateral conventions must be as widely in force or as generally accepted as possible.'<sup>47</sup>

These competing desires came to be described as a choice between integrity and universality.<sup>48</sup> The answer to this dilemma must be that it depends on the type of treaty regime being established.<sup>49</sup> The Law of the Sea Convention and the Statute of the International Criminal Court state that no reservations are permitted. For such treaties it makes sense that states cannot pick and choose obligations and undermine the integrity of the regime. On the other hand, a treaty for judicial co-operation may restrict the

47. All quotes from Brierly, Special Rapporteur on the law of treaties, 'Report on Reservations to Multilateral Conventions' UN Doc. A/CN.4/41, II *ILC Yearbook* (1951) 1-17 at paras 11-12.

48. See Joint Dissenting Opinion by Judges Guerrero, McNair, Read, and Hsu Mo, *Advisory Opinion on Reservations to the Convention on Genocide* ICJ Rep. (1951) p. 15, at 46-7.

49. Note the VCLT includes the following provisions: Article 20(3) 'When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.' For certain plurilateral treaties a reservation will have to be accepted unanimously: 'When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.' Art. 20(2).

topics on which states parties are prepared to co-operate, and may have to be adjusted to fit the different domestic legal orders. In this way certain reservations may actually facilitate greater participation and ultimately a wider range of possibilities for co-operation.<sup>50</sup> States which might otherwise feel obliged to remain outside the regime may feel comfortable joining with reservations and other states may be ready to accept this situation.

Where a treaty is silent on the issue of reservations, or only allows for specified reservations, a problem arises where some states object to the proposed reservation. Is the state attempting to make the reservation to be considered a party to the treaty? This question was put to the International Court of Justice in connection with reservations to the Genocide Convention. At that time it had been assumed that the rule in the law of treaties was that reservations had to be accepted by all parties to the treaty in order for the reserving state to be considered a party to the treaty.<sup>51</sup> Reservations had been made, in particular by eight states excluding the jurisdiction of the Court for inter-state disputes, and some states had objected to some of these reservations. The question originally had a practical dimension. The UN Secretary-General, as depositary of the treaty, needed to know whether the requisite number of parties had been reached for the treaty to enter into force. Although this point was moot by the time the Court delivered its opinion, the question still remained whether the reserving states could be considered parties to the treaty.

50. Consider the European Convention on Mutual Assistance in Criminal Matters (1959) and its multiple reservations.

51. *Reservations to the Convention on Genocide*, ICJ Rep. (1951) p. 15, at 31.

The Court took into consideration the nature of the Genocide Convention as something concluded under the auspices of the United Nations, an organization of universal character envisaging a wide degree of participation in the Convention. Furthermore, the Court pointed out: 'that although the Genocide Convention was finally approved unanimously, it is nevertheless the result of a series of majority votes. The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations.'<sup>52</sup> The Court concluded that even though the Convention was silent on the issue of reservations, taking into consideration the character, purpose, provisions, mode of preparation and adoption of the Convention, reservations were permitted. It then addressed the questions: what kinds of reservations were permitted? What kind of objections can be made to them? And what are the effects of such objections?

The Court recalled the intention to create a Convention which would be universal in scope, and went on to state that in this type of Convention: 'the contracting States do not have any interests of their own; they merely have, one and all a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.'<sup>53</sup> This represented a radical departure from the traditional idea that treaties were founded on state consent; the Court prioritized a common interest over individual interests. The implication was that reservations would be valid not according to the unanimous consent of the states parties, but according to the compatibility of the reservations with the *raison*

52. Advisory Opinion, *ibid* 22.

53. *Ibid* 23.

*d'être* of the Convention. The Court (by a majority of seven to five) prioritized universality over integrity:

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession...

It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.<sup>54</sup>

54. *Ibid* 24.



The Court held that, in the case before it, a state making a reservation to which some, but not all the parties, objected would become a party, if its reservation should be 'compatible with the object and purpose of the convention', but not otherwise. The problem is that in many situations the decision on compatibility is left entirely to the other states.

The Vienna Convention follows this logic in the main but, as predicted at the time, such a system has led to confusion and uncertainty. The eventual rule included in the Vienna Convention works as follows: the reservation formulated (at the appropriate time<sup>55</sup>) by the reserving state is circulated to all the parties to the treaty, as well as to all those entitled to become parties to the treaty. These addressees then have a fourfold choice:

- to remain *silent* (S);
- to *accept* the reservation (A);
- to formulate an *objection* to the reservation—but accept that the treaty will enter into force between itself and the reserving state (O);
- to *object* to the reservation and *oppose* the entry into force of the treaty between itself and the reserving state (OO).

Each course of action gives rise to different legal results. In order to assist the reader in understanding the consequences of choosing

55. When signing, ratifying, formally confirming, accepting, approving, or acceding to a treaty, or when a state is making a notification of succession to a treaty. Note that although the VCLT states that a reserving state becomes a party once at least one state has accepted the reservation, the practice of the UN Secretary-General is to consider the state that has formulated the reservation to be a party to the treaty as of the date of its instrument joining the treaty. See ILC Guide, Guideline 2.6.12 Commentary para. 6.

one or another response, we here work through the different options, taking an actual reservation as an example, in order to demonstrate how this arrangement is supposed to take effect in practice.

We saw in the previous chapter that there is disagreement over whether the diplomatic pouch can be subject to x-ray or search. On acceding to the Diplomatic Relations Convention in 1977, Libya formulated a reservation to Article 27(3) stating that it 'reserves its right to request the opening of such pouch in the presence of an official representative of the diplomatic mission concerned. If such request is denied by the authorities of the sending state, the diplomatic pouch shall be returned to its place of origin.'<sup>56</sup>

State S which stays *silent* has 12 months to consider whether to object or not.<sup>57</sup> After that time it is considered to have accepted the reservation and will be in the same position as State A which has explicitly *accepted* the reservation. For State A the treaty is in force between it and the reserving state and modified to the extent of the reservation. This may work in a reciprocal fashion.<sup>58</sup> So, in our exam-

56. Art. 27(3) states: 'The diplomatic bag shall not be opened or detained.' A number of other Arab states made similar reservations.

57. More precisely, we should say that the state is deemed to have accepted the reservation 'if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later'. VCLT Art. 20(5). Of course a treaty may specify a different timeline.

58. Note that reciprocity will not apply if this is not appropriate in view of 'nature of the obligations or the object and purpose of the treaty' or where 'reciprocal application is not possible because of the content of the reservation'. ILC Guideline 4.2.5. So for example where France had formulated a reservation to the European Convention on Human

ple, the United Kingdom, having remained silent for 12 months in the face of the Libyan reservation, would be deemed to have accepted it, and the Convention would be in force between the two states. Should the Libyan authorities suspect the content of the British diplomatic bag arriving at Tripoli airport from the Embassy, they would be entitled under the treaty to demand that a UK official be present while the bag is opened. If the United Kingdom refused, and the bag were sent back to the British Embassy in Tripoli, the UK could not complain as the treaty has been modified between these two states. The reciprocal effect of the reservation is as follows: if the British authorities at Heathrow suspect the Libyan diplomatic bag en route to Tripoli they can ask to open it in the presence of a Libyan official. If this is refused the bag can be sent back to the Libyan Embassy in London. Libya could not complain of a violation of the Convention.<sup>59</sup>

For the *objecting* State O the treaty is in force but the relevant provision does not apply to the extent of the reservation. This would mean that neither state would be legally obliged to allow the bag to be opened in the way foreseen in the reservation. Neither the rule forbidding the opening of the bag nor the modified

Rights with regard to the threshold for a state of emergency in France, Turkey could not rely on that reservation when France brought a complaint against Turkey for human rights violations in Turkey. The European Commission stressed that the Convention created 'objective obligations' and that complaints about a breach of the Convention were not actions to enforce a state's own rights but rather 'an alleged violation of the public order of Europe'. *France v Turkey* 35 D&R 143, at paras 37–43.

59. The UK authorities chose for political reasons not to challenge the Libyan bags leaving the Libyan Embassy in St James's Square following the shooting of WPC Fletcher outside the Embassy. According to Denza they 'almost certainly contained the murder weapon'. E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 3rd edn (Oxford: OUP, 2008) at 236.

rule allowing for the opening of the bag in certain conditions would apply between the two states.<sup>60</sup> The rest of the provision that states that the bag may not be detained would continue to apply. And indeed the rest of the treaty would apply so that diplomatic agents would remain immune and embassies would remain inviolable and so on.

For State OO that both *objects* to the reservation and *opposes* the entry into force of the treaty between itself and the reserving state, there are no treaty rights and obligations between the two states. Neither state can complain about a violation of any of the provisions of the whole treaty by the other state, nor are they able to use any mechanisms that provide for the settlement of a dispute with regard to the treaty because the treaty is not in force between them.<sup>61</sup>

For all four types of non-reserving state the treaty will apply in its entirety between themselves. Unfortunately the permutations do not end here. We have still not considered the effect of invalid reservations. In making their objections states often claim that the reservation is invalid.<sup>62</sup> While multiple claims of this sort may be evidence that the reservation is indeed contrary to the object and purpose of the treaty, such a claim may be merely subjective, and validity is a separate issue from acceptability. Validity depends first, on whether such reservations are foreseen in the treaty, and

60. The issue would fall to be determined by customary international law. See further Denza (above) 236–7 who discussed some of the similar reservations and objections.

61. Consider for example the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes (1961).

62. For example Canada responded to Libya's reservation by stating that she did not regard it as valid.

second, on whether the reservation is compatible with the object and purpose of the treaty.<sup>63</sup>

This problem has come to a head in the context of human rights treaties. Human rights treaties are not generally enforced by other states; nor is their object primarily to provide reciprocal benefits for other states. The beneficiaries of a state accepting a human rights treaty are the individual human beings who find themselves under that state's jurisdiction. Supervision of a state's respect for its treaty obligations is usually left to an international human rights court or a treaty monitoring body. Other states can of course object and deny that the treaty enters into force between them and the reserving state—but this can hardly help those the treaty is intended to protect.

Human rights bodies have been faced with seemingly invalid reservations when adjudicating individual petitions. In some cases they have decided to 'sever' invalid reservations, even where a state argues that the reservation was a condition for its accepting to be bound by the treaty in the first place. In these cases the state may have a choice: to leave the relevant treaty regime (where this is possible under the treaty), or decide to remain in the regime without the benefit of the reservation.

The first scenario took place against the background of a reservation formulated by Trinidad and Tobago stating: 'the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out

of the death sentence on him and any matter connected therewith.' The Committee (by a majority) decided that it 'cannot accept a reservation which singles out a certain group of individuals for lesser procedural protection than that which is enjoyed by the rest of the population'. In their view 'this constitutes a discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols, and for this reason the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol'.<sup>64</sup> Trinidad and Tobago then denounced the Optional Protocol allowing for individual complaints, and left that treaty regime. This meant that complaints could no longer be brought with regard to alleged violations of any of the provisions of the Covenant on Civil and Political Rights.

The second scenario arose in cases brought against Switzerland and Turkey. In the first case the European Court of Human Rights held that Switzerland's interpretive declaration sought to limit Switzerland's obligations with regard to fair trial and found that the interpretation was invalid as incompatible with the conditions for reservations.<sup>65</sup> The Court went on to apply the provision on fair trial against Switzerland. The Court determined that 'it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration'.<sup>66</sup> The Turkish declaration conditioning its acceptance of the Court's

63. VCLT Art. 19.

64. *Rawle Kennedy v Trinidad and Tobago*, Communication 845/1999, Decision of 2 November 1999.

65. For a detailed analysis of the implications of this case see S. Marks, 'Reservations Unhinged: The *Belilos* Case before the European Court of Human Rights', 39 *ICLQ* (1990) 300–27.

66. *Belilos v Switzerland* (1988) para. 60.



jurisdiction sought to restrict the territorial protection of the Convention. It was also considered invalid, and the restrictions were 'severed' from the declaration accepting the jurisdiction of the Court.<sup>67</sup> Both Turkey and Switzerland chose to remain parties to the Convention and to continue to recognize the jurisdiction of the Court.

There are a number of contextual differences relating to these two scenarios which continue to influence the ILC in its work on reservations to treaties. First, the judgments of a regional Court of Human Rights are binding on the states parties. By contrast some states have resisted the idea that a treaty monitoring body which is not empowered to deliver binding judgments should be able to determine the validity of reservations. These states insist on the overriding idea that a treaty only takes effect if the state consents to be bound. For these states a formulated reservation should be seen as a pre-condition of acceptance to be bound by the treaty, and so the consequence of discounting a reservation as invalid is that the reserving state cannot be considered a party to the treaty.<sup>68</sup>

The ILC has struggled with this problem for a number of years, and its Special Rapporteur, Alain Pellet, has now considered the issue in some detail. The ILC Guide to practice includes the following guidelines, which supplement the relevant provisions of the Vienna Convention on the Law of Treaties.<sup>69</sup>

67. *Loizidou v Turkey (preliminary objections)* (1995) paras 95–97.

68. See the separate Observations by the United Kingdom, the United States, and France to General Comment 24 of the UN Human Rights Committee, 3 IHRR (1996) at 261–9, and 4 IHRR (1997) at 6–9.

69. See Arts 19–23.

1. The status of the author of an invalid reservation in relation to a treaty depends on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by the treaty.
2. Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organization without the benefit of the reservation.
3. Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may express at any time its intention not to be bound by the treaty without the benefit of the reservation.
4. If a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organization intends not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment.<sup>70</sup>

The solution includes what can be described as a rebuttable 'presumption that the author of the reservation is bound by the treaty without being able to claim the benefit of the reservation, unless the author has expressed the opposite intention.'<sup>71</sup>

The ILC Guidelines also articulate the factors to be taken into account in determining the validity of a reservation. First, the treaty may prohibit certain types of reservation; second, the reservation

70. Guideline 4.5.3.

71. Commentary to Guideline 4.5.3 at para. 1.

must not be incompatible with the object and purpose of the treaty. It will be incompatible if 'it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty'.<sup>72</sup> Third, reservations may not be formulated 'concerning rights from which no derogation is permissible under any circumstances, unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable'.<sup>73</sup> Fourth, a reservation which 'purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific rules of the internal law of that State... may be formulated only insofar as it does not affect an essential element of the treaty nor its general tenour'.<sup>74</sup> Fifth, in order to assess compatibility with the object and purpose of a treaty containing numerous interdependent rights and obligations, 'account shall be taken of that interdependence as well as the importance that the provision to which the reservation relates has within the general tenour of the treaty, and the extent of the impact that the reservation has on the treaty'.<sup>75</sup>

If we return to our diplomatic bag example the guidelines would apply as follows. The terms of this reservation do not suggest that its acceptance is a condition for becoming a party to the treaty. The third party adjudicator would probably apply the presump-

72. Guideline 3.1.5.

73. Guideline 3.1.5.4.

74. Guideline 3.1.5.5.

75. Guideline 3.1.5.6.

tion that Libya intended to be bound by the Convention (whether or not the reservation be considered invalid) and move on to decide whether the reservation was invalid as contrary to the object and purpose of the treaty. The questions then are whether the reservation affects the general *raison d'être* of the treaty and what is the relationship of the obligations concerning the diplomatic bag to the general thrust of the treaty. Should the adjudicator determine the reservation to be invalid, the reservation would be severed, and the treaty provision stating that the diplomatic bag may not be opened or delayed would apply to Libya with no adjustments.

The issues are often seen as more complex in the context of human rights treaties: the advantages for the reserving state to remain in the regime will be reputational rather than related to the rights acquired by the reserving state; the other states may not see an interest in challenging the validity of a reservation; and designated monitoring bodies will be caught between a desire to reinforce the values embodied in the treaty and the risk of the reserving state exiting the regime on the grounds that the reservation was wrapped up in its consent to be bound by the treaty in the first place. But should it be necessary to decide on the validity or acceptability of such a reservation, a human rights body will be able to apply similar reasoning. It will take into account, however, that the object and purpose of human rights treaties are different from those regulating diplomatic relations, and that certain human rights, such as the right not to be tortured, allow for no derogation under any circumstances whatsoever.<sup>76</sup>

76. See further I. Boerefijn, 'Impact on the Law on Treaty Reservations', and M. Scheinin, 'Impact on the Law of Treaties', both in M.T. Kamminga and M. Scheinin (eds),



A key controversy has concerned the authority of UN human rights treaty bodies when considering the validity of reservations. The ILC Guidelines call for states to 'give consideration' to a treaty body's 'assessment of the permissibility of the reservations'.<sup>77</sup> But the Guidelines carefully limit the right to come to a legally binding decision on the validity of a reservation to those dispute settlement bodies that are empowered to adopt decisions that are binding on the parties.<sup>78</sup>

By now the reader may be bemused by the complexity of the issue of the validity of reservations, but the tension at the heart of the relevant ILC Guidance is really the tension we have been exploring now for some pages. Who is authorized to determine objectively the subjective intentions of sovereign states? Leaving this merely to other states seems to deny the idea that international law exists over and above the consent of states. Allowing this to be determined by someone else seems to surrender sovereignty.

## § 6. The role of the depositary and the requirement to register

As we have seen, the role of the depositary is crucial when determining whether there exists the requisite number of states parties

*The Impact of Human Rights Law on General International Law* (Oxford: OUP, 2009) at 63–97, and 23–36; see also the Report of the UN Human Rights Treaty Body Working Group on Reservations, HRI/MC/2007/5, 9 February 2007; for further examples of peremptory norms that allow for no derogation see § 7 below.

77. Guideline 3.2.3.

78. Guidelines 3.2.1.–3.2.5.

for a treaty to enter into force. Depositaries can be single states, two or more states, the United Nations, or another international organization. Some of the formal duties of depositaries are laid out in the VCLT.<sup>79</sup> The emphasis has been on the need for the depositary to be neutral and impartial.<sup>80</sup> Indeed when faced with demands from entities which are not yet members of the UN, the UN Secretary-General follows the practice and advice of the UN General Assembly.<sup>81</sup> In the context of liberation movements, that guidance is clear: 'The Secretary-General has no authority to grant recognition to a Government', and authority to join a treaty is dependent on action taken by a UN political body or UN specialized agency.<sup>82</sup>

The practice of the Secretary-General will be of particular interest where an entity has been recognized as a state by part of the international community. The situation is explained by the UN Office of Legal Affairs as follows:

But when a treaty is open to 'States', how is the Secretary-General to determine which entities are States? If they are Members of the United Nations or Parties to the Statute of the International Court of Justice, there is no ambiguity. However, a difficulty has occurred as to possible participation in treaties when entities which appeared otherwise to be States could not be admitted to the United Nations, nor

79. VCLT Arts 76–9.

80. For more detail see Aust (above) ch. 18.

81. Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, ST/LEG/7/Rev. 1, at paras 79–100.

82. Ibid para. 100.

become parties to the Statute of the International Court of Justice owing to the opposition of a permanent member of the Security Council. Since that difficulty did not arise as concerns membership in the specialized agencies, where there is no 'veto' procedure, a number of those States became members of specialized agencies, and as such were in essence recognized as States by the international community.<sup>83</sup>

The practice with regard to the Cook Islands is worth noting:

[A]n application by the Cook Islands for membership in the World Health organization was approved by the World Health Assembly in accordance with its article 6, and the Cook Islands, in accordance with article 79, became a member upon deposit of an instrument of acceptance with the Secretary-General. In the circumstances, the Secretary-General felt that the question of the status, as a State, of the Cook Islands, had been duly decided in the affirmative by the World Health Assembly, whose membership was fully representative of the international community.<sup>84</sup>

Article 102 of the Charter of the United Nations requires that 'every treaty and every international agreement entered into by

83. Ibid para. 79 (footnote omitted).

84. Para. 86 reference omitted. Palestine was admitted to UNESCO by a vote of 107 votes in favour of admission and 14 votes against, with 52 abstentions. Admission to UNESCO for states that are not members of the UN requires a recommendation by the Executive Board, as well as a two-thirds majority in favour by the General Conference of Member States present and voting (those abstaining are not considered as voting).

any member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it'. This requirement stems from the aim of preventing secret treaties.<sup>85</sup> Treaties and international agreements (including unilateral declarations that are binding in international law) are registered by the UN only when they have entered into force, and most are published *in extenso* (online and in hard copy) in the UN Treaty Series in their authentic languages followed by English and French translations.<sup>86</sup>

## § 7. The issue of *jus cogens*

Previous editions of this book again highlighted a supposed difference between the national and international legal orders. It was stated that, on the one hand, 'in our national law we have long ceased to regard absolute freedom of contract as either possible or socially desirable', and as a result 'our courts will not enforce contracts... whose object is contrary to public policy'. On the other hand, 'no such process has yet been possible in international law;

85. Although Article 102(2) states that parties to unregistered treaties may not invoke such treaties before UN organs, in practice this rule has not been applied. A somewhat similar article in the Covenant of the League of Nations had left in some doubt the effect of a failure to register on a treaty. The discovery of secret treaties during and after the First World War caused some public outrage and President Wilson addressed the question by including a demand for open covenants of peace in his Fourteen Points. See A.D. McNair, *The Law of Treaties* (Oxford: Clarendon, 1961) at 179ff.

86. See UN *Treaty Handbook* (New York, UN Publications, 2006) paras 5.6 and 5.7.4. and see the website < treaties.un.org >.

no doctrine of international public policy exists as yet to restrict the freedom of states to insert in their treaties such provisions as they think fit.<sup>87</sup> This has now changed; and the Vienna Convention on the Law of Treaties (VCLT) foresees that a treaty can be found to be void if it conflicts with a peremptory norm of general international law (also known as *jus cogens*).<sup>88</sup> Sir Hersch Lauterpacht, as Special Rapporteur on the law of treaties, had first sought to articulate this idea when dealing with the 'legality of the object of the treaty':

It would thus appear that the test whether the object of the treaty is illegal and whether the treaty is void for that reason is not inconsistency with customary international law pure and simple, but inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*). These principles need not necessarily have crystallized in a clearly accepted rule of law such as prohibition of piracy or of aggressive war. They may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations which the International Court of Justice is bound to apply by virtue of Article 38 [1(c)] of its Statute.<sup>89</sup>

87. See, e.g. 6th edn at 332.

88. VCLT Art. 53.

89. II *Yearbook ILC* (1953) at 155.

The issue proved extremely divisive at the Vienna Conference. Again the two sides are depicted as reflecting a separation between those concerned about the stability and certainty that should attach to treaty obligations, and those who were keen to emphasize the moral high ground and the unacceptability of *inter alia* slavery, genocide, and aggressive war.<sup>90</sup> Sinclair memorably explained his apprehension: '*Jus cogens* is neither Dr Jekyll nor Mr Hyde; but it has the potentialities of both. If it is invoked indiscriminately and to serve short term political purposes, it could rapidly be destructive of confidence in the security of treaties; if it is developed with wisdom and restraint in the overall interest of the international community it could constitute a useful check upon the unbridled will of individual states.'<sup>91</sup>

As with the question of coercion, the idea of invalidating treaties having an object contrary to public policy is relatively radical. But the final version of the VCLT adopted in Vienna built in a number of safeguards. First, retroactive effect was explicitly ruled out. 'A treaty is void if, *at the time of its conclusion*, it conflicts with a peremptory norm of general international law.'<sup>92</sup> Second, the final 'package deal' adopted in Vienna on the last day of the Conference resolves the problem of who has the authority to divine the existence of such a rule and thereby determine that the treaty in question is void.<sup>93</sup> The VCLT provides that, in a situation where the parties have been unable to resolve their dispute, one party can

90. Sinclair (above) ch. 7.

91. *Ibid* 223.

92. VCLT Art. 53 (emphasis added) see also Art. 64 discussed below.

93. See T.O. Elias, 'Problems Concerning the Validity of Treaties', III *RCADI* (1971) 341-416, at 397-404.

bring the question of the validity of the treaty to the International Court of Justice.<sup>94</sup>

Again the conceptual point is perhaps more important than the practical application of the rule. No treaties have been invalidated as a result of this rule. No attempts have been made to draft new treaties to engage in aggression, the slave trade, or genocide. But the idea that there are principles of international public policy that can invalidate a treaty and override the consent of states is a powerful one. It remains for us to try to pin down what principles constitute *jus cogens* today.

The final provision described a *jus cogens* norm for the purposes of the VCLT as follows: 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'<sup>95</sup> During the Vienna Conference, Ambassador Yasseen, the Chair of the Drafting Committee, explained two relevant points concerning this description of *jus cogens*. First the word 'accepted' was added to reflect wording in Article 38(1) of the ICJ Statute, and secondly the reference to the community of states *as a whole* was to reflect the apparent agreement that 'no individual State should have the right of veto'.<sup>96</sup> But the source and content of these norms

94. Art. 66(1)(a). Note that for the Court to have jurisdiction both parties to the dispute need to be parties to the VCLT.

95. Art. 53.

96. Official Records, 21 May 1968, p. 471, paras 4 and 7; see also the explanation at 472 para. 12.

remains rather mysterious.<sup>97</sup> As we saw in Chapter II § 4(b), the ILC has most recently limited itself to stating that the concept includes the rules on aggression, genocide, apartheid, slavery, the slave trade, racial discrimination, crimes against humanity, torture, self-determination, as well as the basic rules of international humanitarian law applicable in armed conflict. The UN Human Rights Committee has described as peremptory norms Articles 6 and 7 of the International Covenant on Civil and Political Rights (prohibitions on arbitrary deprivation of life and torture or cruel, inhuman or degrading treatment or punishment). They also refer to further examples such as 'taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence'.<sup>98</sup>

The most striking thing about the introduction of *jus cogens* into the law of treaties is that its actual impact has been almost entirely outside the context of the validity of treaties.<sup>99</sup> A significant development has been the approach taken in the ILC's Articles on State Responsibility. These make clear that all states have

97. See A. Bianchi, 'Human Rights and the Magic of *Jus Cogens*', 3 *EJIL* (2008) 491–508; For a detailed examination see A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford: OUP, 2008) ch. 5.

98. General Comment 29, adopted 24 July 2001, para. 11.

99. *Jus cogens* is regularly invoked as an argument against immunity, or in order to ground a case for universal jurisdiction. See, e.g. the dissenting opinions in *Al-Adsani v UK*, European Court of Human Rights, 21 November 2001; see also *R v Bartle et al Ex Parte Pinochet* [1999] UKHL 17. It has also been argued (without success) that a reservation excluding the jurisdiction of the International Court in the context of the Genocide Convention should be disregarded due to the *jus cogens* nature of the prohibition of genocide. *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)*,

duties when faced with a serious breach of a *jus cogens* norm by another state. First, to co-operate to bring to an end through lawful means such a serious breach; second not to recognize as lawful a situation created by the serious breach; and third not to render aid or assistance in maintaining that situation.<sup>100</sup> These injunctions were applied by the International Court of Justice when it delivered its Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>101</sup> More recently, Lord

ICJ Rep. (2006). See also A. Cassese, *International Law*, 2nd edn (Oxford: OUP, 2005) at 201–12; the Swiss Constitution includes a provision that popular initiatives to revise the Constitution may not violate 'les règles impératives du droit international', for details on how this provision may or may not be applicable see L. Langer, 'Panacea or Pathetic Fallacy? The Swiss Ban on Minarets', 43(4) *Vanderbilt Journal of Transnational Law* (2010) 863–951. A recent official report explains in its summary that this concept encompasses 'le *jus cogens*, les principes fondamentaux du droit international humanitaire et les garanties du droit international qui ne souffrent aucune dérogation même en état de nécessité'. See *Rapport additionnel du Conseil fédéral au rapport du 5 mars 2010 sur la relation entre droit international et droit interne* of 30 March 2011. For more detail of what this includes see para. 2.4.1. The proposal in the report is that the Constitution be amended so that popular initiatives should not only respect peremptory rules of international law, but also the essence of fundamental constitutional rights (at para. 4.3).

100. See Arts 40 and 41 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (2001); cf VCLT Art. 71. The argument that the *jus cogens* nature of the violations by Germany should alter the scope of any obligations on Italy to grant Germany immunity was rejected by the ICJ in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* Judgment of 2 February 2012; cf the dissenting opinions Judge *ad hoc* Gaja and Judge Cançado Trindade. See also C. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: CUP, 2005) at 310 who concludes that '*jus cogens* rules are by necessity valid *erga omnes*'. (*Erga omnes* obligations are dealt with in the next Chapter), and L. Yarwood, *State Accountability under International Law: Holding states accountable for a breach of jus cogens norms* (Abingdon: Routledge, 2011).

101. ICJ Rep. (2004) at para. 159.

Bingham's reference, in *A v Secretary of State for Home Department*, to both the ILC's Article 41 as requiring 'states to cooperate to bring to an end through lawful means any serious breach of an obligation under a peremptory norm of general international law' and the International Court's Opinion, may be seen to indicate that a state has a duty to reject the fruits of torture committed by another state.<sup>102</sup> In this case the House of Lords rejected arguments that evidence obtained from detainees in Guantánamo Bay should be admitted in hearings concerning the detention in the United Kingdom of suspected terrorists. The House of Lords ruled that evidence procured by torture was not admissible before the British courts even where the allegations related to torture by foreign officials.<sup>103</sup>

Finally, we should note that under the VCLT: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'<sup>104</sup> Again any dispute over the application of this provision can be eventually submitted to the International Court of Justice. There are however two key differences with regard to the effects of such a supervening norm of *jus cogens*. First, the treaty becomes invalid at the time the new norm appears—it is not void from its

102. *A v Secretary of State for the Home Department* [2005] UKHL 71 at para. 34.

103. Per Lord Bingham 'The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer.' At para. 51.

104. VCLT Art. 64. For an application of this principle see *Case of Aloboetoe et al v Suriname*, Judgment of the Inter-American Court of Human Rights, 10 September 1993 at para. 57.



adoption. This is sometimes expressed as the difference between a treaty being voidable or void *ab initio*; the supervening norm renders the treaty voidable but up until that point the treaty was valid and the parties had to abide by their obligations. Second, in the case of a supervening norm it is possible to sever the offending clause and leave the rest of the treaty in force.<sup>105</sup>

While the practical effects of the inclusion of these provisions on *jus cogens* have yet to be explored, their adoption is better seen in historical perspective. The inclusion of these provisions was symbolic of a new law displacing the traditional law, of the developed countries accepting that concerns regarding justice, voiced by developing and socialist countries, may have a place in the law of treaties. T.O. Elias, Head of the Nigerian Delegation and Chairman of the Committee of the Whole in Vienna, wrote that the *jus cogens* rule is 'a form of international public policy or *ordre public* for the community of States. There has thus been recognised a transition from the concept of an international *society* to that of an international *community*, ever more closely integrated and inter-dependent.'<sup>106</sup>

## § 8. Other grounds of invalidity

The other grounds of invalidity included in the VCLT relate to error, fraud, corruption, and defects in capacity. In each case the treaty will be voidable rather than *void ab initio*. And in each case

105. Art. 44(3).

106. Above fn 93 at 410. Elias was later President of the International Law Commission and of the International Court of Justice.

it is the victim state that has to raise the invalidity.<sup>107</sup> This is sometimes known as 'relative nullity' in contrast to 'absolute nullity'.<sup>108</sup> We will simply examine here the issue of defects in capacity as it highlights some doctrinal differences related to the relationship between international law and national law.

The VCLT provides in Article 46:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Today this may seem fairly self-explanatory, but the text represents a compromise between those who saw constitutional law as essential to the state's right to enter into treaty obligations (constitutionalists), and those who saw international law taking effect irrespective of what a state's constitution might or might not say about international law (internationalists).<sup>109</sup> As we have already

107. Note also the provision on acquiescence with regard to these grounds of invalidity: Art. 45. In the case of fraud or corruption the victim state may invoke invalidity with respect to particular clauses: Art. 44(4).

108. See further Cassese (above) at 177-8.

109. Brierly's first report is sometimes characterized as constitutionalist, but at that time his draft included treaties with international organizations, and although he could foresee a clause stating that one could assume the capacity of a Head of State to enter into treaties,

seen, different countries have different methods for absorbing international law in their domestic legal orders. These rules stem from the ways in which treaties have to be approved. If the Senate or Parliament has to approve a treaty, one can consider that the treaty in this way may *democratically* pass into law. In other systems, where for example a Head of State may bind a state without parliamentary approval, absorption may be delayed until the legislature has had a chance to address the issues.

The eventual compromise in the VCLT is that one may presume that a state is complying with its internal law, but there will be an exception when the other state should have realized that there was a manifest violation of a fundamental rule. In a case concerning the Maroua Declaration, signed by the Heads of State of Nigeria and Cameroon, Nigeria claimed that it was not bound by the Declaration as its Constitution required the ratification of treaties by the Nigerian Supreme Military Council. The International Court of Justice rejected Nigeria's claim. The Court confirmed that the 'rules concerning the authority to sign treaties for a State are constitutional rules of fundamental importance'. But they found that 'a limitation of a Head of State's capacity in this respect is not manifest in the sense of Article 46, paragraph 2,

the situation would be more complicated with regard to any assumed authority of international organizations; for example, the UN Security Council and the Economic and Social Council have different capacities in this context. II *Yearbook of the ILC* (1950) at 231. For examples where the European Union or a member state was held not entitled under EU law to enter into a treaty, see Aust (above) at 314. He explains that an EU member state would not be able to invoke Art. 46 of the VCLT as 'a non-Member State cannot be expected to know all the intricacies of [EU] law, the violation would not seem to be manifest'.

unless at least properly publicized'.<sup>110</sup> Heads of State, by virtue of their function, do not have to produce 'full powers' and are considered as representing their state for the purposes of expressing the consent of the state to be bound by a treaty.<sup>111</sup>

## § 9. Interpretation

The object of interpretation is to give effect to the intention of the parties as fully and fairly as possible. We should, however, consider the real nature of the process that a court goes through when it interprets a document, whether it be a municipal court interpreting a statute or contract, or an international court interpreting a treaty. We speak of the process as interpretation because we do not care to admit that the court puts something into the document which was not there before; practically no document needs interpretation when the case which has arisen was foreseen by its framers. The difficulty arises precisely because they did not foresee or provide for it; and what a court really does when we say that it interprets, is that,

110. *Land and Maritime Boundary between Cameroon and Nigeria* ICJ Rep. (2002) p. 303, at para. 265.

111. VCLT Art. 7(1) and (2)(a), see § 4 above. It has been suggested that treaties that cede territory or move boundaries represent a special category and so the burden of establishing the notoriety of the rule should be adjusted, see M. Fitzmaurice and O. Elias, *Contemporary Issues in the Law of Treaties* (Utrecht: Eleven, 2005) ch. 11. See also the Declaration of Judge Rezek who did not consider that Cameroon could be considered to be unaware of the internal Nigerian rule: 'I know of no legal order which authorizes a representative of a Government alone definitively to conclude and put into effect, on the basis of his sole authority, a treaty concerning a boundary, whether on land or at sea—and *ergo* the territory—of the State.' At pp. 191–2.

by employing well-known methods of judicial reasoning, it says what it thinks the framers of the document must have intended to say. But they did not intend to say that; they probably had no intention at all in the matter that has arisen, almost certainly no common intention. The act of the court is a creative act, in spite of our conspiracy to represent it as something less. Moreover, although it is not an arbitrary or capricious act, interpretation is an act in which different minds, equally competent, may, and often do, arrive at different and equally reasonable results.<sup>112</sup>

We should bear in mind that while Acts of Parliament may lend themselves to strict methods of interpretation, treaties do not, as a rule, invite those same very strict methods of interpretation as applied in the English courts. Those who draft treaties are not used to drafting national legislation; and the international context, and the circumstances of the negotiations, are different from those of a national legislature. Westlake made the point in the following way:

[T]he nature of the matters dealt with by [the eminent diplomats and ministers from other countries], and the peculiar conditions under which they work, must be considered. A style of drafting accommodated to the expectation of a very literal interpretation would necessitate the suggestion and discussion of so many possible contingencies, as would be likely to cause needless friction between the representatives of countries not always very amicable. It seems best in the interest of peace that,

112. This paragraph is adapted and transposed from Brierly 'The Judicial Settlement of International Disputes' in *The Basis of Obligation in International Law*, 93–107 at 98.

when an agreement on broad lines has been reached, it should be expressed in language not striving to hide a felt doubt, but on the other hand not meticulously seeking occasions for doubt; and to such a style of drafting, which we believe to be that most common in treaties, a large and liberal spirit of interpretation will reasonably correspond.<sup>113</sup>

We might also suggest two further reasons which explain why treaties are interpreted differently from national law. First, although treaties are interpreted every day by foreign offices and their legal advisers, the art of treaty interpretation is most exposed when the text is interpreted by an international court. As should by now be clear, international courts depend on states choosing to submit to their jurisdiction. Governments will be ready to withdraw their custom should they feel that treaties are being interpreted in ways that they did not intend. At the national level we have mostly no choice but to submit to the jurisdiction of our national courts and the national judge's interpretation of the law. Moreover the national legislature can if necessary intervene to correct deviations from their intentions.<sup>114</sup> By contrast international courts may have

113. Westlake, *International Law*, 2nd edn (Cambridge: CUP, 1910), Part I, p. 293–4.

114. See Reuter (above) 'The primacy of the text, especially in international law, is the cardinal rule of any interpretation. It may be that in other legal systems, where the legislative and judicial processes are fully regulated by the authority of the State and not by the free consent of the parties, the courts are deemed competent to make a text say what it does not say or even the opposite of what it says. But such interpretations, which are sometimes described as teleological, are indissociable from the fact that recourse to the courts is mandatory, that the court is obliged to hand down a decision, and that it is moreover controlled by an effective legislature whose action may if necessary check its bolder undertakings. When an international judge or arbitrator departs from a text, it is because he is satisfied that another text or practice, ie another source of law, should prevail.' At 96.

to be mindful of losing the confidence of states as potential litigants or having their jurisdiction restricted by those they are seeking to judge.

Second, whether the interpretation is done by legal advisors or an international court, the parties disputing the interpretation of a treaty are often the same entities that negotiated the treaty. As Richard Gardiner explains: 'those in dispute internationally over a treaty are commonly representatives of the actual originators of the treaty terms in issue, or at least later parties to the treaty. Hence their interpretation has a special value.'<sup>115</sup>

Previous editions of this book were able at this point to state boldly that '[t]here are no technical rules in international law for the interpretation of treaties'. This is no longer really true, and, as we shall see, the eventual rules included in the 1969 Vienna Convention are quite detailed and are now applied to all treaties. Sinclair explains the doctrinal divisions over treaty interpretation in the prelude to the Vienna Conference.

There have been three distinct schools of thought reflecting respectively (a) the 'textual' approach, (b) the 'intentions' approach and (c) the 'teleological' approach. Those favouring the 'textual' approach place particular emphasis on the text of the treaty as incorporating the authentic expression of the intentions of the parties. Those favouring the 'intentions' approach insist that the prime goal of treaty interpretation is to endeavour to ascertain the intentions of the parties. And

115. *Treaty Interpretation* (Oxford: OUP, 2010) at 11; and see the rules on subsequent practice and authentic interpretation by the parties referred to below.

those favouring the more dynamic 'teleological' approach maintain that the task of the decision-maker is to ascertain the object and purpose of the treaty and then to interpret the treaty so as to give effect to that object and purpose. As between the 'textual' approach and the intentions approach, the main difference lies in the extent to which and the circumstances in which recourse to preparatory work should be admitted as an aid in the process of interpretation.<sup>116</sup>

The eventual rule adopted in the Vienna Convention combines these approaches in Article 31. The Article also explains what material is relevant in the interpretative process. In order not to distort the provision it seems appropriate here to reproduce the whole Article.

#### *Article 31* *General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

116. I.M. Sinclair, 'Vienna Conference on the Law of Treaties', 19 *ICLQ* (1970) 47-69, at 61.

- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
- 3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
- 4. A special meaning shall be given to a term if it is established that the parties so intended.

Most of the terms in this Article in turn lend themselves to interpretation,<sup>117</sup> and here we will only sketch the essential details.

Emphasis has been placed on the labelling of Article 31 as a single rule, thereby reminding us that the provision is to be applied in its entirety. There is no suggestion that some elements are to be given priority over others in applying the rule. The opening reference to good faith has been understood as encompassing the principle of *effectiveness*. In turn this has two dimensions: first, that *effect* must be given to *all* the terms of the treaty; and second that the interpretation should enable the treaty to have appropriate *effects*.<sup>118</sup>

117. See Gardiner (above) chs 5–7.

118. We will consider below the application of these principles in the *Georgia v Russia* (preliminary objections) 2011 judgment of the ICJ.

Ordinary meaning is to be determined in the light of the object and purpose of the treaty, and in the context of the treaty. What constitutes context in this regard includes the preamble and annexes as well as agreements and instruments accepted as relating to the conclusion of the treaty. These agreements could take the form of understandings agreed at the final Conference but not included in the text of the treaty,<sup>119</sup> or paragraphs included in the Final Act of the Conference or in a General Assembly Resolution to which the text of the treaty is annexed. Instruments may be unilateral, and where interpretative declarations are accepted by the other parties they may constitute an *agreement* regarding the interpretation of the treaty.<sup>120</sup> While reservations modify the terms of the treaty, an instrument in this case is part of the context which the interpreter considers in determining the meaning of the actual text.

The inevitable importance of context when determining the meaning of terms is nicely illustrated by McNair:

A man, having a wife and children, made a will of conspicuous brevity consisting merely of the words 'All for mother'. No term could be 'plainer' than 'mother', for a man can only

119. See for example the Understandings on the amendments concerning the crime of aggression in the International Criminal Court Statute contained in Annex III of Resolution 6 adopted 11 June 2010 (discussed in Ch. IX below);

120. This could fall under any of the following paras of Art. 31(2)(a)(b)(3)(a)(b), see ILC Guidelines (above) 4.7.3 at para. 3 to the Commentary. Where the other parties have not acquiesced, a unilateral declaration is simply evidence that may or may not be taken into account under the general rule. See Guideline 4.7.1 and the Commentary thereto which explains that such a declaration is not autonomous but may confirm an interpretation based on the objective factors listed in Arts 31 and 32. At paras 26 and 31.



have one mother. His widow claimed the estate. The court, having admitted oral evidence which proved that in the family circle the deceased's wife was always referred to as 'mother', as is common in England, held that she was entitled to apply for administration... and she took the whole estate. 'Mother' is, speaking abstractly, a 'plain term' but, taken in relation to the circumstances surrounding the testator at the time when the will was made, it was anything but a 'plain term'.<sup>121</sup>

Subsequent practice in the application of the treaty relates to acts attributable to a state. Not *all* states need engage in the practice, but there should be 'manifested or imputable agreement' from the other parties.<sup>122</sup> In some cases a court will impute an intention to be bound by an evolving interpretation of the terms of a treaty. The International Court of Justice explained the approach in the context of the need to decide whether the word 'commerce' should be interpreted to cover solely goods—or rather be seen as including services such as passenger transport.

On the one hand, the subsequent practice of the parties, within the meaning of Article 31(3)(b) of the Vienna Con-

121. McNair (above) at 367. For a situation where the International Court of Justice interpreted a text by focusing on context rather than the literal meaning of the words see *Anglo-Iranian Oil Co. case (jurisdiction)*, ICJ Rep. (1952) p. 93. McNair's Separate Opinion explained as follows: 'there is a real ambiguity in the text, and, for that reason, it is both justifiable and necessary to go outside the text and see whether any light is shed by the surrounding circumstances.' At 117–18.

122. Gardiner (above) 225–49 at 236.

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

The Court concludes from the foregoing that the terms by which the extent of Costa Rica's right of free navigation has been defined, including in particular the term 'comercio', must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning.

Thus, even assuming that the notion of 'commerce' does not have the same meaning today as it did in the mid-nineteenth century, it is the present meaning which must be accepted for purposes of applying the Treaty.<sup>123</sup>

123. *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* judgment 13 July 2009, at paras 64 and 70. See also *Kasikili/Sedudu Island (Botswana v Namibia)* judgment 13 December 1999 at paras 47–80 for a rejection of claims by both sides that certain subsequent practice was not relevant for the purposes of Art. 31(3)(b). In the *Arbitration concerning Heathrow Airport User Charges*

The obligation to take into account 'relevant rules of international law' under Article 31(3)(c) seems to cover the need to interpret the terms of the treaty in the light of the international law applicable at the time of the conclusion of the treaty, as well as the evolving law applicable to the terms.<sup>124</sup> The presumption must be that the drafters would have accepted that certain terms will evolve under international law. This rule of interpretation has, however, in some circumstances been regarded as a fulcrum for weighing international obligations in competing regimes.<sup>125</sup> What weight is to

(*USA v UK*), 30 November 1992, XXIV RIAA, 3, the Tribunal considered that a Memorandum of Understanding constituted 'consensual subsequent practice of the Parties' and therefore an aid to interpretation of the relevant treaty. At para. 6.7. For a full review of these and related questions see the Report being prepared in the context of the ILC by Professor Nolte's 'study group on treaties over time'. Amendment of a treaty by practice can occur outside the rules in the VCLT; see for example the question of the death penalty under the European Convention on Human Rights (1950). Article 2 on the right to life had an exception allowing for 'execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'. In a case concerning the transfer by the United Kingdom of two individuals from its jurisdiction into the jurisdiction of the Iraqi authorities, the European Court of Human Rights found a violation of the prohibition of inhuman or degrading treatment (due to the psychological effect of the possible death penalty). With regard to Article 2 the Court stated: 'All but two of the Member States have now signed Protocol No. 13 and all but three of the States which have signed have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances.'

124. On these two aspects of intertemporal law see the discussion related to the effects of discovery and the question of title over territory in the award of Judge Huber discussed in Ch. V § 2 above. See also the ICJ Judgments in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, 4 June 2008, at paras 113–14; *Case Concerning Pulp Mills on The River Uruguay (Argentina v Uruguay)*, 20 April 2010, at paras 55–66.

125. For the separate issue of successive treaties on the same subject matter see VCLT Arts 30 and 59.

be given to the rules on sovereign immunity when interpreting access to court under a human rights treaty?<sup>126</sup> What weight to be given to freedom of expression when interpreting the obligation to protect the dignity of an embassy?<sup>127</sup> What weight to be given to the prohibition on the use of force when interpreting a friendship treaty?<sup>128</sup> How to include human rights and environmental obligations when interpreting trade<sup>129</sup> or investment agreements?<sup>130</sup> At one level, resolving the tension between these competing obligations through the technique of interpretation is very satisfying and allows us to see international law as a coherent system.<sup>131</sup> At

126. See ECtHR *Al-Adsani v UK*, 21 November 2001, at para. 55ff.

127. See Ch. VI § 11(e) above.

128. See *Oil Platforms (Iran v USA)* ICJ Rep. (2003) p. 161 at para. 41ff. Compare the Separate Opinion of Judge Higgins paras 44–52.

129. J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge: CUP, 2003); G. Marceau, 'WTO Dispute Settlement and Human Rights', 13 *EJIL* (2002) 753–814; T. Cottier, J. Pauwelyn, and E. Bürgi (eds), *Human Rights and International Trade* (Oxford: OUP, 2005); M. Andenas and S. Zleptning, 'Proportionality: WTO Law in Comparative Perspective', 42 *Texas International Law Journal* (2007) 371–427.

130. P. Sands, 'Treaty, Custom and the Cross-fertilization of International Law', 1 *Yale Human Rights and Development Law Journal* (1998) 85–105; P.-M. Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law', in P.-M. Dupuy, E.-U. Petersmann, and F. Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford: OUP, 2009) 45–62, esp. at 55ff; A.S. Sweet, 'Investor-State Arbitration: Proportionality's New Frontier', 4 *Law Ethics and Human Rights* (2010) 47–76; B. Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' 60 *ICLQ* (2011) 573–96.

131. See the ILC Report 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (2006) at paras 17–23; UN Doc. A/61/10, para. 251; C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *ICLQ* (2005) 279–320.

another level it obscures the fact that states may have actually taken on competing obligations reflecting different values to be protected, and, in most cases, the international court or panel will have its jurisdiction restricted to only one of the competing treaties.<sup>132</sup> While the national judge may be entitled to weigh multiple competing values, rights, and obligations to arrive at a judicious result, international judges may ultimately be restricted in their jurisdiction to the treaty before them.<sup>133</sup>

Nevertheless there will be cases where judges do indeed have to choose between competing values. In such a situation the late Judge Antonio Cassese suggested that 'an interpreter will necessarily have to rely upon his or her personal ideological or political leanings. What matters, however, is that he or she should make it explicit and clear that the choice between two conflicting values is grounded in a personal slant or bias, and not in any "objective" legal precedence of one value over the other.'<sup>134</sup>

132. Klabbers concludes in this context that 'where values clash, the law offers little solace, and can only offer what has become known as the "principle of political decision": in case of such unavoidable treaty conflict, the responsible party will eventually have to choose which commitment to honour, and make sure that it compensates the other partner or partners.' 'Beyond the Vienna Convention: Conflicting Treaty Provisions', in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (Oxford: OUP, 2010) 192–205, at 195. He also makes the following important point: 'it is by no means clear that the marketing of genetically modified organisms should be regarded as a trade issue rather than, say, a health issue, an environmental issue, a security issue, or a human rights issue. How to constitute the proper field (or system) is itself a political question, something the mechanics of a system approach have a hard time accommodating.' J. Klabbers, *Treaty Conflict and the European Union* (Cambridge: CUP, 2009) at 39.

133. R. Higgins, 'A Babel of Judicial Voices: Ruminations from the Bench', 55 *ICLQ* (2006) 791–804.

134. *Five Masters of International Law: Conversations with R.-J. Dupuy, E. Jiménez de Aréchaga, R. Jennings, L. Henkin and O. Schachter* (Oxford: Hart, 2011) at 259.

Attitudes to *travaux préparatoires* (preparatory work) have in the past reflected different legal traditions. The confrontation prepared by Professor Myres McDougal, as a member of the US delegation to the Vienna Conference, is perhaps emblematic of a more general historical division over interpretative method and the application of international law. In short, McDougal argued that preparatory work should be considered alongside the elements contained in Article 31. He stressed that '[i]n reality, words had no fixed or natural meaning which the parties to an agreement could not alter. The "plain and ordinary" meanings of words were multiple and ambiguous and could be made particular and clear only by reference to the factual circumstances of their use.'<sup>135</sup> He emphasized that '[i]t was essential to respect the free choice of the States parties regarding their agreements, and not to impose upon them the choices of others.'<sup>136</sup>

Sinclair, from the UK delegation, summarized the position of those who preferred to concentrate on the text rather than the original common intention of the parties:

As a matter of experience it often occurred that the difference between the parties to the treaties arose out of something which the parties had never thought of when the treaty was concluded and that, therefore, they had had absolutely no common intention with regard to it. In other cases the parties might all along have had divergent intentions with regard to

135. Official Records, 1st Session, Meeting of the Committee of the Whole, 19 April 1968 at p.167, para. 44.

136. *Ibid* p. 168, para. 46.

the actual question which was in dispute; each party had deliberately refrained from raising the matter, possibly hoping that that point would not arise in practice, or possibly expecting that if it did, the text which was agreed would produce the result which it desired.<sup>137</sup>

He went on to argue that in practice, reliance on preparatory work was inevitably selective and would disadvantage both small delegations and new states.

In the first place, preparatory work was almost invariably confusing, unequal and partial: confusing because it commonly consisted of the summary records of statements made during the process of negotiation, and early statements on the positions of delegations might express the intention of the delegation at that stage, but bear no relation to the ultimate text of the treaty; unequal, because not all delegations spoke on any particular issue; and partial because it excluded the informal meetings between heads of delegations at which final compromises were reached and which were often the most significant feature of any negotiation. If preparatory work were to be placed on equal footing with the text of the treaty itself, there would be no end to debate at international conferences....

Finally, if greater significance were attributed to preparatory work than in the Commission's text of article [31], a greater degree of risk would be created for new States wishing

137. 22 April 1968, p. 177 para. 4.

to accede to treaties in the drafting of which they had taken no part. The text of the treaty was what those new States had before them when deciding whether or not to accede; if more weight were attached to preparatory work in the rules of treaty interpretation, new States would be obliged to undertake a thorough analysis of the preparatory work before acceding to treaties, and even a thorough analysis was likely to give them limited enlightenment on the intentions of the parties.<sup>138</sup>

The United States' proposal was rejected by a vote at the Vienna Conference, and the VCLT only allows for recourse to supplementary material including preparatory work when application of the Article 31 rule leads to an absurd result, or leaves the meaning ambiguous or obscure.<sup>139</sup>

In sum, the rule contained in Article 31 is carefully constructed and comprehensive, and yet, as suggested at the outset, there is still plenty of room for different judges to come to different conclusions. The point is starkly illustrated by the recent judgment of the International Court of Justice in the case brought by Georgia against Russia. The Court had to decide as a preliminary matter whether Article 22 of the UN Racial Discrimination Convention could provide the necessary jurisdiction for the Court. Article 22 reads:

138. *Ibid* p. 178, paras 8 and 10.

139. See Art. 32. In practice parties and judges will often refer to the preparatory work in order to reinforce their arguments. For example in the *Georgia v Russia* case considered below, the Court's judgment and the dissenting opinions examine the preparatory work and each finds that that work reinforces their divergent interpretations. For a full examination of what constitutes supplementary means and preparatory work see Gardiner (above) at 99–108 and 301–50.

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

The Court explains the differences in interpretation:

There is much in this compromissory clause on which the two Parties hold different interpretations. First they disagree on the meaning of the phrase '[a]ny dispute... which is not settled by negotiation or by the procedures expressly provided for'. The Russian Federation maintains that the phrase imposes a precondition to the jurisdiction of the Court, in that it requires that an attempt must have been made to resolve the dispute by the means specified in Article 22 and that that attempt must have failed before the dispute can be referred to the Court. Georgia on the other hand interprets the phrase as imposing no affirmative obligation for the Parties to have attempted to resolve the dispute through negotiation or through the procedures established by CERD. According to Georgia, all that is required is that, as a matter of fact, the dispute has not been so resolved.<sup>140</sup>

140. At para. 118.

The Court explains a further difference:

assuming that negotiations are a precondition for the seisin of the Court, the two Parties disagree as to what constitutes negotiations including the extent to which they must be pursued before it can be concluded that the precondition under Article 22 of CERD has been fulfilled. Additionally, they disagree as to the format of negotiations and the extent to which they should refer to the substantive obligations under CERD.<sup>141</sup>

The Court (by a majority of ten votes to six) upheld the Russian argument that the words 'which is not settled by negotiation' must be given effect. This is an application of the rule regarding effectiveness or *effet utile* (referred to above). The Court considered that the Georgian argument that it was sufficient that the dispute had not been resolved by negotiation would lead to a result whereby 'a key phrase of this provision would become devoid of any effect'.<sup>142</sup>

The dissenting judges considered that the Court had relied solely on this one aspect of the effectiveness rule. They argued that the Court should have considered that the literal meaning of the words '*is not settled by negotiation*' is clearly different from the

141. At para. 120.

142. At para. 133. For an the explanation of the effectiveness principle, sometimes referred to as *ut res magis valeat quam pereat* (roughly translated as: words are to be given value rather than ignored), see the Third Report by Waldock on the law of treaties, II *Yearbook of the ILC* (1964) at 52-61.



alternative clause found in other treaties '*which cannot be settled by negotiation*'.<sup>143</sup> Second, they emphasized that 'while diplomatic negotiations concerning a dispute may be helpful before judicial proceedings are brought, particularly in clarifying the terms of the dispute and delimiting its subject-matter, they as a general rule are not a mandatory precondition to be satisfied in order for the Court to be able to exercise jurisdiction'.<sup>144</sup> The dissenting Judges concluded therefore that the Georgian interpretation of the expression 'is not settled by negotiation' should have been preferred.

The Judges of the Court were also divided on the meaning of the word 'negotiation' in this context. The Court's judgment held that the negotiation must go beyond protest, and relate specifically to the dispute over the treaty in question. The dissenting judges argued 'a firmly realistic, rather than formalistic, approach should be taken to the question of negotiations', and they concluded that 'there was no reasonable possibility of a negotiated settlement of the dispute as it was presented to the Court, and the condition in Article 22, if one exists, had been met'.<sup>145</sup>

In closing this section on interpretation we can conclude that while it is no longer correct to claim that there are no technical rules for treaty interpretation, when applying the rules on interpretation, different judges can still arrive at different interpretations of the same provision of a treaty.

143. Joint dissenting opinion of President Owada, Judges Simma, Abraham, and Donoghue, and Judge *ad hoc* Gaja at paras 21–3. See also the dissenting opinion by Judge Cançado Trindade.

144. Joint dissenting opinion at para. 24.

145. Joint dissenting opinion at paras 55 and 84.

## § 10. Third party rights and obligations

The general rule is that a 'treaty does not create either obligations or rights for a third State without its consent'.<sup>146</sup> However, if it is shown that the parties clearly intended to confer a *right* on one or several states not a party to the treaty in question, there is nothing in international law to prevent effect being given to this intention, and it can be assumed that the third state has assented to benefiting from such a conferred right.<sup>147</sup> According to the VCLT where states intend to impose an *obligation* on a third state, that state will need to accept that obligation in writing.<sup>148</sup>

The question of when a treaty between states may create rights or obligations for *individuals* and *other non-state actors* is a complex one.<sup>149</sup> As the ILC's Special Rapporteur on the law of treaties,

146. VCLT Art. 34. For a detailed examination of the this area see C. Chinkin, *Third Parties in International Law* (Oxford: Clarendon Press, 1983) 25–119.

147. See PCIJ *Free Zones of Upper Savoy and the District of Gex*, Series A/B, No. 46, at p. 147. '[I]t must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such.' VCLT Arts 36 and 37(2).

148. VCLT Arts 35 and 37(1).

149. For an early examination of the individual as a potential subject of international treaty rights see H. Lauterpacht, 'General Rules of the Law of Peace' at 279–94 in E. Lauterpacht (ed.), *International Law: Collected Papers*, vol. 1 (Cambridge: CUP, 1970). (English version of the Cours Général 62 *RCADI* (1937)); see also C. Chinkin, *Third Parties in International Law* (above) chs 1, 4, 5, and 16. C. Tomuschat, 'The Responsibility of Other Entities: Private Individuals', in J. Crawford, A. Pellet, and S. Olleson (eds), *The Law of International Responsibility* (Oxford: OUP, 2010) 317–29. M. Milanović, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)', 9 *JICJ* (2011) 21–52.

Waldock had proposed an article for the Vienna Convention which referred to the situation where 'a treaty provides for obligations or rights which are to be performed or enjoyed by individuals, juristic persons, or groups of individuals in question'. The draft article set out how such rights and obligations take effect at the national and international levels: '(a) through the contracting States by their national systems of law; (b) through such international organs and procedures as may be specially provided for in the treaty or in any other treaties or instruments in force.'<sup>150</sup>

The debate in the Commission in 1964 was very divisive; some members were not convinced that any treaties at that time provided for such individual rights, and regarded the idea of giving an individual access to an international court to be an unnecessary prolongation of the legal process at the national level, arguing that it 'would be extremely dangerous to attack the jurisdiction of the State on the pretext of providing international protection for the individual citizen'. Others, however, considered that the idea that individuals could have subjective rights against their own state was 'gradually gaining ground' in the context of the drafting of the UN Human Rights Covenants. Waldock eventually agreed to withdraw the provision, but recorded his view that individuals already had access to international bodies, and that he regretted the deletion of this reference as 'it would not accord with the high importance attached by the Charter and by modern international law generally to human rights and freedoms.'<sup>151</sup>

150. Third Report on the Law of Treaties, II *Yearbook ILC* (1964) at 45–8.

151. 9 June 1964, I *Yearbook ILC* (1964) at 114–19, esp. at paras 30–1, 40, 43, 46–7, 53, 54, and 61.

The doctrinal debate that dominated the Commission's discussion in 1964 has now been overtaken by writers citing modern examples of treaties which do indeed create rights and obligations for entities that are not parties to the treaties. Many accept that certain treaties, such as the 1948 Genocide Convention or the 1949 Geneva Conventions setting out war crimes (labelled grave breaches) create international obligations for individuals.<sup>152</sup> Similarly, armed groups are said to be bound by the laws of armed conflict contained in, *inter alia*, Common Article 3 to the 1949 Geneva Conventions.<sup>153</sup> Theodor Meron has given examples of provisions in human rights treaties as intended by the parties to create obligations for individuals;<sup>154</sup> Harold Hongju Koh has pointed to oil spill treaties and hazardous waste conventions as creating liability for corporations.<sup>155</sup> And European Union law has been interpreted by the European Court of Justice as creating rights and obligations for individuals which flow from the treaties and take direct effect in the member states.<sup>156</sup>

152. For an early finding that international criminal law such as the Genocide Convention 'creates duties for the individual directly' see Waldock 'General Course on Public International Law' 106 *RCADI* II (1962) 1–251 at 229. For the conditions under which the International Criminal Court has jurisdiction over such individual international crimes see Ch. III § 4 above. Cf M. Milanović, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)', 9(1) *JICJ* (2011) 25–52.

153. See also A. Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts', 30 *ICLQ* (1981) 416–39. Chinkin (above) at 132–3; S. Sivakumaran, 'Binding Armed Opposition Groups', 55 *ICLQ* (2006) 369–94.

154. T. Meron, *Human Rights in Internal Strife: Their International Protection* (Cambridge: Grotius, 1987) at 33–40.

155. H.H. Koh, 'Separating Myth from Reality about Corporate Responsibility Litigation', 7(2) *Journal of International Economic Law* (2004) 263–74.

156. See, e.g. *Van Gend & Loos v Netherlands Fiscal Administration* [1963] ECR I at 12: 'Independently of the legislation of Member States, Community law therefore not

The International Court of Justice itself has considered that the Vienna Convention on Consular Relations creates individual rights for those detained individuals entitled to consular assistance.<sup>157</sup> While the individuals are to assert those rights in the domestic legal system of the state where they are detained; the state of nationality of the detained person can invoke those rights, and its own rights, before the International Court of Justice (where the jurisdiction does not extend to individuals). Some international courts, such as the European Court of Human Rights, do however have jurisdiction beyond inter-state cases and can hear complaints brought by individuals and other non-state entities. In these cases it again makes sense to see the treaties as creating international rights for such third parties.<sup>158</sup>

only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

157. *Avena and Other Mexican Nationals (Mexico v USA)* (2004) at para. 40, *LaGrand (Germany v USA)* (2001) at para. 77. See Ch. VI § 11(c) above and VCCR Art. 36(1). See further B. Sepúlveda-Amor, 'Diplomatic and Consular Protection: The Rights of the State and the Rights of the Individual in the *LaGrand* and *Avena* Cases', in U. Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: OUP, 2011) 1097–117.

158. Indeed already in the 1964 ILC debate (above) Waldock complained that 'he could hardly conceive of the European Commission of Human Rights as a municipal tribunal, and it applied a Convention through international machinery; he believed the view expressed by the Chairman [Ago] on that point to be in contradiction with the existing practice'. At para. 60. A similar argument has been made by Gaeta who has recently suggested that the protected persons under the Geneva Conventions of 1949 are the holders of rights under those treaties. P. Gaeta, 'Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?', in O. Ben-Naftali (ed.), *International*

The extent to which an international right or obligation for an individual or corporation can be vindicated in a national legal order depends on the ways in which international law is received in that order.<sup>159</sup> But there is no reason to equate the existence of an international right or obligation with access to a national remedy or an international jurisdiction. Even where no national or international court has jurisdiction over the case, the rights and obligations exist and could be addressed through negotiation or the creation of a new remedy or jurisdiction.

In sum, in the words of Yoram Dinstein: 'It is a commonplace today that treaties can directly impose obligations on—and accord rights to—individual human beings.'<sup>160</sup> The more problematic issue is usually how to vindicate those rights and enforce such obligations. The presumption is that states are responsible for ensuring that such rights and obligations may take effect in national law. Today this may happen in some countries even in the absence of specific implementing legislation. Moreover, international human rights courts apply these rights and obligations on a daily basis,

*Humanitarian Law and International Human Rights Law* (Oxford: OUP, 2011) 305–27, at 319; see further the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 60/147 of 16 December 2005.

159. See Ch. II § 8 above. See D. Shelton *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: OUP, 2011); see also H. Lauterpacht, 'General Rules of the Law of Peace' at 279–94 in E. Lauterpacht (ed.), *International Law: Collected Papers*, vol. 1 (Cambridge: CUP, 1970). (English version of the Cours Général) 62 *RCADI* (1937)).

160. Y. Dinstein, *The Interaction Between Customary International Law and Treaties*, 322 *RCADI* (2006) 243–427, at 339.

awarding compensation to individuals, non-governmental organizations, and corporations; while international criminal tribunals hear cases alleging the commission of international crimes—and imprison those who are found guilty.<sup>161</sup> The rights and obligations of these third parties to the relevant treaties are therefore no longer merely topics of doctrinal debate—they are given very concrete effect.

## § 11. Breach, suspension, and termination of treaties

### (a) *Material breach*

A treaty may be simply terminated through mutual consent, performance of the relevant obligations, or the expiration of a time-limit.<sup>162</sup> But there are more difficult cases. From the time of

161. In addition to the European Court of Human Rights, the ECOWAS Community Court of Justice and the African Court of Human and Peoples' Rights both have jurisdiction over cases brought by individuals. In the sphere of international criminal obligations imposed on individuals international treaties may often be inadequate on their own to detail all the elements of a crime, and international tribunals will in practice rely heavily on customary international law. This does not apparently mean, however, that treaties on their own may not provide for individual obligations. An appeal complaining that the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia had relied on treaty law rather than customary law was rejected in the *Galic* case. The Appeal Chamber noted: 'However, while binding conventional law that prohibits conduct and provides for individual criminal responsibility could provide the basis for the International Tribunal's jurisdiction, in practice the International Tribunal always ascertains that the treaty provision in question is also declaratory of custom.' IT-98-29-A, 30 November 2006, at para. 85.

162. For background see McNair, 'La Terminaison et la dissolution des traités', in *Hague Recueil*, 1928, xxii, 463.

Grotius,<sup>163</sup> many writers propounded the view that the breach of *any* term of a treaty by one party will release the other from all obligations of the treaty. But such a doctrine, applied to any of the more important treaties, would lead to results so startling that it has never been adopted in international practice, and ought equally to be rejected by legal theory.<sup>164</sup>

The Vienna Convention developed provisions to address the situation where one party is said to be in *material breach* of a treaty. For a bilateral treaty the rule is apparently quite simple: a material breach entitles the other party 'to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part'.<sup>165</sup> What then constitutes a 'material breach'? The VCLT defines this as '(a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty'.<sup>166</sup> Scholars have criticized the 'inherent vagueness' of this provision,<sup>167</sup> and in practice, states may choose to label certain provisions as 'essential' in order to avoid any

163. *De jure belli* (1625), book ii, 15, 12.

164. For an examination of a proposed principle that performance of an obligation may be withheld if the other party has itself failed to perform the same or a related obligation (*exceptio inadimpleti contractus*) see J. Crawford and S. Olleson, 'The Exception of Non-performance: Links between the Law of Treaties and the Law of State Responsibility', 21 *Australian Year Book of International Law* (2001) 55–74.

165. Art. 60(1).

166. VCLT Art. 60(3).

167. Simma and Tams (above) at 1361.

argument as to whether suspension or termination is justified.<sup>168</sup>

The provisions for multilateral treaties reflect the fact that even if a specially affected state may suspend the treaty towards the state which is in material breach, that injured state will still owe obligations to the other parties.<sup>169</sup> We can also see that the aggrieved party cannot simply terminate the treaty; it merely has a right to *invoke* the breach and follow the Convention's procedures.<sup>170</sup>

168. See for example the EU Cotonou Agreement with African, Caribbean and Pacific States (2010), which stipulates in Article 9 (2) that '[r]espect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement'. Article 96 sets out the procedure to be followed for suspension. Of course the rationale for suspension will be dependent on political factors and the chances of improving rather than worsening the situation, the law of treaties simply gives the parties the option. For a discussion of the policy issues see E. Paasivirta, 'Human Rights, Diplomacy and Sanctions: Aspects to "Human Rights Clauses" in the External Agreements of the European Union', in J. Petman and J. Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Leiden: Nijhoff, 2003) 155–80; see also E. Riedel and M. Will, 'Human Rights Clauses in External Agreements of the EC', in P. Alston (ed.), *The EU and Human Rights* (Oxford: OUP, 1999) 723–54.

169. VCLT Art. 60(2). 'A material breach of a multilateral treaty by one of the parties entitles: (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) in the relations between themselves and the defaulting State; or (ii) as between all the parties; (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State; (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.'

170. See Arts 65–8.

Klabbers reminds us that these procedures are 'famously underutilized', and in any event, 'suspension or termination may be the last thing the aggrieved party desires and may simply be counterproductive'.<sup>171</sup>

The question for us then, is what else can a state do in the face of a breach (material or otherwise) of a treaty by another state? This issue falls to be dealt with under the general law of state responsibility and applies to all breaches of treaties.<sup>172</sup> Although there may be diplomatic reasons for avoiding references to 'breaches' or 'violations' of a treaty, a breach can be defined as a state's acts or omissions which are 'incompatible with an obligation grounded in that treaty'.<sup>173</sup> The other state may demand reparation for the breach of the obligation. An injured state may also wish to engage in countermeasures.<sup>174</sup>

### (b) *Countermeasures in response to breach of treaty*

The conditions for such *countermeasures* to be lawful can be summarized as follows: they must be proportionate, allow for the

171. J. Klabbers, 'Side-stepping Article 60: Material Breach of Treaty and Responses Thereto', in M. Tupamäki (ed.), *Finnish Branch of International Law Association 1946–1996: Essays on International Law* (Helsinki: Finnish ILA Branch, 1998), 20–42 at 22.

172. For a detailed look at this issue see the very incisive piece by Simma 'Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law', 20 *Österreichische Zeitschrift für öffentliches Recht* (1970) 5–83.

173. S. Rosenne, *Breach of Treaty* (Cambridge: Grotius, 1985) at 123.

174. Here we only sketch the principles as applied to a state responding to a breach of a treaty; we examine further the detailed general rules relating to countermeasures as elaborated by the ILC in the context of the draft articles on state responsibility in Ch. VIII § 3.



resumption of performance of the obligation that has been violated, and finish as soon as the violating state has complied with its obligations.<sup>175</sup> Countermeasures are not permitted if they affect obligations to protect fundamental human rights or those persons and objects protected from reprisal under the laws of war.<sup>176</sup> Furthermore, as we have seen, countermeasures cannot be used with regard to obligations owed in the context of respecting the inviolability of ambassadors, embassies and so on. They will not be possible where the state in breach can claim that the act or omission can be justified by self-defence, *force majeure*, distress, or necessity.<sup>177</sup>

It has been noted that a countermeasure 'must be provisional'.<sup>178</sup> Furthermore, as Simma and Tams explain: 'a countermeasure constitutes the (justified) violation of the binding norm; it has no

175. See Arts 49–54 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (2001) (hereafter ARSIWA); and J. Crawford, A. Pellet, and S. Olleson (eds), *The Law of International Responsibility* (Oxford: OUP, 2010) chs 79–86.

176. Compare Art. 60(5) VCLT which states that the provisions on suspension or termination do not apply to treaties of a humanitarian character. This exclusion in Art. 60(5) is now considered to cover human rights treaties as well as those related to humanitarian law, Simma and Tams (above) at 1366–8; Aust (above) at 295. See further Ch. VIII § 3 for prohibited reprisals in times of armed conflict.

177. See ARSIWA Arts 21, 23, 24, 25, 26, and 27; one should note that self-defence cannot be argued as precluding the wrongfulness of breaches of humanitarian law or human rights obligations, and necessity may be a factor within primary obligations in times of conflict rather than a defence to a breach of the obligations; on distress and necessity in the context of the application of treaties see further *Rainbow Warrior (NZ v France)* 82 ILR 499 at para. 75ff.; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Rep. (25 September 1997) at paras 47–8.

178. J. Verhoeven, 'The Law of Responsibility and the Law of Treaties', in J. Crawford et al (above) 105–13 at 111; and see ARSIWA Art. 49.

effect on the continued existence of the norm as such'.<sup>179</sup> The risk for any state engaging in countermeasures is that the alleged original breach may not have been a breach after all, and the countermeasures thereby become themselves a breach of the treaty which continues in force. This point can perhaps best be illustrated by the well-known *Air-Services Agreement* award.

Under a treaty between the United States and France certain airlines were authorized to operate services between the West Coast of the United States and France (via London). The airline Pan Am notified the French authorities that it planned to arrange its flights on this route with a change of 'gauge' in London, replacing the Boeing 747 with a Boeing 727 for the shorter Paris–London leg. The French authorities refused to approve this plan on the grounds that the treaty only allowed for a change of gauge in the territory of either the United States or France. The United States Government failed to get the French Government to change its mind and Pan Am started operating its service with the change of planes in London. The French Government considered that these were unlawful flights and, when the second flight landed at Orly Airport, the plane was surrounded by French police. The Captain of the Pan Am flight was instructed to return to London with all

179. B. Simma and C.J. Tams, 'Article 60', in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford: OUP, 2011) 1351–78, at 1354. Iain Cameron suggests that states have invoked suspension of a treaty as a countermeasure and that '[t]he preponderant view is that the substantive conditions, as well as the procedural requirements, laid down by the VCLT do not apply to such provisional suspension or non-performance. Instead, the lawfulness of this, being a countermeasure, falls to be judged under the law of State responsibility.' 'Treaties, Suspension' <mpepil.com> at para. 12; see also Verhoeven (previous fn) esp. at 112–13.

the passengers and cargo and Pan Am's future flights were suspended.

The United States Civil Aeronautics Board reacted by issuing an order to prevent Air France from operating its flights to and from Los Angeles via Montreal, for the period during which Pan Am was prevented from operating its service with a change of gauge in London. The two states submitted the dispute to arbitration, and the arbitral Tribunal confirmed that certain countermeasures could be a legitimate response to a breach of a treaty. The Tribunal's assessment of the meaning of proportionality in the context of countermeasures was that:

[t]heir aim is to restore equality between the Parties and to encourage them to continue negotiations with mutual desire to reach an acceptable solution.... It goes without saying that recourse to counter-measures involves the great risk of giving rise, in turn, to a further reaction, thereby causing an escalation which will lead to a worsening of the conflict. Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute.<sup>180</sup>

In this case the change of gauge by Pan Am was found to be legal under the treaty. The French action was therefore a breach of the treaty (and not a legitimate countermeasure) and the proposed

180. *Air Service Agreement of 27 March 1946 between the United States of America and France*, 9 December 1978, vol. 18 RIAA 417-93 at paras 90-1.

countermeasures by the United States were seen as a proportionate response to the French breach (and so legal and not a further breach of the treaty). There is no reason, however, to believe that countermeasures need relate to a similar provision or even the same treaty.

(c) *The position of non-injured states parties*

According to the ILC Articles a non-injured state party is entitled to invoke the responsibility of the party in breach where the treaty 'is established for the protection of a collective interest of the group'.<sup>181</sup> Such obligations have sometimes been known as 'obligations *erga omnes partes*'. The ILC suggests such treaties would address, for example, the environment, regional security and human rights.<sup>182</sup> Whether or not such a non-injured state would be entitled to engage in actual countermeasures is debatable.<sup>183</sup>

The idea that a *non-injured state* can react to protect community interests, rather than a bilateral interest, is obviously an important development, for it alters our conception of the international legal system;<sup>184</sup> but, in practice, states are rarely held to account in this way by non-injured states. In many situations there will be no interested non-injured state to hold another state to its treaty obligations. The key examples are environmental pollution and human rights violations against a state's own citizens. In such cases treaty violations are often monitored by specialist treaty bodies and other states play little role. Compliance will be carefully scrutinized by

181. ARSIWA Art. 48(1)(a).

182. UN Doc. A/56/10 at 126-7 para. 7.

183. See ARSIWA Art. 54 (discussed in Ch. VIII § 4 below).

184. C.J. Tams, 'Individual States as Guardians of Community Interests', in Fastenrath et al, *From Bilateralism to Community Interest* (above) 379-405.

non-governmental organizations but they may fail to interest governments from other states in taking any action. UN bodies and civil society engage with states every day in an effort to ensure enhanced compliance with their treaty obligations without necessarily cataloguing 'breaches'. The 'constructive dialogue' refrains from accusations of breach, violations, or non-compliance. One is more likely to find possible breaches met with expressions of 'concern' and 'regret' by the relevant international monitoring bodies.<sup>185</sup> In part this is due to the fact that many such multilateral treaties set out broad obligations which need to be monitored through indicators and focused recommendations, rather than a crude binary finding of compliance/breach.

(d) *The impact of war and armed conflict on treaties*

The outbreak of war is another event which may bring a treaty to an end, but the modern view is that it does not necessarily do so. The approach of Justice Cardozo was to suggest that international law deals with this problem pragmatically so that 'provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected'.<sup>186</sup> Sir Cecil Hurst suggested a rather different approach to the question: that the fate of a treaty depends on the intention of the parties.<sup>187</sup> In some cases

185. See, e.g. the concluding observations by the UN Human Rights Committee on the United Kingdom UN Doc. CCPR/C/GBR/CO/6, 30 July 2008. The International Committee on Economic, Social and Cultural Rights employs similar terms and one can also find instances where this Committee is: very concerned, deeply concerned, gravely concerned, or profoundly dissatisfied.

186. *Techt v Hughes* [1920] 229 NY 222.

187. 'The Effect of War on Treaties', 2 *BYBIL* (1921-2) 37-47.

their intention is clear; for instance, a treaty which regulates the conduct of war is clearly intended to retain its force if war breaks out. But more often the minds of the parties have not been addressed to the possibility that they may some day be at war with one another, and they cannot be said to have had any real intention as to what should happen to their treaty in that unforeseen event. Such a difficulty as this, however, is in no way peculiar to the interpretation of treaties, and law often does not hesitate to attribute an intention to parties who have never thought of the situation with which in the event the law has to deal. In such a case the so-called intention is a 'presumed' intention; it is what the law thinks it reasonable to suppose that the parties *would* have intended if the situation had been present in their minds.

We have therefore to examine the particular treaty with which we are concerned in the light, both of its subject-matter, and of all the relevant surrounding circumstances. Certain presumptions have been applied in the past. Bilateral treaties dealing with political matters or with commercial relations may be assumed to have been made with reference to the relations existing between the parties at the time, and we might find that the provisions of such treaties may be incompatible with a state of war or armed conflict. Or, if we prefer to put it the other way, that the parties must have intended that war should abrogate those provisions. On the other hand, a multilateral treaty, such as a postal convention, though its operation may have to be suspended between the belligerents while the war lasts, will, by the same reasoning, generally revive and recover its force when the war is over. Although the VCLT does not cover the effect of hostilities on treaties,<sup>188</sup> it does clearly state that breaking off diplomatic relations

188. VCLT Art. 73.

does not in itself affect treaty relations 'except insofar as the existence of diplomatic or consular relations is indispensable for the application of the treaty'.<sup>189</sup>

The ILC has recently considered the issue of the 'effects of armed conflicts on treaties',<sup>190</sup> and its work proceeds from the acceptance of the 'basic idea that the outbreak of an armed conflict involving one or more States parties to a treaty does not, in itself, entail termination or suspension'.<sup>191</sup> The overarching principle is that in order to determine the susceptibility of the treaty to termination, withdrawal, or suspension one looks at the nature of the treaty together with the effects of the particular armed conflict on the treaty.<sup>192</sup> The draft articles cover both inter-state conflicts and those where a government is fighting an armed group. The definition of armed conflict is therefore narrower than that used by international criminal tribunals as it does not cover protracted fighting between armed groups. The Commission has provided an indicative list of treaties where the subject-matter implies that such

189. VCLT Art. 63, and see also Art. 74.

190. The legal concept of war is too problematic and has now been overtaken in this context by the concept of armed conflict, see further C. Greenwood, 'The Concept of War in Modern International Law', 36 *JCLQ* (1987) 283–306.

191. L. Caflisch, First report on the effects of armed conflicts on treaties, UN Doc. A/CN.4/627, 22 March 2010, at para. 33.

192. See 'Draft articles on the effect of armed conflicts on treaties' (2011) Art. 6: 'In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, regard shall be had to all relevant factors, including: (a) the nature of the treaty, in particular its subject-matter, its object and purpose, its content and the number of parties to the treaty; and (b) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement.'

treaties continue in whole or in part during such armed conflicts.<sup>193</sup>

### (e) *Other grounds for termination*

One of the most difficult and practically important questions of the law of treaties relates to the termination of treaties which contain no express provision for withdrawal or termination. Such treaties raise two questions which require discussion: first, whether one party may in any circumstances give notice to terminate the treaty without the consent of the other, and second, whether the treaty is liable to be terminated by the operation of any rule of law.

The answer to the first of these questions is probably that we must again inquire into the intention of the parties. The VCLT explains that where a treaty is silent on these issues and there is no

193. See *ibid* Art. 2(b) for the purposes of the draft articles: "armed conflict" means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.' The indicative list of treaties is as follows: (a) Treaties on the law of armed conflict, including treaties on international humanitarian law; (b) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries; (c) Multilateral law-making treaties; (d) Treaties on international criminal justice; (e) Treaties of friendship, commerce and navigation and agreements concerning private rights; (f) Treaties for the international protection of human rights; (g) Treaties relating to the international protection of the environment; (h) Treaties relating to international watercourses and related installations and facilities; (i) Treaties relating to aquifers and related installations and facilities; (j) Treaties which are constituent instruments of international organizations; (k) Treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement; (l) Treaties relating to diplomatic and consular relations.'



consent from all the other parties there can be no withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.<sup>194</sup> These rules have been applied by the UN Secretary-General as depositary in the context of the attempt by North Korea to withdraw from the International Covenant on Civil and Political Rights. It was held that North Korea could not withdraw and so it remains a party.<sup>195</sup>

The second question brings us to the doctrine which was once known as *clausula rebus sic stantibus*. In every treaty, it was said, there is implied a clause which provides that the treaty is to be binding only 'so long as things stand as they are'; the expressed terms may be absolute, but a treaty is never more than conditional, and when a 'vital change of circumstances' has occurred, the condition of the treaty's validity has failed, and it ceases to be binding. Such a doctrine, without careful definition, is capable of being used, and often has been used, merely to excuse the breach of a treaty obligation that a state finds it inconvenient to fulfil.<sup>196</sup>

194. VCLT Arts 56 and 54.

195. The Human Rights Committee's General Comment 26 explains 'the Covenant is not the type of treaty which, by its nature, implies a right of denunciation. Together with the simultaneously prepared and adopted International Covenant on Economic, Social and Cultural Rights, the Covenant codifies in treaty form the universal human rights enshrined in the Universal Declaration of Human Rights, the three instruments together often being referred to as the "International Bill of Human Rights". As such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect.'

196. For a full history see A. Vamvoukos, *Termination of Treaties in International Law: The Doctrines of Rebus Sic Stantibus and Desuetude* (Oxford: Clarendon, 1985).

Not every important change of circumstances will put an end to the obligations of a treaty. The principle will not relieve a state from treaty obligations merely because new and unforeseen circumstances have made obligations unexpectedly burdensome to the state party, or because some consideration of equity suggests that it would be fair and reasonable to give such relief. The rule concerning change of circumstances bears no analogy to a principle such as that of *laesio enormis* in the Roman law.<sup>197</sup> What puts an end to the treaty is the disappearance of the foundation upon which it rests.<sup>198</sup> The familiar fiction of a presumed intention, or implied clause, was eventually rejected by the ILC in the drafting of the Vienna Convention.<sup>199</sup> The ILC wanted to stress an objective rather than a subjective test, and decided to avoid the use of the expression *rebus sic stantibus* altogether.<sup>200</sup> Moreover the rule is expressed as a presumption that a change of circumstances may *not* be invoked unless very specific conditions are fulfilled. Article 62 reads:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a

197. Literally 'enormous loss'; allowing a vendor to resile from a sale of land where the land was sold for less than half the market value.

198. Note the separate rule which allows a party to invoke the impossibility of performance of a treaty where this arises from the 'permanent disappearance or destruction of an object indispensable for the execution of the treaty'. VCLT Art. 61.

199. Compare the previous edition of this book at 336-8; N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Oxford: Clarendon, 1994) at 35.

200. II *Yearbook ILC* (1966) at 258.

treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

- (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
  - (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
- (a) if the treaty establishes a boundary; or
  - (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

The exclusion of boundary treaties in Article 62(2) was aimed at the preservation of stability and to reassure states at a time when the third party dispute settlement was being reinforced through the new law of treaties. Concerns were raised during the drafting as to the effect such a provision might have on the principle of self-determination in cases where a boundary treaty had been imposed on a people in the context of decolonization. The ILC Commentary explained that the principle of self-determination would remain unaffected.

Some members of the Commission suggested that the total exclusion of these [boundary] treaties from the rule might go too far, and might be inconsistent with the principle of self-

determination recognized in the Charter. The Commission, however, concluded that treaties establishing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. It also took the view that 'self-determination', as envisaged in the Charter was an independent principle and that it might lead to confusion if, in the context of the law of treaties, it were presented as an application of the rule contained in the present article. By excepting treaties establishing a boundary from its scope the present article would not exclude the operation of the principle of self-determination in any case where the conditions for its legitimate operation existed.<sup>201</sup>

The International Court of Justice later explained that, once established, the boundary exists independently of the treaty. 'Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court... A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary.'<sup>202</sup>

Returning to the general rule on fundamental change of circumstances, the International Court of Justice has had to deal with

201. II *Yearbook ILC* (1966) at 259 para. 11.

202. *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Rep. (1994) p. 6 at paras 72-3.

a set of arguments by Hungary claiming that due to a fundamental change of circumstances it was no longer bound under a treaty with Czechoslovakia to work on a particular hydro-electric project involving dams on the River Danube.

Hungary identified a number of 'substantive elements' present at the conclusion of the 1977 Treaty which it said had changed fundamentally by the date of notification of termination. These included the notion of 'socialist integration', for which the Treaty had originally been a 'vehicle', but which subsequently disappeared; the 'single and indivisible operational system', which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been overturned by the sudden emergence of both States into a market economy; the attitude of Czechoslovakia which had turned the 'framework treaty' into an 'immutable norm'; and, finally, the transformation of a treaty consistent with environmental protection into 'a prescription for environmental disaster'.<sup>203</sup>

The Court stated that such arguments failed to fulfil the conditions set out in Article 62, and that the plea of fundamental change of circumstances will only apply in exceptional cases:

In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent

203. *Case Concerning the Gabčíkovo-Nagymaros Project* (above) at para. 95.

of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result. The Court does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen.<sup>204</sup>

This confirms that there is a heavy burden on a state raising the plea of fundamental change of circumstances.<sup>205</sup>

The rule on fundamental change of circumstances has little to do with the problem of obsolete or oppressive treaties, for which *rebus sic stantibus* was too often supposed to be the solution. The problem of oppressive or obsolete treaty obligations is, in fact, only

204. *Ibid* para. 104.

205. See also *Fisheries Jurisdiction (UK v Iceland) jurisdiction*, ICJ Rep. (1973) at paras 32-40. The ILC Commentary suggests the rule offers a safety valve rather than an escape clause: 'there may remain a residue of cases in which, failing any agreement, one party may be left powerless under the treaty to obtain any legal relief from outmoded and burdensome provisions. It is in these cases that the *rebus sic stantibus* doctrine could serve a purpose as a lever to induce a spirit of compromise in the other party. Moreover, despite the strong reservations often expressed with regard to it, the evidence of the acceptance of the doctrine in international law is so considerable that it seems to indicate a recognition of a need for this safety-valve in the law of treaties.' II *Yearbook ILC* (1966) at 258 at para. 6.

one aspect, and not the most important aspect, of a much wider problem of international relations; for the danger to international order comes more often from oppressive *conditions*, and especially frontier conditions, than from the obligations of a treaty. Whether these conditions were, or were not, originally created by a treaty, and whether they have, or have not, been brought into existence by some change of circumstances, are from a practical point of view irrelevant considerations. Dissatisfaction, unrealized national ambitions, inequalities between states, are all relevant grievances but they do not usually have their source in oppressive treaties; many are created by geography, or climate, or the distribution of nature's resources, or by historical events which happened centuries ago. When these things can be remedied or alleviated by changes in the law, it is right and necessary that those changes should be made, and that is why peaceful change through law deserves our serious consideration.<sup>206</sup> It is perhaps a mistake to think that by some ingenious manipulation of existing legal doctrines we can always find a solution for the problems of a changing

206. For a fuller version of Brierly's concern with peaceful change, understood as adjusting treaty obligations in order to prevent war, see the previous edition of this book at pp. 331–45 and more fully J.L. Brierly, *The Outlook for International Law* (Oxford: Clarendon, 1944) at 124–42; see also Craven (above) at 65–71. The expression 'peaceful change' had multiple meanings in the inter-War years; some went so far as to build on Article 19 of the League of Nations Covenant to propose a world legislature with the power to rewrite treaties (see, e.g. H. Lauterpacht, 'The Legal Aspect' in C.A.W. Manning (ed.), *Peaceful Change: An International Problem* (London: MacMillan, 1937) 135–65. The expression has been retained here as it is emblematic of Brierly's articulation of his seemingly contradictory dual concern that international law provide both stability and justice. For the use of this expression in contemporary international relations see H. Miall, *Emergent Conflict and Peaceful Change* (Basingstoke: Palgrave, 2007).

international world. That is not so; for many of these problems—and oppressive treaties are one of them—the only remedy is that states should be willing to take measures to bring the legal situation into accord with new needs, and if states are not reasonable enough to do that, we must not expect the existing law to relieve them of the consequences. Law is bound to uphold the principle that treaties are to be observed; it cannot be made an instrument for revising them, and if political motives sometimes lead to a treaty being treated as 'a scrap of paper' we must not invent a pseudo-legal principle to justify such action. The remedy has to be sought elsewhere, in political, not in juridical action.