Disagreement Reduced to Writing : Rethinking the Law of Treaties

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Foreword

In the early 1990s I embarked on my doctoral project, initially aiming to figure out whether administrative agreements between branch ministries or other sub-national entities in different states could be considered treaties for purposes of international law. Thus, could an agreement between the Dutch and German waterboards, or between the Swedish Ministry of Defense and its Norwegian counterpart, be seen as treaties, subject to the workings of international law? This was, at the time, a topic of some relevance, discussed in the Dutch legal literature[1] but not much, it seemed, outside.[2]

I realized fairly quickly that in order to answer to answer that question, I would first need to figure out what a treaty was, and thus understood I would have read to works on the essence, the nature, the definition, or the concept of treaty in international law. Much to my surprise though, little literature was to be found: some articles, the odd introduction in a treatise on treaties, but no monographs, at least not in English, and at least not on the notion of treaty in international law[3]. And thus, I realized, the preliminary question became my main question, and accordingly I wrote and defended *The Concept of Treaty in International Law*[4].

Writing that thesis was not just a one-off: it sparked a decades-long bemusement concerning the law of treaties, for really, already on the question of what a treaty is, many different views exist, some better founded than others; and the more I started to look at other aspects of the law of treaties, the more I found things, opinions and approaches that did not seem to make much sense or, I started to realize, only made some sense upon first adopting some basic assumptions. This resulted in attempts to demonstrate that various actors (courts, including the EU courts[5]) had started to re-think bits and pieces of the law of treaties, but never comprehensively.

So when the Secretary-General of the Hague Academy of International Law invited me to teach a course in 2024, I suggested to do so on the law of treaties. The result is before you. The title is gratefully, if somewhat prematurely, borrowed from the wonderful Philip Allott, who debunked the myth that treaties are based on a 'meeting of the minds' by claiming that, instead, they represent "disagreement reduced to writing"[6]. This starting point, I will suggest, helps make sense of aspects of the law of treaties, but in the period between suggesting topic and title and actually presenting the lectures, I realized that there are other factors of relevance too. My own 'interim obligation' prevented me from reconfiguring the lectures completely (this would possibly have undermined the bargain struck between the Hague Academy and myself, so to speak), but I did feel the need to explore some other factors which may help explain why the law of treaties (more specifically, the Vienna Convention on the Law of Treaties) says what it says, and in particular why it is more suitable for simple, bargain-based contractual arrangements than it is for more complicated undertakings.

Two factors (additional to the foundational role of disagreement) seem to me to be of great relevance. The first is historical and conceptual: the VCLT was drafted by lawyers with relatively little familiarity with

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[1] J.C.E. van den Brandhof, "Administratieve overeenkomsten in het internationaal publiekrecht", *Nederlands Juristenblad,* 61 (1986); E.W. Vierdag, "Spanningen tussen recht en praktijk in het verdragenrecht", *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht*, 99 (1989); Jan Klabbers, "Het volkenrechtelijk convenant", *Nederlands Juristenblad,* 68 (1993).

[2] A rare exception was Jean-Pierre Plouffe, "Les arrangements internationaux des agencies et ministères du Canada", (1983) 21 *Canadian Yearbook of International Law*, 21 (1983).

[3] I did find an old study in French on, effectively, the concept of treaty in French law: Pierre Chailley, *La nature juridique des traités internationaux selon le droit contemporain,* Paris, Sirey, 1932, and some even older work in German: see Georg Jellinek, *Die rechtliche Natur der Staatenverträge,* Vienna, Hölder, 1880.

[4] Jan Klabbers, *The Concept of Treaty in International Law,* The Hague: Kluwer, 1996. While I was writing my doctoral work, Philippe Gautier published *Essai sur la définition de traité entre États,* Brussels, Bruylant, 1993.

[5] See in particular Jan Klabbers, "Re-Inventing the Law of Treaties: The Contribution of the EC Courts", *Netherlands Yearbook of International Law*, 30 (1999).

[6] Philip Allott, "The Concept of International Law", *European Journal of International Law,* 10 (1999), p. 43.

public law, but a far greater understanding of private law – and thus, the treaty was conceptualized as simply a contract between states, rather than as a legislative or regulatory instrument concluded between states. Second, the law of treaties is a highly formalist enterprise: it is almost totally devoid of any substantive considerations. This cannot and does not work (I will detail below how some oblique references to non-formalist factors have crept in), but has come to characterize much of the law of treaties.

I do not, in these lectures, address the entire VCLT. Important parts are only mentioned in passing: there is little attention for expressing consent to be bound, e.g., or for validity and invalidity[7]. Partly this is because some aspects are hardly addressed in the VCLT: it may have a provision on amendment (article 40), but this does not say much, other than elaborating on the position of states unwilling to accept particular amendments. Likewise, the provision on provisional application (article 25) merely outlines that provisional application may happen, leaving most of the relevant questions untouched. Partly also some provisions have fairly little applicability in the real world of international law and diplomacy. While a VCLT without rules on validity would have been incomplete, it is nonetheless the case that states rarely claim invalidity, and where all parties agree on it, the grounds for invalidity hardly play a role[8].

As a methodological note, in what follows I indicate where relatively unknown or obscure treaties can be found, but have refrained from clogging up the footnote apparatus with references to treaties that are widely available, such as the UN Charter, the EU treaties, or, indeed, the Vienna Convention. The footnotes contain references to the cases and to the literature (and on occasion can be somewhat digressing).

Finally, a word of caution. What follows represents, quite literally, an attempt at re-thinking the law of treaties. It does not add up to a full-fledged theory about the law of treaties – if such were possible to begin with. It is better seen as an attempt to come to understand why parts of the VCLT say what they say, how they work in practice, and why they work in *this* way rather than any other way. In the meantime, I am grateful to the Hague Academy for providing me with the opportunity to give these lectures; to the participants in The Hague for probing questions, sharing alternative perspectives and experiences, and for stimulating comments; and to Noora – she knows why.

[7] I have addressed this at some length elsewhere: Jan Klabbers, "The Validity and Invalidity of Treaties", in Duncan Hollis (ed.), *The Oxford Guide to Treaties*, 2nd edn, Oxford, Oxford University Press, 2020.

[8] Former UK Foreign Office lawyer Tony Aust recalled that during his "more than thirty-five years of practice", only once had a state suggested "that an existing treaty *might* be invalid." Anthony Aust, *Modern Treaty Law and Practice*, 2nd edn, Cambridge, Cambridge University Press, 2007, p. 312 (emphasis in original – JK).

CHAPTER I
MESSINESS IN THE LAW OF TREATIES

A. Introduction

The law of treaties, it can confidently be claimed, is a mess. Despite the conclusion, in 1969, of what seemed to be a fairly comprehensive 'treaty on treaties'[9], in many legal disputes and many diplomatic disputes alike, issues relating to the law of treaties prop up – and matters which seemed to have met with some regulation turn out not to have been very well-regulated at all. As any practicing international lawyer (and some international law academics[10]) will realize, there are few certainties in the law of treaties, despite centuries of experience and despite the existence of a well-established and fairly comprehensive convention on the topic: the Vienna Convention on the Law of Treaties (VCLT), concluded in 1969 and in force since 1980.

The present lectures aim to explore this messiness, both in terms of description (as not everyone seems convinced) and in terms of explanation, and the main explanation will be something to the effect of saying that the idea of 'treaty' on which the Vienna Convention is based is a very narrow idea. Consequently, the Convention has great problems addressing issues related to other treaties not fitting this narrow archetype (and this effectively means: most treaties). Related, the VCLT is also based on the false idea that treaties somehow involve agreement between states: this may hold true with respect to the narrow archetype – the sale of something by one state to another – but rapidly dissipates with more complicated undertakings. As a result, much of the law of treaties concerns techniques to manage disagreement among states: rules on treaty reservations, interpretation of treaties, and so on. These have all been the subject of a wide array of academic legal studies, but rarely from the perspective I have adopted: the idea, gratefully borrowed from Philip Allott, that treaties are mostly 'disagreement reduced to writing'[11].

1. Limited Political Imagination

It is a curious circumstance that the role of disagreement in politics is not often-studied to begin with. The suggestion of 'agreement' as the basis of law – international and domestic – has a strong hold on our political imagination, and dominates reflections on law-making – again whether domestically or internationally. This is not terribly realistic: to expect that the 100 members of the Senate of the United States of America or the 150 members of parliament sitting in the Dutch Second Chamber are on occasion in full agreement, let alone the 650 members of the House of Commons in the United Kingdom. What seems far-fetched is the possibility that these individuals, representing different constituencies, different ideologies, and different interests, somehow manage to reach unanimity; a form of wishful thinking best exorcised.

In domestic law and jurisprudence (though not in political philosophy perhaps) this may be explained by the overwhelming attention in legal scholarship generally for case-law and the role of appellate courts, as has been suggested[12]. One example is the well-known work by Sunstein on 'incompletely theorized agreements', addressing how the judiciary (rather than the law-maker) could, and perhaps should, strive to come to terms with a plurality of opinions[13].

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[9] Richard Kearney and Robert Dalton, "The Treaty on Treaties", *American Journal of International Law*, 64 (1970).

[10] See, e.g., Vaughan Lowe, "The Law of Treaties; Or, Should This Book Exist?", in Christian Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds.), *Research Handbook on the Law of Treaties*, Cheltenham: Edward Elgar, 2014.

[11] Allott (footnote 6), p. 43.

[12] Jeremy Waldron, *Law and Disagreement*, Oxford, Oxford University Press, 1999, pp. 8-10.

[13] Cass Sunstein, "Incompletely Theorized Agreements", *Harvard Law Review*, 108 (1995).

By contrast, international law can offer no such explanation ('excuse' being too strong a word). In international legal studies, much attention is devoted to law-making, with lots of work being devoted to the sources of international law, the various techniques of law-making, and assorted other questions[14], and these can range from strict positivist stalwarts[15] to more sociologically inspired work, carving out a niche for the participation of, e.g., non-state actors[16]. Against this background, it is all the more surprising that here too (and this includes scholarship in the neighbouring discipline of International Relations), the role of disagreement in academic work in negligible[17].

2. Agreement and Disagreement

'Agreement' and 'disagreement' can mean various things. One obvious reference is the complete and total identity of opinion between or among strangers, with all people involved being of the exact same opinion. This is understandably rare, and it would be unrealistic to take this as the yardstick. Instead, a useful working concept is offered by Besson. To her mind, a first characteristic of disagreement in the body politic should be its inter-subjective nature. People can possibly disagree with themselves or sit on the fence, but that is better framed as a dilemma, moral or otherwise, rather than as disagreement. Disagreement, thus, involves at least two actors. Second, Besson distinguishes disagreement over principles (or values, or the like) from disagreement over interests: disagreement in the body politic, domestic and international, is disagreement about the right thing to do; disagreement over interests is less, eh, interesting, unless given the form of disagreement over principle, if only because disagreement over interests is often based on social situated-ness: the employee may have different interests from her employer; the rich with three vehicles may have different interests from the automobile-less poor[18]. Plus, though Besson does not emphasize this, disagreement over interests can often be 'bought of', so to speak – at least hypothetically, the rich can agree with the (far more numerous) not-so-rich that they can find each other somewhere in the middle. With disagreement over values this is much more difficult: it is difficult to imagine a workable compromise among pro-life and pro-choice activists, for instance. Finally, disagreement needs to be made publicly known: people can, after all, decide to refrain from articulating their viewpoints for reasons of civility, for the sake of enabling compromise, et cetera – and this will often look as if they are in agreement, even when they are not. Matters will only come to a head when articulated and, in matters relating to international law-making and the law of treaties, the negotiations leading up to treaties are inevitably moments where the responsible negotiator will articulate his or her (or their government's[19]) position[20]. At the end of the day, much international law-making may be the result of what has been referred to as 'reasonable disagreement' (meaning: "disagreement that survives the best efforts of a group of reasoners to answer a particular question"[21]), but disagreement nonetheless.

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[14] See generally Catherine Brölmann and Yannick Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking*, Cheltenham, Edward Elgar, 2016.

[15] G.M. Danilenko, *Law-Making in the International Community*, Dordrecht, Martinus Nijhoff, 1993.

[16] Alan Boyle and Christine Chinkin, *The Making of International Law*, Oxford, Oxford University Press, 2007.

[17] But see Samantha Besson, "State Consent and Disagreement in International Law-Making: Dissolving the Paradox", *Leiden Journal of International Law*, 29 (2016).

[18] And there is a certain intellectual poverty about the sort of political science which reduces everything to interests. One notable attempt to offer an alternative is Hannah Arendt, *The Human Condition*, Chicago IL, University of Chicago Press, 1958.

[19] The thought that the representative always voices a government's opinion is an academic conceit. Often enough, representatives will have unclear instructions, contradictory instructions, or no real instructions whatsoever, in which case their personal attitudes will be of great relevance.

[20] Adapted from Samantha Besson, *The Morality of Conflict: Reasonable Disagreement and the Law*, Oxford, Hart, 2005, pp. 20-21.

[21] Christopher McMahon, *Reasonable Disagreement: A Theory of Political Morality*, Cambridge, Cambridge University Press, 2009, p. 2.

B. Putting the ILC to Work, Again

One indication that all is not well with the VCLT is the circumstance that several topics that had been addressed by the International Law Commission (ILC) in preparing the Convention, have in the meantime been sent back to the ILC for further study, reflection, and possibly guidance. This applies, e.g., to the provisional application of treaties.

1. Provisional Application

If and when parties to a new treaty are in a hurry to apply their newly created regime, they can, and sometimes do, provide that the treaty can be applied in whole or in part prior to its entry into force: this is referred to as provisional application. The topic is mentioned in the VCLT, in article 25, but it would be a stretch to say that article 25 actually regulates it. The provision merely states the facility of provisional application, and that it ends for a particular state when that state makes clear that it does not intend to become bound by the treaty concerned. The words are lapidary and not very helpful; small wonder then that when the issue arises, it tends to come with all kinds of unresolved questions, including such questions as to whether provisional application means the treaty concerned ought to be treated as binding during the period of provisional application, and what the role of domestic law here is[22]. After all, extended periods of provisional application of a treaty may have the side-effect of rendering domestic democratic law-making nugatory: a state can hypothetically circumvent a domestic legislation by agreeing, typically without parliamentary approval, to apply a contrary treaty provisionally – thus, it becomes relevant to enquire what domestic law holds of provisional application. And to be sure, while provisional application should be true to its label (i.e., 'provisional'), some treaties have been so applied for quite some time: the old General Agreement on Tariffs and Trade (GATT) for nearly half a century[23].

The latter issue in particular has come up repeatedly in arbitration under the Energy Charter Treaty (ECT), whose provisional application provision (article 45 ECT) holds that provisional application by a state should not be "inconsistent with its constitution, laws, or regulations" – and the inevitable follow-up question is whether this means that there is a gatekeeping provision somewhere in a state's public law (something to the effect that 'no provisional application of treaties shall be acceptable') or whether provisional application is subservient to any particular rule of domestic law. On the latter construction, provisional application can easily be nullified: in case of inconsistency with a domestic rule of environmental law, or administrative law, or tax law, or family law, the domestic rule would prevail.

In *Kardassopoulos* v *Georgia*, the arbitral panel opted for the first of these readings: "… article 45(1) is to be interpreted as meaning that each signatory State is obliged, even before the ECT has formally entered into force, to apply the whole ECT as if it had already done so"[24]. The Dutch Supreme Court reached much the same conclusion in 2021 in what is colloquially known as the *Yukos* case, but earlier stages in the *Yukos* saga had come up with different readings[25].

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[22] The *locus classicus* is René Lefeber, "The Provisional Application of Treaties", in Jan Klabbers and René Lefeber (eds.), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, The Hague, Martinus Nijhoff, 1998; a more recent monograph is Anneliese Quast-Mersch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature*, Leiden, Martinus Nijhoff, 2012.

[23] Related, and more complicated still, is the EU's practice to have treaties apply provisionally pending ratification by all those who need to ratify which, in the EU case, might involve the European parliament as well as its 27 member states and a few regional governments. For useful discussion, see Merijn Chamon, "Provisional Application of Treaties: The EU's Contribution to the Development of International Law", *European Journal of International Law*, 31 (2020).

[24] *Ioannis Kardassopoulos* v *Georgia*, ICSID Case No. ARB/05/018 (2010), § 211.

[25] *Russian Federation* v *HVY*, ECLI:NL:HR:2021:1645, § 5.2.1-5.2.21.

Clearly, the provision of article 25 VCLT is not very helpful, and when asked to look at provisional application again, the International Law Commission, responsible for the drafting of the VCLT, appointed its Mexican member Juan Manuel Gómez Robledo as special rapporteur. Six reports of special rapporteur (now Judge) Gómez Robledo later, the ILC adopted a set of guidelines. These make clear that a provisionally applied treaty is as binding as any treaty, but still remain opaque with respect to the domestic law question[26]. Guideline 10 stipulates that domestic law is no excuse for non-performance of an obligation during provisional application (the logical corollary to article 27 VCLT), with Guideline 11 stating that violation of a domestic treaty-making provision is no ground of invalidity except in certain very limited circumstances (the equally logical corollary to article 46 VCLT). Still, the clarity this provides can be undone when states introduce provisions such as article 45 ECT: Guideline 12 holds that states (and international organizations) retain the right to insist on limitations deriving from their internal law, without further specifying how far this can be taken. Thus, states could provide, hypothetically at any rate, that provisional application remains subservient to any provision of domestic law, effectively nullifying much of what there is to be applied provisionally. More to the point perhaps, they are still able to claim that any reference to domestic law must be interpreted in this manner.

2. Interpretation

Less obviously perhaps, the question of treaty interpretation has also been sent back to the ILC, although not under that heading but under reference to the passage of time. Special rapporteur (now Judge) Nolte dedicated several reports to questions relating to the passage of time, effectively discussing the meaning of notions such as ‘’subsequent practice’ and ‘subsequent agreement’[27]. And already earlier, a study group chaired by Martti Koskenniemi discussed the much-lamented ‘fragmentation’ of international law, effectively also addressing treaty interpretation, in particular in its endorsement of the ‘principle of systemic integration’[28]. Uniquely (at the time) for the ILC, none of this was ever meant to result in a new draft convention or even in guidelines; instead, and possibly as a result of the very nature of interpretation as a topic, the ILC’s work on these topics is better seen as academic in nature.

3. Jus Cogens

The most controversial aspect of the Vienna Convention is undoubtedly its article 53, introducing the notion of *jus cogens* into positive international law and, in so doing, introducing a vertical element into the, until then, strictly horizontal international legal order. The idea of *jus cogens* entails that states cannot agree, in law, to do horrible things together – which runs counter to the very idea of unlimited state sovereignty and accompanying freedom of contract. Hence the controversial nature of *jus cogens*, so controversial that it is the main reason why France has not even signed, let alone ratified, the VCLT[29]. Representing a community element in a bilateralized legal order, *jus cogens* provokes all sorts of fundamental questions. How can it come into being? Does it also bind those who object to the very notion, or to the *jus cogens* nature of any particular rule? If so, how can this be justified in a world of sovereign states?

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[26] Guide to Provisional Application of Treaties, A/CN.4/L.952/Rev.1, 15 July 2021.

[27] Conveniently brought together, with some further academic commentary, in Georg Nolte (ed.), *Treaties and Subsequent Practice*, Oxford, Oxford University Press, 2013.

[28] The report came out in book form as Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Helsinki, Erik Castrén Institute, 2007. The principle of systemic integration owes much to preliminary work by Campbell McLachlan, “The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention”, *International and Comparative Law Quarterly*, 54 (2005).

[29] Olivier Deleau, “Les positions francaises à la Conférence de Vienne sur le droit des traités”, *Annuaire Francais de Droit International*, 15 (1969).

The Draft conclusions adopted by the ILC in 2022 do not answer these questions, nor could they have been expected to[30]. The Draft Conclusions, prepared by special rapporteur (now Judge) Dire Tladi over five reports, do provide some practical clarity though, stipulating for instance that it is also possible that decisions and acts of international organizations may go against *jus cogens* (Conclusion 16); in such a case, the decision or act concerned shall have no obligatory force – curiously perhaps, the language of nullity or invalidity is here not employed. That decisions of international organizations violating a rule of jus cogens ought to have no obligatory force is eminently sensible: it would seem to follow from the very nature of jus cogens – if the international community cannot tolerate certain acts, it should not matter what type of instrument is concerned[31].

Likewise, it is recognized that unilateral acts of states manifesting to be bound by a norm violating *jus cogens* (Conclusion 15) shall "not create such an obligation" – again, the language of nullity and invalidity is shunned, explained here by the desire to capture unilateral acts "more broadly" than merely those immediately associated with law-making[32]. The ILC must have further considered it as exceeding its mandate to spell out that committing nasty acts in themselves would also be problematic. Currently, Conclusion 15 suggests that it would be wrong to accept an obligation to commit genocide (for instance), without saying much about actually committing genocide.

The Draft Conclusions do provide some clarity on the possible consequences of *jus cogens*, and that can only be welcomed. They do however little to illuminate the identification of *jus cogens* beyond what was already stated in the VCLT, and the question what to do with persistent objectors is left unaddressed, unless the term "universally applicable" in Conclusion 2 is code for also binding on those who do not accept the category of *jus cogens* or any particular norm as being of such a nature. This is indeed the case, according to the Commentary to the Draft Conclusions: "The universal applicability of peremptory norms of general international law (*jus cogens*) means that they are binding on all subjects of international law that they address, including States and international organizations"[33].

4. Reservations

Most prominently, the topic of reservations to multilateral treaties has been remanded to the ILC. This was, arguably, the main reason why the UN thought there might be a need for a convention on the law of treaties to begin with. In the same resolution in which the International Court of Justice was asked to render an advisory opinion on reservations to the Genocide convention, the General Assembly invited the ILC to prioritize its study of reservations[34]. As early as 1951, professor Brierly, the ILC special rapporteur on the law of treaties at the time, produced a dedicated brief report on reservations to treaties, complete with some draft articles. Brierly set the tone for much of the subsequent debate, positing the issue of reservations as one involving the tension between universality of parties (thus endorsing reservations) and integrity of the regime (thus limiting reservations)[35].

This tension between integrity and universality has never really been resolved. Attempts to shed further light on the issue of reservations, whether by the ICJ in its 1951 advisory opinion, the work of the ILC on the

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[30] Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens), UN Doc. A/77/10.

[31] It has been argued before the ICJ that a Security Council resolution ought to be invalidated for conflict with *jus cogens – in casu,* the ICJ did not address the point. See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*, further request for the indication of provisional measures, [1993] ICJ Reports 325.

[32] Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens), Commentary (footnote 30), p. 61.

[33] *Ibid*., pp. 22-23.

[34] UN GA Res. 478(V), 16 November 1950.

[35] UN Doc. A/CN.4/41, §§ 11-12.

VCLT, or the seventeen (!) later reports drafted by special rapporteur Alain Pellet and culminating in the publication of a Guide to Practice on Reservations to Treaties. While the tension between integrity and universality makes intuitive sense[36], it may actually have served mostly as a red herring[37] – below I will suggest that the VCLT actually deals with the topic of reservations as well as is possible, and that the source of the widespread discontent with the VCLT's regime resides elsewhere[38]. Be that as it may, it is clear that reservations are considered a pivotal part of the law of treaties, and a part not addressed to great satisfaction. In addition to discussing it in the run up to the VCLT, it is listed in two different places in the analytical guide to the ILC's work – the only topic carrying this distinction[39]. The first refers to the early 1950s work of professor Brierly, while the second refers to the work (those seventeen reports) of professor Pellet. In particular the separate reference to Brierly's work is remarkable: it suggests that the issue of reservations was considered of the utmost importance, given that he was working on the law of treaties generally at any rate.

5. Non-Legally Binding Agreements

In 2022, the ILC took a fifth issue emanating from the VCLT: the very concept of treaty, under the heading of 'non-legally binding international agreements'. As will be discussed later, since the 1950s it is considered a policy option for states to conclude not merely treaties, but also enter into agreements that would nonetheless remain outside the reach of the law: binding on some level or under some normative system, but somehow not *legally* binding. The ILC appointed its member professor Mathias Forteau as special rapporteur, who published his first report in 2024. The circumstance that the ILC chose to take this on is mildly puzzling: if those agreements are non-legally binding, then why would an organ tasked with codifying and developing the law even be interested? The most likely answer is in order to clarify, or to police, the boundary between the legal and the non-legal, as it is clear that quite a few boundary questions are raised in the practice of states[40].

C. Some Further Messiness

1. The Interim Obligation

Even where matters have not been sent back to the ILC, the VCLT does not always offer convenient practical solutions. It remains unclear, e.g., how the interim obligation of article 18 (the obligation not to defeat the object and purpose of a treaty pending ratification or entry into force) applies to general, standard-setting conventions. Is a state about to join the Chemical Weapons Convention (CWC) free to continue stockpiling chemical weapons pending the CWC's entry into force for that state? On the face of it, it is

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[36] To heed MacIntyre's warning: intuition alone usually does not offer a good explanation ("… the introduction of the word 'intuition' by a moral philosopher is always a signal that something has gone badly wrong with an argument"). See Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2nd ed., London, Duckworth, 1985, p. 69.

[37] Interestingly, while still framing the matter in terms of the tension between universality and integrity, Brierly later maintained that a practical solution based on something coming close to an unanimity rule, therewith prioritizing the integrity of the incipient regime. See J.L. Brierly, *The Law of Nations*, 6th edn, Oxford, Clarendon Press, 1963, p. 324.

[38] See chapter 4 below.

[39] At least within the law of treaties strictly speaking. The topic of the most-favoured-nation clause (which has law of treaties connotations as well) has also graced the ILC's agenda twice.

[40] The Commission also addressed several matters deliberately left outside the VCLT over the years. These concern treaties concluded with or between international organizations (resulting in the conclusion of the 1986 VCLTIO, not in force) and the effects of state succession on treaties (resulting in a 1978 Convention, barely in force). More recently, it tackled the effects of armed conflict on treaties.

difficult to accept that such stockpiling would 'defeat the object and purpose' of the CWC. As long as the state gets rid of its arsenal from the moment of entry into force, it would seem that continued stockpiling pending entry into force is a meaningless activity: a silly waste of money on the part of that state, assuming of course it takes seriously its legal obligation commencing with entry into force[41]. For that is the moment at which stockpiling and ownership become prohibited, not before.

2. Treaty Conflict

The VCLT also offers a less than fully adequate regulation of treaty conflicts, i.e. when a state is bound by a treaty that instructs it to 'do X', and simultaneously to a different treaty saying 'do not do X' or, as the case may be, 'do non-X'[42]. The VCLT, confirming the supremacy of the UN Charter[43], works well when the parties to conflicting treaties are identical: if A and B have a treaty superseded by a conflicting one, the later in time is bound to prevail. This is eminently sensible, as the later in time contains the most recent political configuration of their mutual relationship. But the VCLT is at a loss when the treaty relationships involve a third party: a treaty conflict involving a treaty between A and B and a conflicting one between A and C is not easily solvable – the Vienna Convention is of little help here.

3. Third Parties

The classic maxim *pacta tertiis nec nocent nec prosunt* is embodied in the VCLT, and in all its simplicity works reasonably well: treaties shall create neither rights nor obligations for third parties without their consent[44]. There is no question of making an exception for treaties aiming to protect a common good (however defined), and the rule is kept simple and straightforward: whenever a right or obligation for third parties is envisaged, their consent is required, even if consent can take on different forms. And yet, below the surface there is a sizeable issue left unregulated by the VCLT and even largely undiscussed: what if at issue is not the creation of a right or an obligation, but something else? Or, more accurately perhaps, what if the situation is framed in terms not involving rights or obligations for third parties? The Antarctic regime is but one example of such a situation, as are international organizations[45].

4. Breach

The Vienna Convention is also not very helpful on breach of treaty. If, classically, a breach by one party to a treaty justifies non-performance by the other side (*inadimplenti non est adimplendum*), the VCLT has not incorporated this particular idea – although it undoubtedly stands as customary international law[46]. Instead,

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[41] Jan Klabbers, "Strange Bedfellows: The "Interim Obligation" and the 1993 Chemical Weapons Convention", in E.P.J. Myjer, (ed.), *Issues of Arms Control and the Chemical Weapons Convention*, The Hague, Martinus Nijhoff, 2001. It would seem this disquiet with my conclusion was occasioned by a fear of some parties possible acting in bad faith. See, e.g., E.W. Vierdag, "Comments on the Paper by Jan Klabbers", in *ibid*., pp. 31-34.

[42] Valentin Jeutner, *Irresolvable Norm Conflicts in International Law*, Oxford, Oxford University Press, 2017.

[43] It confirms the supremacy of the UN Charter, laid down in article 103 UN. For useful discussion, see Rain Liivoja, "The Scope of the Supremacy Clause of the United Nations Charter", *International and Comparative Law Quarterly*, 57 (2008).

[44] Ronald Roxburgh, *International Conventions and Third States: A Monograph*, London, Longmans, Green and Co., 1917; Christine Chinkin, *Third Parties in International Law*, Oxford, Oxford University Press, 1993.

[45] The ICJ, unsurprisingly, was struggling with this in *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, [1949] ICJ Reports 174, eventually holding that the UN had an 'objective' existence because it was established by the "vast majority" of states then in existence (at 185).

[46] So too Omer Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, Oxford, Clarendon Press, 1988, p. 152. Unfortunately, Elagab holds that this is the case with 'material' breaches, but the context makes clear he is not employing here the definition of article 60 VCLT.

the VCLT introduces the new notion of the 'material breach of treaty', defined as a breach of a provision essential to the accomplishment of a treaty's object and purpose. This raises the specter of grave breaches of non-essential provisions going un-remedied, while relatively minor breaches of essential provisions might result in some kind of action[47].

Moreover, as the *Rainbow Warrior* incident indicates, often enough the remedy offered by the VCLT is the last thing the aggrieved party wants. In *Rainbow Warrior*, two French government agents were held on a French military base, and could only be taken off with New Zealand's permission (they had, after all, been sentenced to a lengthy prison term in New Zealand before being sent to the military base by way of diplomatic goodwill gesture). Both were taken off by the French without New Zealand's permission. This would have entitled New Zealand to terminate the agreement, but obviously this is not what New Zealand wanted: instead, it wanted the two to sit out the remainder of their sentences. This, though, never happened[48].

More generally, the vocabulary and arguments offered by the VCLT to facilitate responses by states wishing to temporarily (or definitively) to escape from treaty obligations they consider onerous are considerably less often invoked, so it seems, than arguments offered by the law of responsibility. Binder observes that states are more likely to justify suspensions or termination by invoking 'necessity' or 'force majeure' than to rely on articles 61 and 62 (or 60, for that matter) of the VCLT, addressing a supervening impossibility of performance and a fundamental change of circumstances, respectively, while tribunals are likewise a little more generous in upholding responsibility-based claims[49].

D. The Coverage of the Law of Treaties

There is a marked tendency to limit the universe of the law of treaties to the VCLT. This, after all, has the advantage of having been written down and of being fairly widely ratified, suggesting that it offers solutions and techniques that are widely embraced in diplomatic practice. But as the above has already suggested, things may get a little complicated when stepping outside the VCLT and, inevitably, sometimes doing so is needed.

1. Customary International Law?

It is widely accepted that the VCLT is largely identical to the customary international law of treaties, but 'largely identical' is not the same as saying 'fully identical'. There are several issues here vying for prominence. The first is whether the VCLT reflected customary international law at the time of its conclusion, and here the answer must be that such is implausible. The VCLT was needed precisely to create some order on certain topics (such as means of expressing consent to be bound[50], or reservations), which entails that these were not based on identical or even near-identical customary rules.

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[47] Jan Klabbers, "Side-Stepping Article 60: Material Breach of Treaty and Responses Thereto", in Matti Tupamäki (ed.), *Essays on International Law*, Helsinki, Finnish Branch of ILA, 1998.

[48] See further Jan Klabbers, "Revisiting *Rainbow Warrior*: Virtue and Understanding in International Arbitration", in Guilherme Vasconcelos Vilaca and Maria Varaki (eds.), *Ethical Leadership in International Organizations: Concepts, Narratives, Judgment, and Assessment*, Cambridge, Cambridge University Press, 2021.

[49] Christina Binder, "Stability and Change in Times of Fragmentation: The Limits of *Pacta Sunt Servanda* Revisited", *Leiden Journal of International Law*, 25 (2012). She does not address how this aligns with article 42 VCLT, which aims to keep the VCLT closed off from interference by the law of responsibility. On this, see Jan Klabbers, "Reluctant *Grundnormen*: Articles 31(3)(c) and 42 of the Vienna Convention on the Law of Treaties and the Fragmentation of International Law", in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *Time, History and International Law*, Leiden, Martinus Nijhoff, 2007.

[50] On this, see J. Mervyn Jones, *Full Powers and Ratification*, Cambridge, Cambridge University Press, 1946. Suggesting prevailing unclarity, several international lawyers who would later become very prominent wrote their

A second question that emerges is whether the rules of the VCLT themselves have crystalized into rules of customary international law. This is almost impossible to ascertain with any degree of precision: to the extent that the VCLT contains residual rules, i.e. rules that may be departed from, one can only stipulate that VCLT rules that are rarely departed from may have generated the sort of state practice and *opinio juris* that is required for the creation of customary rules. This applies *ex hypothesi* to the interim obligation, but tribunals, on the rare occasions where they have been called upon to apply the interim obligation, seem to have refashioned the rule to such an extent that one can hardly maintain that the rule of article 18 has, as such, given rise to a new customary rule[51].

And some of the VCLT's rules are more in the nature of methodological instructions to the users of the VCLT, in particular perhaps the rules on interpretation, embodied in articles 31 and 32 VCLT. These tell treaty interpreters how best to approach interpretation, but do not create hard and fast obligations for states. Those treaty interpreters, moreover, can be just about anyone: it may concern states (or, more likely, their officials), but also others, ranging from courts and tribunals to academics and the general public- there is no limit as to who can interpret, although some interpretations will be more authoritative than others, either because of their plausibility or because of the status of the interpreters. These 'rules' are, moreover, very open-ended, so much so that it is generally difficult to accuse anyone of having come up with a 'wrongful' interpretation[52]. And as a result of all this, no one has ever been held responsible for misinterpreting a treaty provision[53], and obviously such an allegation would have to accompany an allegation that some substantive rule has been violated. One cannot, logically speaking, have a wrongful interpretation yet perform the obligation concerned in rightful manner[54]. And if that is so (if interpretation and application perfectly overlap), then there is little to be gained by separating the two.

But the bigger issue is quite possibly the circumstance that certain rules exist as customary rules applicable to treaties without having a VCLT counterpart. The VCLT's preamble makes clear that the VCLT does not displace the customary international law of treaties altogether: the parties to the VCLT affirmed that "the rules of customary international law will continue to govern questions not regulated" by the VCLT[55].

The leading example is perhaps, as mentioned above, the *inadimplenti non est adimplendum rule*. This has not really found a way into the VCLT, and yet is generally considered a well-established rule, one that, moreover, embodies elementary fairness, as highlighted by Judge Anzilotti in the 1937 *River Meuse* case[56]. The drafting history of article 60 VCLT suggests[57] that many jurists were agreed that the rule should be covered, but only in cases of serious breach – which then came to be called 'material', and came to defined

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doctoral works related topics while the VCLT was being drafted: Hans Blix, *Treaty-Making Power*, London, Stevens and Sons, 1961; Luzius Wildhaber, *Treaty-Making Power and Constitution: An International and Comparative Study*, Basle, Helbing and Lichtenhahn, 1971.

[51] Jan Klabbers, "How to Defeat the Object and Purpose of a Treaty: Toward Manifest Intent", *Vanderbilt Journal of Transnational Law*, 34 (2001). Villiger, who holds that article 18 already was generally accepted as customary prior to the VCLT's conclusion, is more sanguine: Mark E. Villiger, *Customary International Law and Treaties*, Dordrecht, Martinus Nijhoff, 1985, pp. 320-321.

[52] Andrea Bianchi and Fuad Zarbiyev, *Demystifying Treaty Interpretation*, Cambridge, Cambridge University Press, 2024.

[53] A pioneering exploration of the idea of 'misinterpretation', albeit in a different context, is Noora Arajärvi, "Misinterpreting Customary International Law: Corrupt Pedigree or Self-Fulfilling Prophecy?", in Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds.), *The Theory, Practice, and Interpretation of Customary International Law*, Cambridge, Cambridge University Press, 2022.

[54] Unless, of course, if the mistaken interpretation gets mistakenly applied, as when two wrongs somehow make a right. This however presupposes a serious degree of separation between the interpretation of a rule and its application – a separation which does not seem altogether plausible.

[55] VCLT preamble, final consideration.

[56] *The Diversion of Water from the Meuse*, [1937] Publ. PCIJ, Series A/B, No. 70, at 50.

[57] See ILC 1966 Report, in *Yearbook of the International Law Commission* (1966/II), draft with commentaries, article 57.

in an unhelpful manner[58]. Based on the wording of article 60, insisting that a 'material' breach is one that relates to a provision essential for the accomplishment of the treaty's object and purpose, it is unlikely that a serious breach or a grave breach can be accepted, unless it happens to be a breach of such a formally important provision. The sentiment is obvious and possibly laudable; the formulation however far from helpful.

It also seems to be the case, ironically as we will see, that the drafters somewhat desperately tried to adapt the *inadimplenti* rule to multilateral treaties, given the idea that a material breach entitles all parties to respond, and that special provision is made for treaties of a humanitarian character. The irony is that the VCLT is generally designed to cover contractual arrangements, as I will argue in the next chapter, and that the one time when it seriously aspired to cater to multilateral agreements containing integral obligations[59], it could not hold on to the *inadimplenti* rule - one of the elementary contractual ideas. Either way, the net result is that the *inadimplenti* rule does not really align with the definition of material breach, and thus must be deemed to exist outside and alongside the VCLT – such is a better conceptualization than aiming to squeeze it into an unfortunate formulation.

2. Outside the Scope of the VCLT

And then there are some topics deliberately left outside the scope of the VCLT, but without suggesting that these are not, somehow, law of treaties issues – although one can often also see them as related to something else[60]. Most prominent of these is the topic of the effect of war (armed conflict) on treaties, kept outside the VCLT largely because the ILC was of the opinion that the topic belonged to "a quite distinct part of international law"[61], by which in all likelihood the law on the use of force was meant. In 1966, when the ILC issued its final report, the article concerned (then article 70 of the draft) specifically addressed matters relating to aggressor states; only later would the topic be more generalized, though the special case of the aggressor state has retained its place in the VCLT, in article 75.

Be that as it may, and despite the explicit provision of article 73 that the VCLT "does not prejudge" any question arising in relation to a treaty from the "outbreak of hostilities", nonetheless sometimes the outbreak of hostilities has on occasion been 'imported' into discussions of VCLT provisions, most notably perhaps the doctrine of the fundamental change of circumstances. Here, the outbreak of hostilities is sometimes seen as such a fundamental change, allowing a state to invoke it as a ground for unilateral termination of a treaty[62]. This is curious, and somewhat unsatisfactory perhaps: it brings back in, through the backdoor so to speak, something not allowed in through the front door. It would be more transparent to treat the effect of outbreak of hostilities on treaties as part of the customary law of treaties.

In essence, something like this has been done with two other parts of the law of treaties more broadly conceived. The first of those is, like the outbreak of hostilities, expressly exclude through article 73 VCLT, and relates to the effect of state succession on treaties. Here, the ILC drafted a separate convention, to be

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[58] See also Shabtai Rosenne, *Breach of Treaty*, Cambridge, Grotius, 1985, and Mohammed Gomaa, *Suspension or Termination of Treaties on Grounds of Breach*, The Hague, Martinus Nijhoff, 1996.

[59] By this I mean obligations that cannot be dispersed over dyads of states, although article 60 contains a trace of this as well when specifying that the rule may apply in multilateral regimes solely to the relation between the injured and defaulting states.

[60] For a comprehensive discussion covering also such topics as the position of individuals and the notion of intertemporal law, see Shabtai Rosenne, "Unaddressed Issues in the Codified Law of Treaties", reproduced in Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986*, Cambridge, Cambridge University Press, 1989.

[61] ILC 1966 (note 57), p. 268.

[62] The European Court of Justice has done so in Case C-162/96, *Racke* v *Hauptzollamt Mainz*, ECLI:EU:C:1998:293. In a similar move, Oeter brings state succession under the fundamental change of circumstances rubric, despite state succession too having been explicitly left outside the VCLT. See Stefan Oeter, "German Unification and State Succession", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 51 (1991).

concluded in 1978 and in force since 1996, with only the bare minimum of parties. The convention is generally not considered very successful: having required only fifteen instruments of ratification in order to enter into force, in October 2024 it still has only 23 parties. The provisions of this Vienna Convention on the Succession of States in Respect of Treaties deal with a topic that can hardly be said to be "of norm-creating character", to invoke the phrasing of the *North Sea Continental Shelf* cases, as many of the consequences of state succession will eventually have to be addressed through inter-state agreement between the new state and the treaty partners concerned. In addition, it captures rather different phenomena under the same heading: from merger of states to decolonization, from secession to dissolution – as a result, it is unlikely that many general rules can even exist.

Also left out of the VCLT but addressed separately by the ILC is the law of treaties as it relates to international actors other than states or, as article 3 has, with or between "other subjects of international law". Liberation movements, for one, are known to conclude treaties, as are governments in exile, and international organizations. For the latter group, a dedicated Vienna Convention has been concluded in 1986 (the Vienna Convention on Treaties Concluded with or between International Organizations, or VCLTIO), but this has yet to enter into force. Its provisions follow largely those of the VCLT, making due reference on occasion to 'international organizations' rather than states, but not substantively different. As a result, there is a close link between the VCLT and this 1986 VCLTIO, and at least the EU Court of Justice, when concerned with questions about the EU's treaties with third parties[63], often refers to the customary law of treaties which it then identifies with the VCLT. And this may help explain, in turn, why there is such a strong tendency to consider the VCLT as the expression and embodiment of the customary international law of treaties.

The current set of lectures will, like so many other studies on the law of treaties, focus predominantly on the VCLT, but not in a terribly rigid way. Some practice takes place at the edge of the VCLT (think, for instance, of the non-legally binding agreement), and some principles may or may not be encompassed by VCLT rules – here the *inadimplenti non est adimplendum* principle may be an example, as may be the *lex specialis* rule. Either way, these warrant some discussion in what follows.

E. Causes of Messiness

The fact that no less than five topics addressed in the VCLT have been sent back to the ILC for further discussion, clarification or refinement suggests that all is not well with the VCLT. Likewise, the issues touched upon above with respect to treaty conflict, objective regimes, the interim obligation, and breach, suggest that all is not very well. While occasionally discussions taking the measure of the VCLT seem to indicate that on balance, it has proved quite successful, this is only accurate on the surface level[64]. The VCLT functions; it works; states keep concluding treaties; and they keep invoking the VCLT, at least nominally. Underneath the surface however, things seem to be brewing. This raises the obvious question: if the VCLT is indeed in a state of disarray, then what causes this? As with most things in life, there will be a collusion of several factors – uni-causality is a rare thing.

1. Residual Rules

[63] Seminal on these is Mario Mendez, *The Legal Effect of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, Oxford, Oxford University Press, 2013.

[64] Marcelo Kohen, "La codification du droit des traités: quelques éléments pour un bilan global", *Revue Générale de Droit International Public*, 106 (2000); see also Azaria's depiction of the VCLT as a "ground-breaking achievement", in Danae Azaria, 'The International Law Commission's Return to the Law of Sources of International Law', *Florida International University Law Review*, 13 (2019), p. 991.

A first observation needs to be that the VCLT regime will by definition be stretched somewhat. Many (nay, most) of its rules are residual in nature – meaning that states are free to adopt their own solutions, but can fall back on the VCLT if no own solutions are developed. And this entails, in turn, that the VCLT is most often called upon when things have become problematic and states have been unable to see eye to eye on particular issues. On reservations, e.g., it is widely accepted that states are free to develop their own regimes. They can agree not to allow any reservations to their treaty, an option employed for instance in the Chemical Weapons Convention, article XXII of which proclaims that the "Articles of this Convention shall not be subject to reservations." They can also agree to allow reservations to some articles but not to others, a practice approved by the ICJ in the *North Sea Continental Shelf* cases[65]. In either of these situations, the VCLT has no work to do; the parties have done the work themselves, so to speak.

But the VCLT will be relied on when the parties, for some reason, have not developed their own regime on reservations. Hypothetically this can be the result of a lack of time or interest; in practice, it will mostly be because states just cannot decide on these matters together (they disagree), or because they realize the safety net of the VCLT is available so they do not have to decide for themselves, leaving the VCLT with the sheer impossible task of managing a fundamental lack of agreement.

2. The Contractual Analogy

But apart from this obvious structural issue, flowing from contractual freedom and respect for sovereignty, it would seem that the problems with the VCLT typically arise when more than two parties are concerned, either because of third party effects (in one way or another, and despite the *pacta tertiis* rule), or because a multilateral agreement is at issue. Recall that solving a treaty conflict involving the same parties is relatively straightforward; but that solving such a conflict when the contracting parties are not identical, is much more problematic. Reservations to treaties (almost) by definition involve multilateral agreements – a proposed reservation to a bilateral agreement would merely mean a renewed offer, in contractual terms.

And this suggests that there might be something in the structure of the VCLT which affects the workings of the VCLT's provisions and their success or lack thereof. The Convention has a far easier time handling bilateral and contractual arrangements; it is rather obviously based on a contractual analogy[66]. This was never, it seems, a conscious decision; rather, the drafting of the convention suggests that the mindset of drafters, their background assumptions and experiences, their *Vorverständnisse* ('pre-understandings'), to use a phrase from hermeneutics, play a pivotal role.

The ILC, tasked with drafting the VCLT, employs a system of special rapporteurs. It appoints one of its members to report on a topic and propose draft articles, which then get discussed by the ILC and, at some point, possibly submitted to a diplomatic conference – although in recent decades other outcomes have also been produced, ranging from reports to guidelines. It so happens that the four special rapporteurs on the law of treaties all hailed from the United Kingdom, with one partial exception. The first was J.L. Brierly, the Chichele Professor of international law at Oxford. Brierly was succeeded by Sir Hersch Lauterpacht, then the Whewell Professor of International Law at Cambridge. After Lauterpacht was called to the bench, having been elected to the ICJ, he was succeeded by Sir Gerald Fitzmaurice, then the legal advisor at the Foreign and Commonwealth Office; and when, after Lauterpacht's death, Fitzmaurice was elected to the ICJ, he was in turn replaced by Sir Humphrey Waldock, who had by then succeeded Brierly as the Chichele Professor of

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[65] *North Sea Continental Shelf Cases* (Federal Republic of Germany v Netherlands; Federal Republic of Germany v Denmark), [1969] ICJ Reports 3.

[66] This analogy goes back to Roman times, if not earlier. See, e.g., Harold Nicolson, *The Evolution of Diplomacy*, New York, Collier, 1954, p. 26. For a classic discussion, see Evangelos Raftopoulos, *The Inadequacy of the Contractual Analogy in the Law of Treaties*, Athens, Hellenic Institute of International and Foreign Law, 1990; also highly critical is Akbar Rasulov, "Theorizing Treaties: The Consequence of the Contractual Analogy", in Tams, Tzanakopoulos and Zimmermann (eds.) (footnote 10).

International Law at Oxford. All four had been trained and educated in a legal system not known for its public law affinities – Martin Loughlin could write with bite that "[m]odern British history is based on a rejection of public law", and a few paragraphs later that Britain's constitutional lawyers "have concluded that public law does not exist"[67].

Brierly, in his later academic work, was still fairly outspoken. He started the chapter on treaties of his classic textbook by referring to them as "[c]ontractual arrangements between states", and when it came to the formation of treaties, he maintained to a large extent "the principles applicable to private contracts apply"[68]. His successor as special rapporteur, Hersch Lauterpacht, was the only one who had not received his initial training in England. Lauterpacht was born in Eastern Galicia, and had initially been trained in Vienna, where he also wrote his doctoral dissertation. Still, by the time of his appointment as special rapporteur he had been in the UK for decades, and that same doctoral thesis had already addressed private law analogies, with the published version somewhat bluntly positing that the "legal nature of private law contracts and international law treaties is essentially the same"[69].

In other words, having been the brainchild of four UK-based special rapporteurs, all well versed in private law if only because public law thinking was not stimulated in the UK, it is no surprise that the VCLT came out the way it did. Put differently, had the VCLT been drafted by a succession of German special rapporteurs, with their long tradition in public law, the VCLT could possibly have looked rather different indeed. But it was not, and the contractual analogy is strongly present.

What is more, the contractual concept, the 'archetype' treaty in the VCLT, is a very limited, straightforward contractual arrangement, one where state A sells something (territory, equipment) to state B – and that is it. This should not come as a surprise: in domestic law generally, the notion of contract is a broad church, which is habitually made to 'squeeze' arrangements into the same category which may not have all that much to do with each other, also suggesting there is a contractual archetype and a number of more or less related and similar-looking phenomena orbiting around the archetype. This applies most obviously to marriage, which is both a contract of sorts and something beyond; but also contracts of employment are somewhat different from the typical sale. The same applies to hopping on a train: buying a ticket is part of a transaction, but differs from buying a house or a car. Likewise, buying an insurance policy fits the traditional model awkwardly, never mind the contractual arrangement entered into whenever computer software demands acceptance of an update[70]. Then there are franchise agreements, or landlord-tenant agreements, or pre-marital agreements: again, all contracts, but all different[71]. Taken together these examples show that the notion of 'contract' is itself less than fully uniform. Patrick Atiyah, in turn, noting that while multiparty *transactions* are not very common, nonetheless observes that multiparty *relationships* are quite common: partnerships, companies, social clubs – and with these, he observes, contract law "has had a lot of trouble"[72].

F. Responses to Messiness

[67] Martin Loughlin, *The Idea of Public Law*, Oxford, Oxford University Press, 2003, pp. 2, 3 respectively.

[68] Brierly (footnote 37), p. 317. Elsewhere in the same work he draws an explicit analogy between the international rules on acquisition of territory and the Roman law rules on property (p. 20). Note that this sixth edition was prepared by Waldock, Brierly's successor at Oxford and the final special rapporteur on the law of treaties.

[69] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law*, London, Longmans, Green & Co., 1927, p. 156.

[70] Some of these examples are derived from Charles Fried, *Contract as Promise: A Theory of Contractual Obligation*, Cambridge MA, Harvard University Press, 1981, p. 3.

[71] See also Brian Bix, *Contract Law: Rules, Theory, and Context*, Cambridge, Cambridge University Press, 2012, pp. 119-127.

[72] Patrick Atiyah, "The Modern Role of Contract Law", reproduced in Patrick Atiyah, *Essays on Contract*, Oxford, Clarendon Press, 1986, p. 7.

1. *Renvoi*

The messiness of the VCLT has provoked several responses, none of them very helpful. Sending matters back to the ILC is an understandable response, and taps into the typical kneejerk reflex of the international lawyer confronted with a gap or a problem: create more rules or better rules (or propose a tribunal). Yet, this is of little assistance when the issue is structural, as I believe it is. The very concepts underlying the VCLT do not allow for quick fixes. If the problem is that the VCLT is founded on an archetypical simple bargain model, then any agreement departing from this model will have a hard time aligning with the VCLT. In much the same way as a train that is not made for a particular track width, or software that is incompatible with a particular operating system, where the problem is a mismatch between the kind of treaty and the model underlying the VCLT, tinkering at the margins will not do. It may create the suggestion that somehow something is being done, but without much chance of success.

2. *Focus on Practical Issues*

A different response, equally problematic in the end, is to focus on practical problems. This resembles the ostrich putting its head in the sand, or the surgeon approaching broken bones with a few plasters. The reflex to do so is all too human perhaps (if we cannot truly understand what causes the ailment, then at least let us solve practical issues), but it ignores, again, the structural nature of the issues. One recent example can be found in the first report of special rapporteur Forteau, who enthusiastically advocates a practical approach, well aware of the theoretical issues thus circumvented or ignored: "… it is imperative that the Commission [the ILC – JK] … focus on the *practical* aspects of the present topic, without getting lost in exclusively theoretical considerations – however interesting they may otherwise be"[73]. The problem with this is that those practical aspects cannot properly be addressed without adopting a least a perspective on the underlying theoretical questions, and aiming for practical solutions already implies taking a stand on the underlying 'theoretical' question. In this case, the question whether the notion of a non-legal yet binding agreement is even possible, gets answered by focusing on practical questions that emerge from accepting the very distinction between legally binding and non-legally binding agreements – it is premised on the thought that this distinction is meaningful to begin with[74]. In doing so, it pre-empts further discussion, taking sides in a theoretical debate of great practical importance without actually making any argument.

3. *Ignorance Can Be Bliss*

Yet a third disciplinary response is again reminiscent of ostrich politics: there is surprisingly little literature available on such topics as breach of treaty[75] or objective regimes[76], and attempts to theorize the law of treaties more generally are close to non-existent.[77] There is a little more literature on treaty conflicts,

[73] Forteau I, 3 (emphasis in original).

[74] Then again, I would say this: see Klabbers (footnote 4).

[75] But see Gomaa (footnote 58).

[76] In a slightly different vocabulary, see Surya Subedi, *Land and Maritime Zones of Peace in International Law*, Oxford, Clarendon Press, 1996.

[77] Two hefty and fairly recent self-styled handbooks on international legal theory lack a separate chapter dedicated to the law of treaties: see Alexander Orakelashvili (ed.), *Research Handbook on the Theory and History of International Law*, Cheltenham, Edward Elgar, 2011; and Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford, Oxford University Press, 2016.

but not nearly as much as one could expect[78], not even when the related literature on the fragmentation of international law is included[79].

By contrast, much ink has been spilled on both reservations, and interpretation. The former was to be expected perhaps: ever since the launch of the VCLT's regime, it has been criticized as tilted in favour of the state proposing a reservation, and as a result, of 'ruining' multilateralism, in particular perhaps ruining human rights regimes[80]. Hence, many studies have appeared aiming to make sense of the reservations regime: the political salience of human rights alone all but guaranteed this[81]. And insightful as some of these works may be, they either fail to comprehend what makes the regime work, or fail to present an alternative proposition – and sometimes both.

Much more surprising is that much ink has been spilt, in one way or another, on interpretation as well. Prior to the conclusion of the VCLT this was not a topic that much was written about: one is hard-pressed to find even a single monograph in English on interpretation written until the turn of the century[82]. Even the first two decades or so after the VCLT entered into force did not see many dedicated studies emerge, and truth be told, the special rapporteurs were not particularly enthusiastic either[83].

At some point though, the floodgates opened, with monographs appearing on interpretation of specified regimes[84], general studies on how best to understand the rules of the Vienna Convention[85], the theory and philosophy of interpretation[86], as well as the role of institutional actors[87] and the interpretation of international legal rules other than treaty provisions[88]. And what is more: many scholarly articles on a wide variety of topics habitually include a section nowadays on the rules of interpretation and how these have guided them to their particular reading of the provision at hand – and courts and tribunals do much the same[89].

It is difficult to fathom exactly why this is the case. The suspicion arises that it may owe much to concerns of power: whoever controls the process of interpretation controls the process of giving meaning to

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[78] A brilliant analysis is offered by Guyora Binder, *Treaty Conflict and Political Contradiction: The Dialectic of Duplicity*, New York, Praeger, 1988; procedural mechanisms are suggested by Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law*, Berlin, Springer 2003,, with more general solutions on offer in Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties*, Leiden, Martinus Nijhoff, n.y.; an excellent critical analysis is offered by Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law*, Cambridge, Cambridge University Press, 2015; while treatment by Dutch courts is discussed in Jan Mus, *Verdragsconflicten voor de Nederlandse rechter,* Zwolle, Tjeenk Willink, 1996.

[79] The *locus classicus*, emerging from out of the ILC, is Koskenniemi, (footnote 28); a systems theoretical discussion is offered by Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des Globalen Rechts*, Frankfurt am Main, Suhrkamp, 2006, while a fine set of case studies is discussed in Margaret Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law*, Cambridge, Cambridge University Press, 2011. An exploration of the interpretative rule that is considered helpful in solving conflicts is Campbell McLachlan, *The Principle of Systemic Integration in International Law*, Oxford, Oxford University Press, 2024.

[80] Telling is the sub-title of Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin*, Dordrecht, Martinus Nijhoff, 1995.

[81] Amongst many others, see, e.g., Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague, TMC Asser Instituut, 1988; Ineta Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation*, Leiden, Martinus Nijhoff, 2004.

[82] Some monographs were written in French: see, e.g., Vladimir-Djuro Degan, *L'Interprétation des accords en droit international*, The Hague, Martinus Nijhoff, 1963.

[83] Interpretation will be more fully discussed below, chapter 4.

[84] Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body*, Oxford, Oxford University Press, 2009.

[85] Richard Gardiner, *Treaty Interpretation*, Oxford, Oxford University Press, 2008.

[86] Fuad Zarbiyev, *Le discours interprétatif en droit international contemporain*, Brussels, Bruylant, 2015.

[87] Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, Oxford, Oxford University Press, 2012.

[88] Merkouris, Kammerhofer and Arajärvi (eds.) (footnote 53).

[89] See, e.g., *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (Ukraine v Russian Federation), ICJ Reports, 31 January 2024, § 46.

rules. In a normative universe where few things are certain and rules are generally considerate indeterminate, dictating the terms of interpretation becomes a way of steering the political debate[90].

4. Lack of Precision

In diplomatic, judicial and academic practice, it has also become noticeable that issues relating to the law of treaties have come to be dealt with in rather opaque terms, with precision being offered on the altar of convenience for the good reason that precision might be impossible to achieve. The most common example is, without a doubt, to invoke a VCLT provision and hold that "in many respects" it reflects customary international law, without ever specifying in which respects, to what extent, whether it applies to the provision in full, let alone to present instances of state practice and *opinio juris*. Hungary and Slovakia both did so in *Gabcikovo-Nagymaros* in general manner, with Hungary acknowledging "that in many respects the Convention reflects the existing customary law", while Slovakia "stressed that a number of its provisions are a reflection of pre-existing rules of customary international law". The Court itself reiterated that "some of the rules" of the VCLT "might be considered as a codification of existing customary law", and continued by stating that "in many respects this applies to the provisions … concerning the termination and the suspension of the operation of treaties…"[91].

It is this formula that is often somewhat thoughtlessly copied, in much the same way as the ICJ has copied it from itself: it already makes an appearance in the early 1970s, before the VCLT even entered into force. In the two *Fisheries Jurisdiction* cases, reference was made to the principle that a fundamental change of circumstances may be invoked, in limited circumstances, in order to terminate a treaty or suspend its operation. The idea is embodied in article 62 VCLT which, so the Court held, "may in many respects be considered as a codification of existing customary law"[92].

In a variation of the theme of imprecision, moreover, Richard Gardiner has astutely observed that contrary to what is often held with respect to interpretation, the VCLT does not relegate recourse to the preparatory works of a treaty to 'subsidiary' or subordinate status; instead, the VCLT refers to the *travaux préparatoires* as possible 'supplementary' means to arrive at meaning – and that is fundamentally different from 'subsidiary'[93]. In the same vein, Gardiner rightly points out that the general rule (singular) of interpretation refers not just to paragraph 1 of article 31 VCLT, but also comprises subsequent paragraphs: thus, such phenomena as 'subsequent practice' and 'subsequent agreement', the 'context' and any 'special meaning' all form part of the general rule – and should accordingly not be seen in isolation, as is so often the case[94].

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[90] Already David Kennedy, "The Turn to Interpretation", *Southern California Law Review*, 58 (1985).

[91] See *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary/Slovakia), [1997] ICJ Reports 7, respectively § 42, § 43, and § 46.

[92] See *Fisheries Jurisdiction* case (United Kingdom v Iceland), Jurisdiction of the Court, [1973] ICJ Reports 3, § 36; and *Fisheries Jurisdiction* case (Federal Republic of Germany v Iceland), Jurisdiction of the Court, [1973] ICJ Reports 49, § 36.

[93] Richard Gardiner, *Treaties*, Oxford, Oxford University Press, 2023, p. 74. The ICJ may have been too hasty when using the term 'subsidiary', in *Immunities and Criminal Proceedings* (Equatorial Guinea v France), [2020] ICJ Reports 300, § 61.

[94] Gardiner (footnote 93), p. 74.

One may question whether it is sensible to speak of rules of interpretation to begin with – elsewhere I have expressed considerable doubts on this point[95]. But if one wants to think of treaty interpretation as a rule-governed activity to begin with, governed by the regime of the VCLT, then it should be done seriously and thus with some precision. This conclusion may be pedantic, but then again: the lawyer's job involves "in many respects" a certain amount of pedantry…

G. Three Fundamental Problems

1. The Conceptual Issue: The Limits of the Archetype

Having established that the codified law of treaties is, as stated above, a mess, the question naturally arises what causes this state of affairs. Three explanations will be provided, one conceptual, one philosophical, and one political. One obvious explanation, though remaining somewhat on the surface, is the observation that to the extent that the VCLT presupposes a bargain between two states as the treaty archetype, it follows that everything that departs from the archetype meets with difficulties. This applies, naturally, to multilateral agreements, and that is hardly a novel observation: Shabtai Rosenne observed much the same, having a special sensibility perhaps for the private aspects of public international law[96]. Writing in 1989, Rosenne observed that the multilateral treaty is a phenomenon that has no counterpart in domestic law, and accordingly that "general analytical jurisprudence" is of little help in coming to grips with the multilateral treaty – and he astutely suggested that while treaties may be multilateral in form (as instruments), the VCLT can only handle them by "emphasizing, perhaps excessively, the bilateral element" involved: multilateral treaties can only properly be handled, under the VCLT, if the legal relations contained in the multilateral treaty are reduced to dyads of bilateral relations[97]. And he scathingly noted that "[n]one of the Vienna Conventions touch upon the nature of the obligations arising from multilateral treaty-instrument [sic], in the more precise sense of between whom and how those obligations run"[98].

The same point was made by Bleckmann a few years later: the solutions of the VCLT are developed for bilateral treaties, and do not 'fit' multilateral treaties[99]. For him, the solution was to render 'multipolar' treaties subject to the *erga omnes* idea: a multipolar treaty would not be reducible to dyads of bilateral treaties, but would instead create obligations for all parties towards all other parties, and therewith establish a network of overlapping obligations. This, however, may have been more persuasive in the abstract than in the concrete: it is difficult to picture this applied in concrete fashion to such topics as reservations to multilateral treaties, at least not without falling

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[95] Jan Klabbers, "The Meaning of Rules", *International Relations*, 20 (2006); Jan Klabbers, 'Virtuous Interpretation', in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On*, Leiden, Martinus Nijhoff, 2010.

[96] While a highly acclaimed international lawyer, his first academic articles dealt with prize law and private international law. See Rotem Giladi, "Shabtai Rosenne: The Transformation of Sefton Rowson", in James Loeffler and Moria Paz (eds.), *The Law of Strangers: Jewish Lawyers and International Law in the Twentieth Century*, Cambridge, Cambridge University Press, 2019.

[97] Rosenne (footnote 60), p. 83.

[98] *Ibid*., pp. 82-83.

[99] Albert Bleckmann, "Zur Wandlung der Strukturen der Völkerrechtsverträge: Theorie des multipolaren Vertrages", *Archiv des Völkerrechts*, 34 (1996), p. 226.

back on an outdated unanimity rule. Bleckmann thus expects much from the old Soviet approach: a state can join even with reservations considered unacceptable by its treaty partners, but without (as is currently the case) the reciprocity effects[100]. The net result would be that the reserving state is better off than its partners, which renders Bleckmann's solution probably even less palatable than the VCLT regime.

2. The Philosophical Issue: Form, Not Substance

The conceptual problem of the poor fit between multilateral treaties and the VCLT, based as it is on the archetype of the contractual bargain, is well-established. The philosophical problem is less generally acknowledged, but is equally important. It holds that a major issue underlying the VCLT is that the law of treaties has been completely formalized: what matters for a treaty to be valid is exclusively form (i.e., the consent of states[101]), rather than anything related to substance. There is both a philosophical and an eminently practical explanation for this. The philosophical reason, in a nutshell, is that since the Enlightenment, Western political philosophy is united in thinking that political action should be rational. And since people cannot easily agree on matters of substance, refuge is sought in matters of form. It is much easier to agree on what constitutes ratification and what effect it should have, then on what constitutes slavery, or Apartheid, or torture, and at which point these should not be tolerated.

The practical explanation is related. Precisely because considerations of form are given such importance, the VCLT needed to come to terms with various aspects of those formalities: what is the legal effect of signature? How important really is ratification? These are matters that may not be terribly relevant if a treaty is merely conceived as a set of obligations, regardless of the form, but the VCLT makes clear that it focuses rather on the treaty as an instrument. The definition of treaty makes clear that it must concern a written instrument; and oral agreements are excluded from the scope of the VCLT – signifying that with such agreements, acts like signature or ratification make little sense.

It was not always the case that substantive considerations were all but ignored: Gordley notes, under reference to contract law, that in earlier centuries, pre-dating the Enlightenment, there also used to be concerns with justice. In the Aristotelian[102] and Thomistic tradition, so Gordley suggests, making a contract was either exercising the virtue of liberality (aiming to enrich the partner) or the virtue of commutative justice (exchanging things of equal value)[103]; and writing a decade later, he also reserves a role for the very Aristotelian virtue of prudence. On of the reasons why the law would accept some contracts, Gordley notes, is that prudence enables people to choose wisely among different options as to which goods or services to procure, with a view to their flourishing rather than just to be flashy or indulge in an addiction of sorts. In this way, additional virtues such

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[100] *Ibid*., p. 230.

[101] The emphasis on consent is sometimes criticized for a different reason: it would be unable to explain why states remain bound even if they no longer wish to be bound – a problem inspired by largely instrumental motives, it may be suspected. See, e.g., John Setear, "An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law", *Harvard International Law Journal*, 37 (1996), pp. 160-162.

[102] Hints of Aristotelianism, mixed (somewhat uncomfortably perhaps) with a Kant-inspired approach, also underpin Ernest Weinrib, *The Idea of Private Law*, Oxford, Oxford University Press, 2012 [1995]. Eventually Weinrib declines any external purpose for private law: "… the purpose of private law is simply to be private law" (p. 21).

[103] James Gordley, *The Philosophical Origins of Modern Contract Doctrine*, Oxford, Clarendon Press, 1991.

as courage and temperance may also enter the picture[104]. Over time, so Gordley demonstrates, in the development of contract doctrine this role for the virtues has gotten lost with the advent of rationalism, with the making of contract now "regarded simply as an act of will, not as the exercise of a moral virtue"[105]. It is not too far-fetched to apply the same reasoning to treaties and the VCLT.

The reference to Aristotle and St Thomas Aquinas hark back to an ethical tradition that with the Enlightenment had lost some traction: the idea that not just reason (whether in the form of a deontological set of rules or a consequentialist cost-benefit analysis) tells us what to do, but that we may also be guided by the virtues, by the ideal of becoming good and flourishing people. The tradition goes back to Aristotle[106], and was re-discovered, so to speak, during modernity[107], when it became clear that both deontology and consequentialism come with insurmountable problems[108]. The deontologist runs the risk of becoming a thoughtless official, mechanistically applying rules without realizing context or nuance; the consequentialist will need to decide what to put in his or her calculation and what to externalize – and neither approach is beyond reproach.

Gordley's point about the absence of virtue may sound innocuous, and it might perhaps even appear sensible to dispense with virtue in a liberal political climate where no hierarchy of values can be distinguished. After all, formalism has its merits too[109], and does so in particular in the form of a 'culture of formalism'[110]. But it also means that international law (the law of treaties) has few resources to distinguish between 'good' treaties and 'bad' treaties, despite an obvious need to do so. It is precisely because of the absence of anything substantive that a (later) prominent international lawyer could unapologetically list the 1938 Munich Agreement by which Hitler was given free hands in Europe and the 1939 agreement between Germany and Czechoslovakia (effectively incorporating the latter into the former) as useful illustrations of the point he wanted to make, in this case the point that treaties are sometimes concluded by Heads of States[111].

This insistence on consent, and consent alone, obviously creates problems with ascertaining the validity or invalidity of treaties[112]. The Vienna Convention lists a number (eight) of grounds which may be invoked to invalidate a treaty or, in some cases, render a treaty automatically invalid. Most of those relate to the formalist criterion of consent: if there are defects in the consent of a state to be bound by a particular treaty, then such defect may result in invalidity. Thus, if consent is expressed

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[104] James Gordley, "Contract Law in the Aristotelian Tradition", in Peter Benson (ed.), *The Theory of Contract Law: New Essays*, Cambridge, Cambridge University Press, 2001, 265-334.

[105] Gordley (footnote 103), p. 8.

[106] Aristotle, *Ethics*, London, Penguin, 1976, Thomson transl.

[107] Often seen as triggering the rediscovery of virtue ethics is Elizabeth Anscombe, "Modern Moral Philosophy", *Philosophy*, 33 (1958).

[108] See, e.g., MacIntyre (footnote 36). A useful conception of the virtues is Julia Annas, *Intelligent Virtue*, Oxford, Oxford University Press, 2011; a discussion with respect to international affairs is Jan Klabbers, *Virtue in Global Governance: Judgment and Discretion*, Cambridge, Cambridge University Press, 2022.

[109] See, e.g., Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, Oxford, Oxford University Press, 2011.

[110] As advocated by Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge, Cambridge University Pres, 2001.

[111] José Sette Camara, *The Ratification of International Treaties*, Toronto, Ontario Publishing Co., 1949, pp. 55-56. Incidentally, at least the Munich Agreement did not properly illustrate the point: not all of Hitler, Mussolini, Chamberlain and Daladier were Heads of State, and Sette Camara seems to have realized as much when also speaking of them being Heads of Government. Sette Camara would later become a judge at the ICJ.

[112] See generally Klabbers (footnote 7). The *locus classicus* is Edoardo Vitta, *La validité des traités internationaux*, Leiden, Brill, 1940. A rare jurisprudential analysis of validity is Maris Köpcke, *Legal Validity: The Fabric of Justice*, Oxford, Hart, 2019.

in violation of a domestic treaty-making rule of fundamental importance, or is based on an error or even on coercion of a state representative, invalidity may result. And perhaps it should be noted that precisely the Munich Agreement has prompted other observers to proclaim its invalidity, on grounds of either error or fraud (or Hitler's bad faith perhaps)[113].

But in two cases a mere reference to consent cannot be considered sufficient. First, there is the issue of coercion of a state: understandably, treaties concluded by coercion of one of the parties should not stand – but that creates problems with peace treaties, which are by definition based on some kind of coercion. Here then something else is required to distinguish the legitimate peace treaty from the illegitimate coerced treaty, and that something can only be the distinction between using coercion for good or for bad purposes. The commonsensical position is to hold that treaties concluded in conformity with the UN Charter (which prohibits the first use of force, but allows for self-defense) will be considered valid, whereas those concluded in violation of the UN Charter will not be so considered[114].

Second, there is what Verdross long ago referred to as the 'forbidden' treaty in international law[115]. Like all legal orders, the international legal order may have to insist on some semblance of *ordre public*, meaning that some treaties cannot be tolerated, and that is usually cast in Latin, proclaiming that there are *jus cogens* norms from which no derogation is permitted. This, in turn, again has to refer to substantive values, for the jus cogens rule (a treaty concluded in violation of *jus cogens* is invalid) in effect needs to overrule state consent – and state consent is deemed in itself to be the fundamental mechanism for incurring international legal obligations. The dilemma is this: if state consent is fundamental, then why would a treaty to facilitate torture (for instance), freely consented to, nonetheless be invalid? The philosophical problem will be clear and, so Gordley contends with respect to contract, could have been avoided by refusing to concentrate solely on formal characteristics – the point being that substantive concerns cannot be avoided altogether.

The formalist orientation also runs into problems elsewhere, with perhaps a good example to be found in article 56 VCLT. Article 56, relating to withdrawal from treaties, creates a default position: in the absence of a withdrawal clause, withdrawal shall not be allowed, unless a right to withdrawal, despite not being expressly granted, can be implied from the 'nature' of a treaty. Again, then, the substantive reference (the reference to a treaty's 'nature') is asked to overrule consent or, more accurately perhaps, a consensual absence. After all, if a withdrawal clause is the result of a positive intention on the part of the drafters ("Let us make withdrawal possible"), so too the absence of such a clause must be intentional, and thus can be assumed to have been freely consented to by the parties.

And then it is noticeable that the VCLT contains a number of references to the 'object and purpose' of a treaty (and in one case, in article 60 VCLT, to the 'object or purpose'). This too smuggles substantive considerations back in, as do the repeated references to 'good faith'. The latter

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[113] Paul Reuter, *Introduction to the Law of Treaties*, London, Pinter, 1989, Mico and Haggenmacher transl., p. 138; note that while error is mentioned in the VCLT, fraud and bad faith are not. Reuter makes the further hugely interesting point that while Czechoslovakia could possibly invoke several grounds of invalidity, France – also a treaty party – could not, suggesting that different parties may need to rely on different grounds.

[114] See generally H.G. de Jong, "Coercion in the Conclusion of Treaties", *Netherlands Yearbook of International Law*, 15 (1984). In the 2019 *Chagos* opinion, the ICJ made it very clear that an agreement between a colonial power and its colony cannot be considered based on consent. See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, advisory opinion, [2019] ICJ Reports 95, § 172.

[115] Alfred Verdross, "Forbidden Treaties in International Law", *American Journal of International Law*, 31 (1937).

in particular is a strongly virtue ethical notion: it recognizes that rules can be interpreted or applied in various ways, and that one should do so in particular manner. The references to object and purpose suggests that one should do so in light of the substantive mission of a treaty[116]; the references to good faith, more general as they are, suggest that one should do so in a non-destructive manner[117].

3. The Political Issue: Power and Disagreement

Treaties, it is traditionally claimed, are based on a 'meeting of the minds'. The picture is rosy: negotiators enter a room, all bickering and hopelessly divided, but through talk and deliberation and reasonable discussion and perhaps a little compromise they come to see the light, and eventually settle on a text that results from a common intent. The minds have met, the bargain may have been struck, *do ut des* may have been identified and exchanged, as may 'tit for tat', and the rest is plain sailing.

Attractive as the proposition may be, it is not very realistic. If it were realistic, there would be no need for rules on reservations – everyone would be in agreement. There would likewise be no need for rules on interpretation – if everyone agrees, the agreement covers not just the bare words but also their meaning. There would be no need for rules on termination, as termination would either not occur, or itself be subject to that very same agreement. And if circumstances were to change, then it stands to reason to expect that the treaty itself would have identified possible ways and means of amendment or modification. Among the few topics in the Vienna Convention left with any proper field of application would be the treaty conflict, because here it may affect those not party to the treaty, and thus not implicated in the general agreement.

Instead, there exist rules on reservations, on interpretation, on termination, and even on what a treaty is considered to be – all this signifies that at the heart of treaties is not so much some ephemeral form of agreement, but rather that treaties are, in Philip Allott's classic phrase, better seen as "disagreement reduced to writing"[118]. Samantha Besson has further developed the point, as observed above, suggesting that in international law-making generally, a central role is play by "reasonable disagreement"[119]. On such a view, the role of rules on reservations, interpretation or terminations is not just accidental, random or whimsical, but rather integral to the very notion of the law of treaties: if treaties manifest fundamental disagreement, such disagreement needs to be managed, and the rules on reservations et cetera offer techniques for doing exactly that: managing disagreement.

H. Final Remarks

The law of treaties, it is fair to say, is in a mess, and these lectures suggest that there are broadly two interrelated reasons for this state of affairs. The first, and possibly the more important

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[116] Jan Klabbers, "Some Problems Regarding the Object and Purpose of Treaties", *Finnish Yearbook of International Law*, 8 (1997).

[117] Jan Klabbers, "Towards a Culture of Formalism? Martti Koskenniemi and the Virtues", *Temple International and Comparative Law Journal*, 27 (2013).

[118] Allott (footnote 6).

[119] Besson (footnote 17).

one, is that the concept of treaty on which the VCLT is based, the idea of the sort of treaty on everyone's mind when talking about treaties generally, is that of the treaty as contract. And to narrow things down even further: the contract analogy central to the VCLT's analogy is not that of some common project but the simplest possible model: the sale of something tangible. In the following chapters I will suggest, while mindful of Lowe's observation "that all classifications of treaties are … essentially arbitrary"[120], that one can think of (at least) five different models, operating like concentric circles, with the archetype as the smallest and central circle – and the archetype is the sale contract, with one state selling something (territory, equipment) to another; the bargain based-contract The point for present purposes is not to add yet another possible classification, but to make the observation that the VCLT is compatible with only one or two manifestations of the treaty – and has little to say about other manifestations. Lowe summarizes it nicely when holding that most treaties "have in common little or nothing beyond the label that is affixed to them"[121].

This ties in with a second reason: beyond the simple sales transaction, treaties are rarely if ever based on any real kind of agreement between states – and on those rare occasions that agreement may be real, it tends to be short-lived. And this, in turn, entails that the VCLT, based as it is on a narrow archetype, has to develop all sorts of techniques for anything going beyond the simple sales contract.

In the remainder of these lectures, I will first suggest how the archetype of treaty (the bargain-based contract) came to be central to the VCLT (chapter 2), followed by a discussion of the archetype and its limits, and of the concentric circles mentioned above (chapter 3). Chapter 4 will discuss several of the techniques the VCLT provides for managing disagreement and how these work – or do not work. Chapter 5 Concludes.

[120] Lowe (footnote 10), p. 5
[121] *Ibid*., p. 4.

CHAPTER II
TOWARDS THE ARCHETYPE

A. Introduction

The first chapter has mainly demonstrated that the VCLT is in a state of disarray: it cannot answer to a number of practical issues; several of its core elements have been remanded to the ILC for further scrutiny, study and (possibly) solutions; it remains unclear how it relates to the broader law of treaties; and nothing much has happened in the discipline by way of re-thinking the entire edifice – or even of trying to understand it. Much has been written on individual bits and pieces and on particular doctrines, but our understanding of the law of treaties as a whole has remained limited.

The current chapter aims to dig a little deeper and come to an understanding as to what the pain points are. It is one thing to say the VCLT is messy, or the law of treaties is in disarray, but why is this the case and how does this become visible? In doing so, I will first discuss the various roles treaties have to play in the international legal order. This will be followed by three 'case studies', one might say, doctrines where the VCLT has at best only a partly persuasive response to offer to real-world issues. The chapter will conclude by drawing a provisional conclusion, to be further developed in the subsequent chapter.

B. An Overworked Instrument

1. One Size Fits All…

In 1930 Arnold (later Lord) McNair wrote, in some obvious despair, that the treaty formed "the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out its multifarious transactions"[122]. Drawing an explicit analogy with domestic law, McNair observed that domestic legal systems tend to have different rules and rubrics for different types of transactions: for contracts, conveyances, gratuitous promises, legislation, charters establishing corporations, and a few more. In international law however, all these things need to be done by the treaty: there are no other instruments available. If states intentionally want to engage in some form of collaboration, even if only to agree not to get into each other's hair, they need to do so by treaty. Regardless of the underlying intention, states have no choice but to use the treaty. If they wish to avoid double taxation, they have to use the treaty; if they wish to set up the United Nations, they have to use the treaty; if they wish to protect the global environment, they have to do so by treaty; and if they wish to establish a boundary, they have to use the treaty.

International law may have other sources, most prominently customary international law and general principles of law, says article 38 of the ICJ Statute, but these cannot be employed intentionally. They grow organically or spontaneously over time and through usage and practices, but one cannot, e.g., establish an international organization on customary basis, or resolve that from tomorrow onwards customary international law shall protect aquifers, or decide that there shall be a general principle protecting investments.

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[122] Lord McNair, "The Functions and Differing Legal Character of Treaties", reproduced in Lord McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, p. 740.

2. *Four Tasks*

Thus, McNair distinguished four tasks engaged in by the "sadly overworked instrument" of the treaty. The first of those were treaties with the character of conveyances: treaties transferring (or recognizing) ownership of something or other. The most obvious example would be treaties of cession of territory, while treaties conferring user rights (such as 'servitudes') might also qualify. Interestingly, McNair also (as in the present study) seemed to operate with the metaphor of concentric circles, working on the idea of there being something of a core concept with minor variations, providing examples that were either "closely akin" or a little less "closely akin" to the conveyance[123]. Either way, what set this category apart is that real rights were being transferred, and in principle with the aim of permanence: these were 'dispositive' treaties, disposing of a certain matter once and for all. The term is less often heard almost a century later, and if used at all, it is generally reserved for treaties establishing boundaries[124]. These were meant for eternity and, in a sense, required no further work once the boundary was established[125] – at least not until the next boundary settlement.

McNair's second category was what he, somewhat unfortunately perhaps, referred to as the contractual treaty, for he actually had in mind is the synallagmatic transaction, where parties have opposing ends but reach a compromise, typically based on a bargain. In German doctrine, he suggested, this would be referred to as *Vertrag* rather than *Vereinbarung*; the *Vereinbarung*, so he suggested by citing earlier authority, would be geared towards accommodating the situation where parties have identical aims. By way of examples he provided a list – a rather generous list – of bilateral agreements fitting the description of *Vertrag*: this would cover "treaties of peace, alliance, friendship, neutrality, guarantee, commerce…"[126]. The *Vereinbarung* could be bilateral or multilateral – what mattered is that in it, some common goal is aspired to.

Third, he distinguished the proper law-making treaty, creating either constitutional international law, or general international law. The former category would cover conventions on the pacific settlement of disputes, or the charters establishing international tribunals or an entity such as the League of Nations. More generally legislative treaties would include the conventions on the laws of war; on disarmament; the labour conventions sponsored by the new (at the time) International Labour Organization, or treaties regulating the use of international waterways.

And finally, McNair singled out as a separate category treaties "akin to charters of incorporation", effectively referring to the constitutional treaties of international organizations: explicitly given as examples were the Universal Postal Union, the International Union for the Protection of Industrial Property, and the Copyright Union. What sets these treaties apart, so he

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[123] *Ibid*., pp. 740, 741.

[124] Michael Bowman, "The Interplay of Concept, Context and Content in the Modern Law of Treaties: Final Reflections", in Michael Bowman and Dino Kritsiotis (eds.), *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, Cambridge, Cambridge University Press, 2018, p. 1061, footnote 133 (referring to "dispositive treaties, such as boundary treaties.").

[125] This is probably an untenable proposition, even legally. At the very least, a boundary typically will be physically demarcated (border posts, barriers, et cetera), and thus require additional work.

[126] McNair (footnote 122), p. 743.

held, even though they are a species of law-making treaty, is that they "create something organic and permanent"[127].

Lord McNair's categories are rather fluid, as he himself acknowledged when remarking that the constitutions of international organizations are a species of law-making treaty. Moreover, mentioning the League of Nations Covenant as law-making (his third group) rather than charter (his fourth) can only be based on the circumstance that the Covenant not only set up the League, but also contained a host of substantive provisions on use of force, dispute settlement and the like. More generally, it appears that his main distinguishing criterion between the various categories was whether the outbreak of hostilities between the parties would result in termination of the treaty or not. In actual fact, it seemed that this only applied to his second category, but nonetheless additional reasons suggested a four-fold classification.

Either way, McNair's understanding of treaty very much revolved around the idea of treaties being creative (or reflective perhaps, on occasion) of relations between states: a treaty between A and B creates a relation between those two states; a multilateral treaty involving 138 states creates some kind of relationship between those 138 states. This is the traditional conception, and still underlies the VCLT. It is worth wondering (though cannot be further explored here) whether a different perspective would not be more persuasive – perhaps it would be more sensible to think of treaties establishing relations not between the parties to them, but rather between those parties and the text[128]. As we will see though, such a paradigm shift has yet to happen[129]. Treaties – and other written instruments – are expected and considered to establish or nurture relations between the parties to them.

3. New Instruments: Framework Conventions

This also applies to developments taking place after McNair wrote his words. Several new sorts of instruments have been 'invented' for states to intentionally set standards, although some of these are mostly variations on the treaty theme. Popular in the field of environmental protection, for instance, has become the combination of Framework Convention with later Protocol or Protocols – think of the Vienna Convention and Montreal Protocol on the Ozone Layer, or the Framework Convention on Climate Change and its later Kyoto Protocol. Typically, the Framework Convention contains broad agreement on purposes and methods, with the Protocol fleshing out details and containing more specific rights and obligations[130]. This has also been applied outside of the environmental context, witness the Framework Convention on Tobacco Control and the Protocol to Eliminate Illicit Trade in Tobacco Products. Typically, moreover, such arrangements are combined with the creation of what is factually, if not always officially, an international organization to monitor implementation and compliance[131].

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[127] McNair (footnote 122), p. 753.

[128] Lowe (footnote 10), p. 13.

[129] And one should be careful with using such terms at any rate: the popularizer of the term suggested that in the social sciences not a single proper paradigm even existed when he wrote, and there is little reason to assume that has changed. See Thomas Kuhn, *The Structure of Scientific Revolutions,* 2nd edn, Chicago IL, University of Chicago Press, 1970, p. 15.

[130] Geoffrey Palmer, "New Ways to Make International Environmental Law", *American Journal of International Law*, 86 (1992).

[131] See generally Robin Churchill and Geir Ulfstein, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law", *American Journal of International*

4. *New Instruments: The Role of International Organizations*

International organizations also play a role in different manner, often providing the forum and infrastructure where large-scale multilateral agreements are negotiated and under whose auspices they are concluded. The United Nations has played this role since its early years, as has, in Europe, the Council of Europe[132]. Still, such treaties are nonetheless regular treaties, as are the Framework Conventions and their Protocols. They represent agreement between states, in time-honoured legally binding form, and subject to the workings of the law of treaties.

Another development concerns mostly - and surprisingly – instruments that are considered non-legally binding, thus resulting in the curious spectacle that states apparently agree to do something from a certain date onwards (as is the case with treaties) and are expected to behave in conformity with what they agreed to do (as is, again, the case with treaties) but that, unlike treaties, these agreements do not give rise to legal rights or obligations – at best, so the argument goes, the 'rights' or 'obligations' at issue are active in politics, or morality; such agreements are deemed 'politically' or 'morally' binding, but not legally.

The most obvious example are the resolutions adopted by international conferences and, more often, by the plenary bodies of international organizations. It seems clear that, without further regulation, these are usually considered non-binding and often grouped together under the heading 'soft law'[133] – their non-binding nature being the price to pay, as Tammes perceptively noted in the early 1950s, for allowing them to be adopted by a majority of states[134]. This had not always been clear: in the 1930s, confronted with a question about the legal effects of a decision emanating from the Council of the League of Nations, the Permanent Court of International Justice discovered (in some likely embarrassment) that the Covenant said nothing whatsoever about such legal effects, nor much about decision-making. As a result, the Court argued that since the two states concerned had participated in the decision-making process, at least they should be considered bound – not because of a Covenant rule to this effect, but because the two states concerned, "being bound by their acceptance of the Council's Resolution", could not convincingly argue anything else[135]. In the absence of a Covenant rule to the contrary, the states were simply assumed to have become bound by virtue of their consent, as if the resolution were akin to a treaty[136].

5. *New Instruments: Memoranda of Understanding*

Law, 94 (2000); Sebastian Rioseco Sullivan, "Conferences of the Parties Beyond International Environmental Law: How COPs Influence the Content and Implementation of their Parent Treaties", *Leiden Journal of International Law*, 36 (2023).

[132] On the UN, see Mahnoush Arsanjani, "The United Nations and International Law-Making", *Recueil des Cours*, vol. 362 (2012).

[133] The label may not be very felicitous: see Jan Klabbers, "The Redundancy of Soft Law", *Nordic Journal of International Law*, 65 (1996); for useful discussion, see Ellen Hey, "Making Sense of Soft Law", *Recueil des Cours*, vol. 439 (2024).

[134] A.J.P. Tammes, *Hoofdstukken van internationale organisatie*, The Hague, Martinus Nijhoff, 1951, p. 48.

[135] *Railway Traffic between Lithuania and Poland* (Railway Sector Landwarów-Kaisiadorys), advisory opinion, [1931] Publ. PCIJ, Series A/B, no. 42, 116.

[136] Elsewhere I have referred to this as the 'treaty analogy': see Jan Klabbers, *An Introduction to International Organizations Law*, 4th edn, Cambridge, Cambridge University Press, 2022, pp. 161-163.

But more closely resembling treaties are such instruments as (some) memoranda of understanding which, according to some, are meant to influence state behavior but without being legally binding. The idea ("theory" being far too much honour) behind these instruments can be traced back to an article written by James Fawcett in 1953[137], launching the idea that while all agreements between states are 'politically binding' (states, after all, being political actors, and thus, so Fawcett opined, their agreements must be politically binding[138]), only some would also be legally binding, namely only those which their authors would meant to be legally binding, which in Fawcett's universe meant only those with dispute settlement provisions[139]. Underdeveloped as the idea has remained, it has nonetheless become very popular, largely because it allows for diplomats and civil servants to act unimpeded by such things as parliamentary oversight or judicial control. While the constitutional systems of most states provide for some kind of control over treaty-making, few if any provide for control over engaging in politically binding agreements, therewith providing lots of leeway to policy-makers[140].

If it was originally often thought that only the politically not so very salient matters could be arranged by means of non-legally binding agreement, inevitably the idea has expanded to also cover highly influential matters. Some early examples border on the nonsensical: the Atlantic Charter adopted by Roosevelt and Churchill during World War II is often said to be such a non-legally binding agreement, but this is unsustainable: the two statesmen were bright enough to realize that they could not commit this way, and as a result the Atlantic Charter is far better seen as a vision on the post-war world order, with Roosevelt and Churchill calling on others to behave in particular fashion- the language of obligation here is largely out of place, the only possible exception being the promise, made in the first recital, that the two countries "seek no aggrandizement, territorial or other". Beyond this, the Atlantic Charter is a wish list aimed at others: to respect self-determination, to facilitate access to trade, come to accepted boundaries – that sort of thing.

More dramatically perhaps, the 1975 Helsinki Final Act is often also seen as a non-legally binding document, largely because its drafters provided that the Final Act would not be eligible for registration with the United Nations[141]. While this merely means it cannot be invoked before UN organs (including the ICJ), often broader consequences are attached: it would signify an intention not to become legally bound[142]. This assumes, in turn, that instruments are only to be considered legally binding if they can be invoked and relied upon before an international court – that was a respectable position in the early nineteenth century, but is considered jurisprudentially untenable, as

[137] James Fawcett, "The Legal Character of International Agreements", *British Yearbook of International Law,* 30 (1953).

[138] Put like this, the point is fairly nonsensical: states are legal actors too, so therefore their agreements would have to be legally binding, following this logic. But its silliness has not prevented it from becoming hugely popular.

[139] For the genealogy of the thought, see Jan Klabbers, "Governance by Academics: The Invention of Memoranda of Understanding", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* 80 (2020).

[140] Much to their credit, this has been recognized by Duncan Hollis and Joshua Newcomer, "'Political' Commitments and the Constitution", *Virginia Journal of International Law,* 49 (2009).

[141] This is to be found in the testimonium: the Government of Finland (hosting the conference) is asked to send to the Secretary-General of the UN the Final Act "which is not eligible for registration under Article 102 of the Charter of the United Nations". That said, sending it to the Secretary-General was requested, with a view "to its circulation… as an official document of the United Nations."

[142] For useful (and on this point skeptical) discussion by one of the delegates, see Harold Russell, "The Helsinki Declaration: Brobdingnag or Lilliput?", *American Journal of International Law,* 70 (1976).

there are plenty legal rules in existence which may never ever come before a court[143]. In addition, the states concerned also suggested that the Final Act would not affect any of their existing rights or obligations, which can be taken as proclaiming an intention not to be legally bound but can also be taken as a mere observation: the Final Act contained little by way of rights or obligations that did not already exist in international law. It would seem that this is the more natural reading, all the more so as it was prefaced by a reference to good faith[144].

The position that the Act would somehow be kept outside the realm of law is all the more difficult to accept concerning the language and subject matter of the Final Act. While the term 'contracting parties' was studiously avoided, the participating states nonetheless made a number of promises in hard language: to refrain from the threat or use of force; to "regard as inviolable" each other's frontiers; to "respect" each other's territorial integrity, to "refrain from any intervention"; to "respect human rights and fundamental freedoms", et cetera etcetera. Not all of this was faithfully complied with, but then again, much the same applies to regular treaties. Making promises of this kind is very, very cheap if these are immediately considered to be inconsequential.

This became abundantly clear after Russia invaded Ukraine, in 2022 (and earlier in 2014, when it occupied and all but formally annexed the Crimea). Doing so is prohibited under the UN Charter and, indeed, the Helsinki Final Act, but also flies in the face of the explicit security guarantee provided by Russia in 1994. At the time, the newly independent state Ukraine joined the nuclear non-proliferation treaty and therewith gave up the nuclear weapons it had 'inherited' from the erstwhile Soviet Union. It did so in exchange for a security guarantee delivered by the US, the UK and Russia in the so-called Budapest Memorandum. In it, the three powers reaffirmed (amongst others) their commitment to respect the boundaries of Ukraine and reaffirmed their commitment not to use force against Ukraine: "none of their weapons will ever be used against Ukraine…". If this commitment has remained under-discussed following Russia's aggression, it is most likely because it is considered a non-legally binding instrument, despite the firmness and importance of the commitments reaffirmed in it[145].

Where McNair distinguished as a separate category of treaties the charters of international organizations, this category too has become muddled over the years. The Helsinki Final Act, mentioned above, serves as the constituent instrument of the Organization for Security and Cooperation in Europe (OSCE), whose website proudly proclaims that its "decisions are taken by consensus on a politically binding, but not legally binding basis"[146]. What those words mean is anyone's guess, but the gist seems to be a firm denial that the OSCE has anything to do with law – although it has proved keen to conclude some very 'legal' instruments on privileges and immunities[147]. Other organizations too are based on foundations that are less than obvious: on the basis of summit documents, resolutions, and similarly opaque instruments[148].

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[143] One group of examples consists of facilitative rules: in democracies, people have a right to vote, and it is highly unlikely that this right as such will ever be contested before a court (it scope may be subjected to litigation, but that is a different story) – does that mean it must be non-binding?

[144] Helsinki Final Act, point X.

[145] Thomas Grant, "The Budapest Memorandum of 5 December 1994: Political Engagement or Legal Obligation?", *Polish Yearbook of International Law*, 34 (2014).

[146] https://www.osce.org/whatistheosce (visited 5 November 2024).

[147] See generally Mateja Steinbrück Platise, Carolyn Moser and Anne Peters (eds), *The Legal Framework of the OSCE*, Cambridge, Cambridge University Press, 2019.

[148] For early discussion, see Jan Klabbers, "Institutional Ambivalence by Design: Soft Organizations in International Law", *Nordic Journal of International Law*, 70 (2001).

The point that emerges is that McNair's lament still stands: the treaty remains overworked. It may have come to be accompanied by other instruments that allow states to do things together intentionally, but these are either variations on the more traditional treaty (the Framework Convention plus Protocol, or the treaty concluded under auspices of an international organization), or they are seemingly kept outside the law – at least according to dominant doctrine. There are excellent reasons to be highly skeptical, as will be discussed in Chapter 4 below, but for the moment this hardly undermines the general point: when states wish to do things together, they can only do it by treaty. Other 'sources' either cannot be used intentionally, or are said to lack legal force.

This, in turn, entails that the VCLT needs to cater to a number of different instruments: all are treaties in one way or another, but they may have little in common. Obviously then, when put this way, the VCLT might be better equipped to deal with some than with others. Below, I will discuss three examples of doctrinal issues demonstrating either that the VCLT works only in some settings, or does not work at all: the issues of treaty conflict, the interim obligation, and of objective regimes.

C. Treaty Conflict

1. The General Idea

The VCLT devotes a single specialist article to treaty conflict (article 30), but can be said to address the topic in at least one additional place (article 59): a treaty can be considered terminated if all parties to it conclude a later one which specifies that it intends to replace the earlier one or if the later one is incompatible with the earlier one. In the latter case, the earlier one may continue to exist and be applied, save for the incompatibilities. It goes without saying that the chances of having all parties to a multilateral treaty concluding a later incompatible one are slender; by contrast, such is much easier to imagine with bilateral treaties.

A special variation moreover is the later multilateral treaty replacing earlier bilateral agreements. The VCLT remains silent on this possibility, but there is at least one solid example of this and several half-examples. The solid example is the 1957 European Convention on Extradition, concluded under the umbrella of the Council of Europe and formally replacing earlier bilateral agreements: the Convention shall "supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties"[149]. Note that the Convention is considered to apply between 'any two' parties: the multilateral regime, newly created as it is, is immediately bilateralized again. Doing so is only natural, as extradition is (almost) by definition a bilateral affair, with one state asking for extradition and the other either delivering or not[150]. Other examples are partial: the 2015 Mauritius Convention on Transparency in Treaty-Based Investor-State Arbitration complements, but does not replace, existing bilateral investment treaties through a multilateral instrument, and something similar applies to the OECD-sponsored BEPS

[149] European Convention on Extradition, ETS no. 24, article 28, paragraph 1.

[150] Somewhat incongruously and seemingly operating a different perspective, Shearer notes that treaties which are bilateral in form but have identical provisions can be "considered multilateral in effect". I.A. Shearer, *Extradition in International Law*, Manchester, Manchester University Press, 1971, p. 23.

Multilateral Instrument, complementing existing bilateral taxation treaties rather than replacing them[151].

The main focus of article 30 VCLT rests on ensuring compliance in case of treaty conflicts. This is only natural: while Finke has perceptively noted that conflicts may also characterize relations between entire regimes[152], the latter *problematique* was not well-known when the VCLT was drafted and concluded – article 30's focus rests squarely on the resolution of conflicts between provisions. It starts, in paragraph 1, by confirming the supremacy of the UN Charter – something which follows from the UN Charter itself (article 103), and something which by its very nature cannot be dispersed more widely: if many treaties would claim supremacy, the problem of treaty conflict would simply shift to become one of conflicting supremacy claims. Paragraph 2 gives space for treaties to spell out their own relationship to other treaties; an example of this is how article 351 TFEU grants some (minimal) priority to treaties concluded by EU member states with third parties before the EU was created or before they joined the EU, as the case may be. Article 351 TFEU looks fairly generous on its face, but has been stripped of much of its generosity towards non-member states by the case law of the CJEU[153].

2. The Main Rule

The heart of article 30 is to be found in paragraph 3, generally positing the rule that when provisions applicable between the same parties are in conflict, then the later in time shall prevail. This is a useful and sensible provision: when A and B have a treaty and conclude a later incompatible one, one may safely assume that the later in time should be applied, as it records the more recent political configuration between the two. In a normative universe where only A and B exist, article 30 works well. Problems appear, however, when the parties are not identical: when A has an obligation towards B that cannot be reconciled with an obligation on the part of A towards C – another treaty partner of A[154]. The problem then is this: to honour the commitment towards B will necessarily come at the expense of C; to honour the commitment towards C, on the other hand, will necessarily be at the expense of B. The *lex posterior* rule does not change this: still either B or C would suffer, and much the same would be the result if not the later, but the earlier treaty in time should prevail: still, either C or B would suffer. In such a case, the VCLT has no answer, prompting one prominent observer to suggest that such cases be solved on the basis of 'Das Prinzip der politischen Entscheidung' ('the principle of political decision'): state A would have to choose which commitment to honour, and then compensate the other side[155].

The problem now is that problems further multiply when multilateral treaties are involved, and when membership of the EU can bring forth further challenges. With multilateral treaties,

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[151] BEPS stands for Base Erosion and Profit Shifting (tax evasion by multinationals, in more colloquial terms); the initiative aims to close some of the existing loopholes.

[152] Jasper Finke, "Regime-Collisions: Tensions between Treaties (and How to Solve Them)", in Tams, Tzanakopoulos and Zimmermann (eds.) (footnote 10). Finke adds the further dimension of possibly constitutionalizing regimes, which may render normative problems all the more entrenched. On this, see also Jan Klabbers, "Constitutionalism Lite", *International Organizations Law Review*, 1 (2004).

[153] Jan Klabbers, *Treaty Conflict and the European Union*, Cambridge, Cambridge University Press, 2008.

[154] Seminal is Binder (footnote 78), while some of the politics behind treaty conflict are well-dissected in Ranganathan (footnote 78).

[155] Manfred Zuleeg, "Vertragskonkurrenz im Völkerrecht. Teil I: Verträge zwischen souveränen Staaten", *German Yearbook of International Law*, 20 (1977).

conflicting norms often represent conflicting regimes, involving conflicting logics. Classic examples are the tension between the world trading regime (embodied in WTO law) and environmental standards. These regimes embody different values, and conflicts between these values cannot be solved by a simple mechanistic device[156]. One cannot simply say, e.g., that the later in time shall prevail; this would do a grave injustice to the values underlying the regime set up earlier, never mind the cognitive problem in identifying exactly when a regime was created[157]. Neither can one simply (as is sometimes proposed) apply the classic *lex specialis* rule, holding that special rules take priority over general rules[158]. After all, it remains unclear how to determine which treaty is the general one, and which is the special one. Take, e.g., a conflict – not at all unlikely - between WTO law and the UN Convention on Biodiversity. The WTO has 166 members in October 2024; the Convention has 196. Surely, it would be difficult to maintain in all seriousness that since it has attracted fewer states, WTO law constitutes the *lex specialis* and should thus prevail. Likewise, looking merely at the number of parties to determine the special regime would allow for bilateral agreements to depart from multilateral human regimes – not an attractive conclusion. Alternatively, one could instead of concentrating on the number of parties, focus on the special or general nature of the regime at hand, but many of the same problems would surface here as well[159].

Be that as it may, while the *lex specialis* rule may or may not be helpful, it should be pointed out that it is not included in the VCLT. The VCLT, as in particular Rosenne has observed, is based on a conception of the treaty as an instrument, not as obligation or set of obligations. This finds its cause partly in the circumstance that the VCLT aspired to address a number of formalities, such as expressing consent to be bound, and needed to specify something about signature, ratification and accession. These, by their nature, presuppose an instrument – one cannot ratify an obligation, unless cast in an instrument. The result is that for the VCLT, all treaties are equal: none is more 'special' than any of the others, so any distinction can only be made on the basis of formal characteristics, and while this is not impossible with the *lex specialis* rule (the special one would be the one with fewer parties), this will always remain vulnerable to normative disquiet.

3. Individual Rights

And what still further complicates the picture is that treaties may not just create rights for states that may need to be honoured, but may also create directly effective ('self-executing') rights for individuals, so the situation may get very convoluted indeed. One scenario causing the European Court of Justice some headaches at the time was at issue in the *Burgoa* case. Mr Burgoa was a Spanish fisherman, prosecuted in Ireland for fishing in Irish waters. Ireland was at the time already a member of the EU (then the EEC), but Spain was not. The scope of Irish waters was determined by EU law, but Mr Burgoa claimed antecedent rights under the 1964 London Fisheries Convention

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[156] See, e.g., Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge, Cambridge University Press, 2003.

[157] Classic is E.W. Vierdag, "The Time of the Conclusion of a Multilateral Treaty: Art. 30 of the Vienna Convention on the Law of Treaties and Related Provisions", *British Yearbook of International Law*, 59 (1988).

[158] For a subtle discussion, see Anja Lindroos, "Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis", *Nordic Journal of International Law*, 74 (2005).

[159] Finke is somewhat more sanguine, and while recognizing that *lex specialis* is unsuitable for ensuring compliance, nonetheless suggests that it "might be more suitable to address issues of coherence or fragmentation". See Finke (footnote 152), p. 423.

(to which both Spain and Ireland were parties) – and further claimed this Convention merited legal protection under what is now article 351 TFEU, giving preference to treaties concluded by EU member states before they have joined the EU (and therewith in line with article 30(2) VCLT). Under the London Convention regime, Mr Burgoa had done nothing wrong; under the EU regime, he was found to be unlawfully within Irish waters. At issue, in other words, were not just the legal positions of Ireland and Spain, but the legal position (and possibly livelihood and personal liberty) of Mr Burgoa, subjected as he was to criminal prosecution in Ireland. The Court could not find a very plausible way out, and eventually somewhat feebly suggested that Spain and the EU were discussing a new fisheries regime together, and Spain seemed perfectly okay with this. No agreement had yet been signed when Mr Burgoa was arrested (nor even initialed), but an interim regime had been adopted with Spanish approval, and this was treated as good as the conclusion of a proper agreement involving Spain[160]. And those problems become all the more acute when the ever-dynamic EU law is involved: when the EU was first set up, it was not expected to have much to say about fisheries, but by the latter part of the 1970s fisheries had become the exclusive concern and competence of the EU – pre-empting unilateral action by its member states.

The point is not to chide the CJEU; the point is rather to paint a picture of just how complicated things can get in real life, and how much difficulties the VCLT has in responding to issues that real life throws up. It is one thing to stipulate, as article 30(2) VCLT does, that treaties may grant preference to other treaties, but often this can only be the beginning of the analysis – it is unlikely to be the conclusion, all the more so when the rights of individuals or legal persons under treaties are involved.

4. Mitigating the Problem

Some techniques do exist to mitigate the treaty conflict problem. One illustration stems from the 1951 Refugee Convention, which allows for refusal of refugee status if the applicant has been involved in war crimes, crimes against peace or crimes against humanity, in a formulation that owes much to the post World War II Nuremberg Charter. This has been used to in some cases deny applicants refugee status, e.g. in the case of Ms S.K., who in the English courts was considered to have been involved, somewhat loosely perhaps, in crimes against humanity in Zimbabwe – with the definition of crimes against humanity taken from the Statute of the International Criminal Court[161].

And sometimes treaties stand in a hierarchical relationship to each other. If this is the case with the UN Charter and any other treaty[162], mostly it is arranged within treaty systems themselves. For instance, the Court of Justice of the EU acknowledged, in *Bosphorus Queen*, that the 1973 Marpol Convention (the International Convention for the Prevention of Pollution from Ships) and its 1978 Protocol serve to elaborate the 1982 UN Convention on the Law of the Sea and should be

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[160] Case 812/79, *Attorney-General* v *Burgoa*, ECLI:EU:C:1980:231. See for further discussion Klabbers (footnote 153), pp. 127-129.

[161] See Case [2012] ECWA Civ 807, *SK (Zimbawbe)* v *Secretary of State for the Home Department*, Court of Appeal, Civil Division, 19 June 2012. A more humanitarian reading of the same provisions is offered by Canada's Supreme Court in *Ezokola* v *Minister of Citizenship and Immigration*, 2013 SCC 40.

[162] But see Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* v *Council*, ECLI:EU:C:2008:461; here the CJEU prioritized the EU's constitutional values over UN law. Technically it could, because the EU itself is not a UN member, but its member states were effectively told to disobey the Security Council. For sophisticated discussion, see Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*, Oxford, Oxford University Press, 2011.

understood against that background; and the same was even thought to apply to a treaty to which not all EU member states are parties (nor the EU itself), the 1969 Convention Relating to Intervention on the High Seas[163].

It is, in the end, surely no coincidence that international law tends to favour some political decision or other – as Martti Koskenniemi once put it, "[m]odern international law is an elaborate framework for deferring substantive resolution elsewhere: into further procedure, interpretation, equity, context, and so on"[164]. It has been noted in the field of international environmental law that treaty conflicts tends to be sent to committees, and thus to political decision-making processes[165]. Litigation, by contrast, is relatively scarce, which owes much to the circumstances that different regimes also come with different, specialized courts or tribunals, and it is by no means certain that (for instance) a WTO panel could legitimately exercise jurisdiction over rules originating in other regimes and come up with authoritative interpretations of such rules[166].

D. The Interim Obligation

1. The General Idea

Article 18 of the VCLT provides that states should, pending ratification or entry into force, refrain from acts which could defeat the object and purpose of a treaty. This is a notion with clear contractual origins, and the underlying idea goes something like this. Many modern contract law systems insist on a contract only being a valid contract if there is some form of consideration (or *causa*, or *cause* – the finer distinctions are not particularly relevant here) involved. This, as Brian Bix puts it, "separates bargains (i.e., I will do X for you, if you will give Y to me") from other sorts of promises and interactions"[167]. In such a setting, obviously it is not well-appreciated to decrease the value of the bargain prior to ratification or entry into force – in particular the latter perhaps, since prior to ratification there might still be an escape from becoming bound[168]. Beyond this, however, it is rather unclear what defeating the object and purpose of a treaty means – but if words have any meaning at all, it must be quite serious.[169] Merely making the achieving of object and purpose of a treaty more difficult seems too light, as does 'undermining' the object and purpose. The one thing that seems clear, if not particularly relevant in practice, is that there is no need to demonstrate an intent to 'defeat'; earlier drafts contained intent-related terms ("calculated to defeat object and purpose" being one of them), but this idea was eventually, eh, defeated.

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[163] Case C-15/17, *Bosphorus Queen* v *Rajavartiolaitos*, ECLI:EU:C:2018:557.

[164] Martti Koskenniemi, 'The Politics of International Law', *European Journal of International Law*, 1 (1990), p. 28.

[165] Wolfrum and Matz (footnote 78), with more 'legal' solutions being proposed in Sadat-Akhavi (footnote 78).

[166] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford, Oxford University Press, 2003.

[167] Bix (footnote 71), p. 34.

[168] This is partly why Morvay proposed a tightening of article 18 to cover only situations after consent to be bound had been expressed: see Werner Morvay, "The Obligation of a State not to Frustrate the Object of a Treaty Prior to its Entry into Force: Comments on Art. 15 of the ILC's 1966 Draft Articles on the Law of Treaties", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 27 (1967), p. 461.

[169] Palchetti seems to agree: Paolo Palchetti, "Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?", in Enzo Cannizaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford, Oxford University Press, 2011, p. 29.

2. The Law-Making Treaty Problem

If article 18 can work well with contractual agreements, with other agreements things are less clear-cut. Human rights treaties, e.g., are not based on a contractual sort of bargain, and neither are treaties for the protection of the environment, disarmament treaties, and quite a few others. In these settings, where the logic comes much closer to that of unilateral pledging[170] (even if these are done in exchange for similar pledges by others), it is much more difficult to construe particular acts as defeating the object and purpose of the agreement. One example was already discussed above: that of the Chemical Weapons Convention. A state would be silly to produce or stockpile chemical weapons prior to entry into force of the Chemical Weapons Convention, knowing fully well that upon entry into force, it should destroy such chemical weapons as it may possess. But being silly is not unlawful (if only…), and the act concerned, however silly, cannot be said to defeat the Chemical Weapons Convention's object and purpose: the state concerned will only have more weaponry to get rid off[171]. It could be different if the obligation would only relate to a partial reduction expressed in percentages: if a state would, upon entry into force, be obligated to reduce its arsenal by 50%, then the baseline (from which the 50% will be measured) is relevant, and in such a case, stockpiling before entry into force may be seen to defeat the Convention's object and purpose. But where the obligation is an absolute one, i.e., to get rid of all chemical weapons and not just a part of them (as is the case under the Chemical Weapons Convention), this logic becomes inapplicable[172]. In such a circumstance, there is very little that would actually defeat the object and purpose of the Chemical Weapons Convention: even the use of chemical weapons pending entry into force, while nasty and inexcusable and unlawful on other bases, could hardly be said to defeat the object and purpose of the Chemical Weapons Convention; by contrast, it only underlines that the Convention can bring good into the world.

The point will be obvious: article 18 VCLT works very well with contractual, bargain-based agreements, but considerably less well with complicated multilateral instruments. While there is not much case-law concerning article 18 VCLT available, such little case-law as there is supports that particular conclusion. When it comes to agreements concerning the sale of territory or equipment, article 18 VCLT can be very useful, and it is no coincidence that observers writing about article 18 tend to present (often hypothetical) examples precisely of such agreements to illustrate how the 'interim obligation' works[173]. Morvay, e.g., provides examples relating to the cession of territory and the sale of lawfully confiscated property, followed by an agreement seeing to relative (i.e., in percentages) reduction of customs tariffs. And decades later, Aust comes with similar examples: a treaty for the return of objects, a treaty for the cession of territory, and a treaty envisaging a relative reduction of armed forces[174]. Probably the most-cited judicial decision likewise concerns a bargain-type situation, following Türkiye's act of seizing and opening a bank safe held by a Greek citizen

[170] Lea Brilmayer, "From "Contract" to "Pledge": The Structure of International Human Rights Agreements", *British Yearbook of International Law*, 77 (2006).

[171] Klabbers (footnote 41).

[172] Article 1 CWC creates absolute obligations to destroy chemical weapons as well as production facilities.

[173] Unless they merely mention the interim obligation without further analysis or discussion, as does, e.g., T.O. Elias, *The Modern Law of Treaties*, Dobbs Ferry NY, Oceana, 1974, p. 26.

[174] Aust (footnote 8), p. 119.

(and disappearance of some of its contents) pending the entry into force of the 1923 Treaty of Lausanne[175].

One of the reasons why article 18 VCLT works well with contractual agreements is that, eventually, the test to figure out whether a violation has occurred is largely – or relatively – irrelevant. Whether the focus rests on the nefarious intentions of the state breaching the interim obligation, or on the legitimate expectations of the aggrieved party, or on an objective determination whether a breach has taken place, all tests point in the same direction[176]. By contrast, with law-making or institutional agreements, this does not hold true: a decision to stockpile chemical weapons prior to entry into force of a convention banning them cannot frustrate anyone's legitimate expectations, as such an expectation that no stockpiling takes place can legally only arise once the agreement enters into force – otherwise ratification and entry into force would coincide perfectly, and that would render the very interim obligation nugatory. It also follows logically that prior to entry into force no breach can take place, for the same reason, unless the behaviour is such as to defeat the treaty's object and purpose. What remains then is that the acts concerned may manifest a nefarious intention on the part of one of the signatory states. That will not be very commendable, but is unlikely, with non-bargain-based agreements, to undermine their very existence. Hence, where with contractual bargains all possible tests point in the same direction, with non-contractual agreements they point in different directions[177].

3. The Courts

Curiously perhaps, the sparse (relatively) recent case law tends to emanate from the courts of the EU, and tends to focus, the above notwithstanding, on the legitimate expectations of the aggrieved party[178]. The first relevant decision is that in *Opel Austria*, where the Court of First Instance of the EU held that by introducing a new tariff only a few weeks before entry into force of a large and institutional agreement prohibiting the introduction of such tariffs, it had endangered the legitimate expectation of the company that was the sole affected producer of the product concerned. Clearly, this was nasty behaviour on the part of the EU, but equally clearly, the imposition of a single tariff on the products of a single company will hardly defeat the object and purpose of a large-scale integration agreement involving the EU and several other parties[179]. Notable here is that the Court did not apply article 18 full-on, but mixed it with the EU law principle that legitimate expectations be protected – it re-interpreted article 18 in this direction[180].

A decade later article 18 VCLT again made an appearance before the EU courts, and again in somewhat questionable manner. In *Abuja*, relating to the construction of new Commission premises in Nigeria's newly appointed capital, Greece had taken part in the project by ratifying a first

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[175] The case concerned is *Megalidis* v *Turkey*, decided against Türkiye (then still known as Turkey) by a Turkish-Greek Mixed Arbitral tribunal in 1928. An excerpt can be found in 4 *International Law Reports* 395.

[176] It is perhaps for this reason that Sette Camara, writing two decades before the VCLT was concluded, can reduce the interim obligation to merely being the "retroactive effect of ratification": on such a construction, any violation of the treaty's terms will qualify as a violation of the interim obligation. See Sette Camara (footnote 111), p. 120.

[177] Klabbers (footnote 51).

[178] Note that the protection of legitimate expectations is considered a general principle of EU law: see Takis Tridimas, *The General Principles of EC Law*, Oxford, Oxford University Press, 1999.

[179] Case T-115/94, *Opel Austria* v *Council*, ECLI:EU:T:1998:166.

[180] See also Klabbers (footnote 51).

agreement, but not a second, which it had only signed[181]. Still, its behaviour over a couple of years had suggested that it had consented to the second agreement as well, and once Greece made clear it would no longer participate in the project, it was found to have violated article 18. This, however, may have been a category mistake: the Court itself recalls[182] that the second agreement was to be provisionally applied pending ratification, a matter governed by article 25 VCLT rather than article 18, and founded on different premises[183]. A provisionally applied treaty is so applied based on its own provisions, and is to be applied (in principle) in full; this is not the case under the interim obligation. Greece withdrew from the project for financial reasons, and while this would have had a negative impact on the other EU member states (it would have increased their share of the costs), doing so could hardly amount to a defeat of the object and purpose of the agreement to construct new premises. On appeal, the General Court seems to recognize as much. It cites article 18 at the start of its judgment, but otherwise does very little with it, remarking merely that Greece "remained free to withdraw from the project so long as it had not ratified" the second agreement; it could not escape its financial obligations under the second agreement[184]. This, however, is language appropriate to provisional application; a concrete financial obligation pending ratification is unsuitable for an article 18 construction, where (after all) the question is about object and purpose rather than concrete obligations. And again, perhaps sensing as much, the Court continues by suggesting that "the customary principle of good faith" has a role to play here[185].

Article 18 VCLT was also invoked by Peru in a trade dispute with Guatemala, played out before the dispute settlement mechanism of the World Trade Organization. According to Peru, Guatemala had accepted a particular method of calculating agricultural prices in a Free Trade Agreement between the two states which was, however, not yet in force at the relevant time. The FTA, despite not yet ratified, barred Guatemala from claiming the unlawfulness of that particular method before the WTO: such would be irreconcilable with article 18 VCLT, so Peru suggested. The panel deftly avoided the issue by suggesting that the notion of good faith underlying article 18 VCLT might not be the same as the notion of good faith within the WTO[186], but it did confirm that article 18 "does not require a signatory to comply with the terms of a treaty which it has not yet ratified, and does not even require the signatory not to act in a manner inconsistent with that treaty. The only obligation is to refrain from acts which would prevent it from being in a position to comply with the treaty once the latter enters into force or which would invalidate the object and purpose of the treaty"[187].

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[181] Case T-231/04, *Greece* v *Commission*, ECLI:EU:T:2007:9.

[182] *Ibid*., § 101.

[183] That said, there may be (fairly marginal) overlaps: see Agnes Rydberg, "Deciphering Interim Obligations under Articles 18 and 25 of the Vienna Convention on the Law of Treaties", *International and Comparative Law Quarterly*, 73 (2024).

[184] Case C-203/07 P, *Greece* v *Commission*, ECLI:EU:C:2008:606, § 63.

[185] Ibid., § 64. The phrasing is somewhat unfortunate, as it suggests a conflation between general legal principles and customary rules. The difference between rules and principles is nicely exposed in Ronald Dworkin, *Taking Rights Seriously*, Cambridge MA, Harvard University Press, 1978, pp. 22-28.

[186] This may have been brought about by the structure of Peru's argument: it claimed that Guatemala had violated the principle of good faith in WTO law by bringing the dispute, and article 18 VCLT would merely be a manifestation of good faith.

[187] *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R, § 7.91. On appeal, the Appellate Body mentioned article 18 VCLT only when rehearsing the arguments of the parties and the findings of the panel – it did not pay any specific attention. WT/DS457/AB/R.

Be that as it may, it is abundantly clear that the VCLT offers only an interim obligation solution in limited circumstances: where the treaty is based on a bargain. With more complicated treaties, laying down abstract general rules or creating complex institutions, the criterion that behaviour must be such as to defeat the agreement's object and purpose makes it unworkable – to such an extent that the leading case (*Opel Austria*) does not insist on such defeat, but instead merely wonders whether behaviour is acceptable. *Opel Austria*'s reliance on legitimate expectations is not all that persuasive in itself, in that one cannot legitimately expect obligations to take effect prior to their entry into force, but understandable in the circumstances – few other avenues would have been available to achieve fairness.

E. Objective Regimes

1. The General Idea

The VCLT does not address the question of so-called 'objective regimes', i.e. agreements involving a number of states creating the sort of situation they would hope or expect other states to respect. The ILC discussed the issue but its members could not see eye to eye, with some treating objective regimes as an exception to the *pacta tertiis* rule, while authors would regard them rather as emanations of customary ideas[188]. Still, the starting point has to be the *pacta tertiis* rule: treaties shall create neither rights nor obligations for third parties without their consent, as stipulated in articles 34-36 VCLT. Article 34 lays down the general rule: a treaty "does not create either obligations or rights for a third State without its consent", while articles 35 and 36 provide how and under what conditions consent can be expressed. But objective regimes are not normally considered to create direct rights or obligations; they only do so in a highly abstract manner. They tend to create situations, rather than rights or obligations – although these situations can possible be cast in terms of rights or obligations. In a way, this happened when a number of powers decided in 1888 that the Suez Canal should be free for ships of all nations: creating between them a legal regime which took the form of rights for all third parties, and even without participation of Egypt, at the time an autonomous part of the Ottoman Empire and the one state most closely associated with the Suez Canal. Indeed, with respect to the 1901 Hay-Pauncefote Treaty, neutralizing the Panama Canal, the parties seemed to think of their treaty as extending contractual rights to others: Britain's Lord Pauncefote is quoted as having concerns about "conferring upon other nations a contractual right to the use of the Canal"[189].

2. The Notion of Objective Regime

What counts as an 'objective regime' is not always obvious. It may concern internationalized cities (such as Berlin after World War II), typically so designated at major peace settlements at the behest of major powers. It may concern treaties of guarantee, where a state (usually a major power) assumes rights and obligations towards the treaty partners without itself being one of them. It may

[188] ILC 1966 report (footnote 57), p. 231.
[189] As quoted in Roxburgh (footnote 44), p. 66.

concern regimes on particular zones, e.g. when several states determine the area under their jurisdiction shall be a nuclear-free zone, or a zone of peace.

And it may concern international organizations, usually set up by a number of states. Some may be quasi-universal, having a membership of 180 or 190 or so states, but most have considerably fewer member states, and thus a large number of third parties. The ICJ has not pronounced on the issue at any length, but did seem to construe the position of the UN along those lines, in 1949. It held that the UN was an international legal person, capable of acting on the international plane, and moreover that its personality was to be construed as 'objective', i.e. also opposable to non-member states of the UN. The justification was found in the UN's particular characteristics, holding that "fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone…"[190]. The Court's logic is persuasive enough with respect to the UN, which was set up with universalist ambitions (however latent perhaps[191]) both in terms of its membership and the scope of its jurisdiction; it remains questionable though whether the same logic can be extended to other international organizations.

The creation of rights for third parties will rarely be controversial; more problematic is the creation of obligations for third parties or, from a different angle, limiting their freedom. The classic example is the Antarctic regime, in which twelve states decided among themselves to change the legal regime, which obviously meant that third parties were confronted with a new legal situation[192]. This can be framed in terms of new obligations (those third parties were to refrain from making territorial claims over the Antarctic, after all: an obligation to refrain), but this is rarely done – perhaps precisely for fear of alerting the *pacta tertiis* doctrine. Instead, often mention is made of a new 'regime' or 'situation', and while this affects third parties, there is no regulation in the VCLT. In the literature, such regimes are typically classified as 'objective regimes', but is remains unclear how these can be justified[193]. A subtle discussion is provided by Sir Arthur Watts in his study of the Antarctic treaty system. He notes that apart from merely asking third parties to accept the existence of such a regime (this is akin to the legal position of international organizations), the justification of objective regimes usually involves "an intention on the part of the parties to the original treaty to establish a regime valid for all States and not just for themselves, a sufficiently precise object to which the regime relates, a general international community interest in there being an objective regime governing that object, and general acceptance (if only implicitly) by the international community that the regime has such an 'objective' quality"[194]. With respect to the Antarctic regime, he rather carefully concludes that its *erga omnes* validity may have become established by acquiescence of the international community[195].

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[190] *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, [1949] ICJ Reports 174, 185.

[191] But see the excellent study by Thomas Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization*, Leiden, Martinus Nijhoff, 2009.

[192] Useful is Keith Suter, *Antarctica: Private Property or Public Heritage?*, London, Pluto, 1991.

[193] See, e.g., Bruno Simma, "The Antarctic Treaty as a Treaty Providing for an "Objective Regime"", *Cornell International Law Journal*, 19 (1986); Jan Klabbers, "Les cimetières marin sont-ils établis comme des régimes objectifs? A propos de l'accord sur l'épave du *M/S Estonia*", *Espaces et Ressources Maritimes,* 11(1997).

[194] Sir Arthur Watts, *International Law and the Antarctic Treaty System*, Cambridge, Grotius, 1992, p. 296.

[195] *Ibid*., p. 298.

3. *The Third Party Rule*

Articles 34-36 VCLT, addressing the situation of third parties, are undergirded by a bilateralized conception of treaty relations. The simple idea underlying this is the idea that states A and B conclude a treaty and in their treaty aim to create either a right or an obligation for state C. State C can then decide to accept the right or obligation, in principle adding a further bilateral element: the agreement between A and B on one side, and a corollary agreement between them and C. Here too it could be very fruitful to think of treaties as creative of relations not between parties but rather with a text, in that A, B and C will all have relations with the same text(s), but such does not fit the VCLT's framework.

This bilateral foundation is further based on, again, a bargain-type contractual notion. It is no coincidence that Roxburgh starts his classic study with a lengthy comparative overview of the position of third parties in various domestic systems of contract law, having bluntly started from the proposition that "treaties are the contract of International Law", and despite his wise caveat that "the actual rules of the law of nations can be discovered neither by theory nor by analogy, but solely by reference to the practice of states"[196].

In the VCLT's universe, law-making for the common or greater good is excluded. This is no doubt for good reason: in the global body politic, autonomous sovereign states need to be protected against the desires of other sovereign states, and what one may present as being for the common good might be unwelcome to the other. Thus, it is sensible, in a world of sovereign states and characterized by widespread disagreement, to protect states through the *pacta tertiis* rule. But this, in turn, entails that the only treaties possible are treaties that do not radiate outward, and the most typical specimen is the bargain-based contract. When state A cedes territory to B, the third party problem is unlikely to arise[197]. Articles 34-36 can afford to retain a strict respect for the *pacta tertiis* rule precisely because more complicated settings were not seriously envisaged or, when envisaged, not taken seriously enough to try a different approach. Third party issues are expected when a treaty aims to radiate beyond its proper circles of parties, but this now is effectively excluded from the VCLT[198].

Similar problems as those of third states may arise when a treaty can be seen to affect the legal position of individuals, whether natural or legal persons[199]. A human rights convention such as the European Convention on Human Rights is not easily typecast as being based on a bargain between Holland and Belgium, Holland and Armenia, Holland and the UK and Holland and Türkiye. It does not really create ties between those states or, more accurately, it does so only to a very limited extent, reflected in the limited number of inter-state complaints that have been brought under the European Convention on Human Rights. Most of the tens of thousands of cases have been brought

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[196] Roxburgh (footnote 44), p. 3.

[197] Unless others have a claim on the same territory, but in such a case the problem is not best classified as a third party problem.

[198] Related issues arise when it is unclear or contested how far the authority of one of the parties reaches: see, e.g., in respect of Western Sahara the decision of the CJEU in Case C-266/16, *Western Sahara Campaign UK* v *Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, ECLI:EU:C:2018:118.

[199] A faint attempt to regulate this, as proposed by special rapporteur Waldock, never made it out of the ILC. It is briefly mentioned in Chinkin (footnote 44), p. 121.

by individuals against the state under whose jurisdiction they resort, while the inter-state complaints number a few dozen at best[200]. Much the same applies to the EU, whose judicial system is open to inter-state complaints but rarely sees, those, even more rarely than the European Court of Human Rights. And what applies to human rights treaties, giving pride of place to the individual and creating legally meaningful relations between states and those within their jurisdiction, may also apply to investment treaties, which are sometimes said to create 'triangular' legal relations involving not just two states but also investors[201].

The VCLT is incapable of dealing with such constructions on its own, and needs several additional mechanisms. One of these is the notion of corollary agreements to make sense of third party obligations or rights: the construction with the Suez Canal is that usage entails acceptance of the right, effectively a corollary agreement through behaviour. With other regimes, including quite a few international organizations, possibilities or invitations to join have been established – these help to overcome the strict *pacta tertiis* rule. Thus, the number of parties to the Antarctic regime has been extended, as has the number of parties to the agreement on the wreck of the M/S Estonia[202]. Or then it needs adjacent legal doctrines: perhaps the creation of rights for individuals can be explained through the notion of *erga omnes* obligations, or vested rights, or some such construction[203].

F. Final Remarks

The discussions in this chapter concerning treaty conflict, the interim obligation, and objective regimes, all suggest that the VCLT is not very well-equipped to address situations involving several actors. Article 30, regulating treaty conflict, is far better at regulating treaty conflicts involving identical parties than it is at regulating treaty conflicts involving non-identical parties, with problems getting even more pronounced when the rights of natural and legal persons are at stake. Likewise, the notion of objective regimes suggests that there are strict limits to the strict *pacta tertiis* rule, which was designed to exclude third parties from the effects of any treaties. This, obviously, is a pipe dream: third parties do make demands, regardless whether they are natural or legal persons or third states somehow affected. And the case-law of both human rights courts and investment tribunals offers thousands of cases with natural or legal persons claiming rights under some treaty. They may not formally be parties, but that seems much beside the point[204]. And the interim obligation of article 18, finally, is likewise far better with contractual arrangements based on

[200] The European Court of Human Rights reported that as of June 2024, 23 inter-state complaints had been decided, with another 14 pending. Some of these relate to the same larger problem: the Armenia-Azerbaijan conflict forms the direct background to six pending cases, while different phases relating to the same application maybe be listed as separate cases. See https://www.echr.coe.int/en/inter-state-applications (visited 7 January 2025).

[201] Andres Rigo Sureda, *Investment Treaty Arbitration: Judging Under Uncertainty*, Cambridge, Cambridge University Press, 2012.

[202] On the latter, see Marie Jacobsson and Jan Klabbers, "Rest in Peace? New Developments Concerning the Wreck of the M/S Estonia", *Nordic Journal of International Law*, 69 (2000).

[203] In the same vein, Chinkin (footnote 44), p. 35: "The Vienna Convention takes a reductivist and formalist approach to treaty law. Problems that cannot be solved by simple application of treaty principles are excluded."

[204] Likewise, there is a popular argument that in cases of state succession, the succeeding state should automatically be bound by the human rights treaties of the predecessor: see Menno Kamminga, "State Succession in Respect of Human Rights Treaties", *European Journal of International Law*, 7 (1996).

clearly identifiable bargains than it is with treaties laying down general rules of behaviour or establishing institutions.

The overview in this chapter then, limited as it is, suggests that there is a particular model of treaty underlying the VCLT. If the VCLT works best with bilateral treaties containing concrete rights and obligations on such diverse topics as the interim obligation, treaty conflict and the third party problem, this must be because that was the model – the archetype - the drafters of the Vienna Convention had in mind. The problem is not so much that some treaties may be based on reciprocity and others may not: as Bob Keohane has shown, reciprocity can come in different guises, and can be both specific and diffuse. Specific reciprocity is akin to 'tit-for-tat', and might help explain bargain-type agreements. Diffuse reciprocity, however, offers a plausible explanation as to why states might, e.g., set up institutions[205].

The answer then is more likely to be found in epistemic structures: people preparing treaties, whether diplomats or the ILC, tend to have a particular model in mind. It is commonplace to suggest that investment agreements are 'boilerplate', finding inspiration in previous treaties, and much the same applies to other categories of treaties, such as the headquarters agreements between international organizations and their host states or, in the field of military matters, so-called 'status of forces' agreements. Indeed, in some fields it is not uncommon to have someone (typically an international organization, such as the OECD) develop a so-called 'model' treaty, precisely so as to help future treaty makers, and throughout the years, several handbooks for would-be treaty-makers have been produced[206].

The contention of this study is that the VCLT too is modeled on a particular, and rather narrow, conception of what a treaty is: the archetype of the 'bargain-based' contract, with state A promising something to B in return for something else. It is emphatically not the case that the drafters were not aware that there were other models in circulation: they were intimately familiar with the existence of multilateral agreements, and even law-making treaties, as McNair's lament copiously suggests, while special rapporteur Sir Gerald Fitzmaurice famously discussed 'integral' and even 'interdependent' treaties as counterparts to contractual agreements. Some of these, as we will see, could be re-conceptualized in terms far closer to the bargain-based contract, therewith strengthening the appeal of the archetype. And with some others, the VCLT aimed to find a more custom-made solution, as for instance visible in the provision (in article 60 VCLT) that also parties other than directly affected parties may consider invoking a breach of a multilateral agreement as a possible ground for termination. But this takes nothing away from the overwhelming role played by the bargain-based contractual archetype.

The next chapter will develop the idea that the bargain-based contractual model forms the 'inner circle' of international legal thought on the matter, and is surrounded by a several concentric circles of other models. It will be suggested that the further one moves outward, the less the VCLT has to offer, culminating in the proposition that the drafters of the VCLT took their hands almost entirely off treaties establishing international organizations.

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[205] Robert O. Keohane, "Reciprocity in International Relations", reproduced in Robert O. Keohane, *International Institutions and State Power: Essays in International Relations Theory*, Boulder CO, Westview Press, 1989. If anything, it could be argued that Keohane, captured by his embeddedness in rationalist theory, did not even push the idea of diffuse reciprocity as far it could possibly go.

[206] Hans Blix and Jirina Emerson (eds.), *The Treaty-Maker's Handbook*, Dobbs Ferry NY, Oceana, 1973; Jill Barret and Robert Beckman, *Handbook on Good Treaty Practice*, Cambridge, Cambridge University Press, 2020.

CHAPTER III
THE LIMITED ARCHETYPE OF THE VCLT

A. Introduction

1. The Idea of the Chapter

Thus far, I have made the general observation that the law of treaties in general, and the VCLT in particular, is rather messy. The VCLT, as we have seen, addresses a number of topics, but few of them are addressed in satisfactory manner. On many issues, it turns out, the VCLT has little to offer. It is unable to say much that is helpful on reservations, or interpretation, or termination, or quite a few other issues, some of which have been remanded to the International Law Commission.

This chapter will develop an argument and discussion as to why this is the case, and will present a typology (of sorts) of treaties. I will suggest that one can think of different kinds of treaties as one would about concentric circles, ranging from the bargain-based contractual bilateral agreement to the large multilateral treaty establishing an international organization. This obviously owes something to McNair's classic division into four categories, discussed in the previous chapter[207], but as I have a different goal than he did, I also employ a different perspective, and therefore my taxonomy is slightly more extensive.

The argument in this chapter will be largely implicit. I will suggest first that there is a setting in which the VCLT works perfectly fine, and that this limited setting aligns with what I hold to be the archetype (the first concentric circle). From there on, I will further develop four additional concentric circles, where the VCLT has increasingly less to say – and indeed, with the fifth, the VCLT professes not to have anything at all to say.

2. On Archetypes

Before doing so, I should provide a brief word on the notion of archetype, which does not seem to be very common in legal studies. I will use the notion in its more or less Platonic sense, as the dominant source of a phenomenon, in this case the treaty[208] - archetype is a contraction of the Greek words *arche* and *typos*, i.e, source and rule (roughly). Importantly, archetype is neither prototype (not necessarily, at any rate, although the two can possibly coincide) nor idealtype. The latter idea was popularized by the sociologist Max Weber and refers to a construction in the mind of the (or some) ideal version of a phenomenon, which need not correspond to any real-life manifestation of that phenomenon[209]. As Weber explains, this allows the sociologist to provide meaning to each historical manifestation of that particular phenomenon and phenomena like it, allowing for comparison and analysis[210]. Thus, an idealtype of the state might be an entity governed by the rule of law, with a democratically elected government and respect for the rule of law, perfect gender equality and a reasonable equality of income and wealth, the absence of any kind of discrimination based on race or any other factor, et cetera – perhaps an updated version of Thomas More's fictitious *Utopia* might come close.

If the prototype of something is the original model, copied time and again, the archetype is more like the original model which comes to stand for the regular thing, regardless of variations over time and space. It

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[207] See above, chapter 2.

[208] This use can be distinguished from the Jungian archetypes, often used by companies looking to position their product: are we aiming to appeal to 'the explorer', or 'the outlaw', or 'the hero'?

[209] This is not the only idea of what idealtypes stand for: some view them as the highest form of a particular existing type. For brief discussion along these lines, see Raphael Fèvre, *A Political Economy of Power: Ordoliberalism in Context, 1932-1950*, Oxford, Oxford University Press, 2021, p. 84.

[210] See Max Weber, *Economy and Society*, Berkeley CA, University of California Press, 1978, Guenther Roth and Klaus Wittich eds., pp. 20-21.

is in this sense that I will use the notion, and the idea is that when the VCLT was drafted, the type of treaty the drafters had in mind was a very narrow type: a treaty was a written agreement between two states for the sale of something.

This cannot be 'proven' with specific quotations: the four special rapporteurs were highly prominent and above all sophisticated international lawyers, and much the same applied to various leading members of the ILC at the time. These lawyers knew very well that the notion of treaty, in diplomatic and legal practice, encompassed more than just the contractual bargain – they were perfectly aware of the existence of multilateral treaties, and of what Fitzmaurice termed 'integral' treaties, and aimed to find ways to accommodate these. But even so: they could not escape the contractual (and *narrow* contractual) mindset altogether.

And what is more, despite protestations and examples to the contrary[211], this archetype continues to have a strong hold: ask people what they think a treaty is, and often the answer will be something along the lines of 'a contract between states'. What makes this both plausible and problematic is precisely that this harks back to the archetype; and some treaties are indeed contracts between states – or as close as these things can get, at any rate[212].

3. On Taxonomies

What follows is something of a taxonomy, but as with all taxonomies, several warnings need to be heeded. A first is that most categorizations are essentially arbitrary, whether in the natural sciences or the social sciences and humanities – though perhaps *a fortiori* in the latter. I noted earlier that McNair presented a slightly different categorization, and throughout history several others yet have been put forward. Some classic distinctions include the distinction between 'contractual' and 'law-making' treaties, a rough distinction that still has a bearing on twenty-first century international legal thought, although most would agree it is a little rough around the edges. A variation holds that some treaties – human rights treaties in particular – are deserving of special treatment, a position faintly echoed in article 60, paragraph 5, VCLT, which carves out a special rule for "treaties of a humanitarian character": these shall not be terminated upon occurrence of a material breach.

Another classic distinction addresses the sort of rights treaties may create: either rights *in personam* (towards the treaty partner or partners), or rights *in rem* (towards the world at large). In a world of sovereign states, the logical category are the rights *in personam*: states can only create rights "opposable" (another classic term) towards their treaty partners. On the other hand though, if state A sells territory to state B, other states, not involved, cannot claim that this is none of their business: states C, D, et cetera, will have to respect the property rights thus vested in state B. This even resulted in thinking, in earlier days, that the treaty concerned would cease to exist once the territory had been transferred or disposed of: such treaties were called 'dispositive', and would no longer have an existence, although the property rights would continue to exist[213]. The terms may no longer be in vogue, but international law continues to struggle with these issues: a currently popular distinction of similar tenor is that between obligations *erga omnes contractantes* (towards all other parties) and obligations *erga omnes* (towards all) – even if the emphasis here is on obligations rather than rights. And territorial treaties do on occasion occupy a special position in positive law: where regular

[211] Jellinek already, writing in 1880, fulminated against the idea that treaties would somehow be like private law contracts: Jellinek (footnote 3), p. 41.

[212] Notions such as 'treaty' and 'contract' are the result of inter-subjective usage throughout the ages, and have no natural counterpart – there is no such thing as a contract existing in nature, corresponding to how the term is used in everyday communication.

[213] A useful discussion is contained in Roxburgh (footnote 44), pp. 103-109.

treaties may be subject to termination or suspension upon a fundamental change of circumstances, such a change may not be invoked "if the treaty establishes a boundary"[214].

The second warning or caveat is that taxonomies are not only arbitrary, but are typically also informed by the use to which they are put. And this in turn entails that taxonomies can exist side by side. It is unlikely to be the case that one is 'objectively' better than another (although this is not excluded), but rather than some are better for some specific purposes than others[215]. The one offered below is, I think, helpful in explaining why the Vienna Convention is better equipped to deal with some treaties than with others, but has little to say otherwise about, e.g., distinctions between treaty rights *in personam* and treaty rights *in rem*.

B. Towards the Archetype: The First Circle

1. The VCLT At Its Best

Earlier, it was established that the VCLT seems to work best in certain particular, and limited, circumstances. Take, e.g., the interim obligation of article 18: the obligation not to defeat the object and purpose of a treaty pending ratification or entry into force. This, as we have seen, is not particularly useful when at stake is a multilateral agreement for the protection of human rights, a disarmament convention, or a treaty setting up an international organization. It cannot be argued in any meaningful way that a single 'violation' of a human rights convention pending its entry into force would defeat that convention's object and purpose – claiming so would entail that the convention actually enters into force prior to its formal, official, entry into force, as the effects would be indistinguishable. In fact, quite the opposite is the case: such a 'violation' only underlines how useful the convention will be – if and when it actually enters into force.

By contrast, article 18 will work wonderfully well with treaties involving commercial bargains. Should state A sell a piece of territory to state B, and during the interim period conduct nuclear tests, then state B could justifiably claim that it receives less than it bargained for: the value of the transaction was undermined by A's behaviour in such a way that it can be argued that the object and purpose of the bargain was changed beyond recognition. In such a case, article 18 protects state B, and does exactly what it is supposed to do. Much the same applies if state B were to purchase military equipment that would be intensively used before delivery, or any other good for that matter.

2. A Limited Number of Parties

If article 18 is anything to go by, the VCLT works well with treaties meeting several criteria. The first is that it tends to have little problem with treaties having a limited number of parties: in fact, the fewer the better. As a matter of definition, one cannot have a treaty with only one party[216], so the minimum number is two. Still, not all bilateral agreements are equal. A second requirement then is that there must be some kind of bargain involved, whether this is called 'consideration' or *causa*, in terms familiar from contract law, or something else. This can be money, this can be consideration in kind, it can be something symbolic like recognition, but there is some general idea that a purely one-sided agreement is problematic. This was not always the case: Roxburgh could write with some aplomb, a century ago, that ""consideration" is not an

[214] Article 62, paragraph 2(a) VCLT.

[215] Philosophical underpinnings can be found in Hilary Putnam, *Ethics without Ontology*, Cambridge MA, Harvard University Press, 2004.

[216] This need not be entirely true: it is conceivable that a treaty is withdrawn from by all parties except one: in such a case, one could think of treating this as a unilateral treaty – but the example is hypothetical and contrived. That said, there may be treaty-like relationships established by unilateral declarations: see below, section G of this chapter.

essential element in the conception of a contract in International Law"[217], but that position, while not mistaken per se, is probably just a tad too strong – it would allow for unequal treaties[218].

3. Allocating Risk?

This can be further theorized by adopting Charles Fried's suggestion that "contracts generally are a device for allocating risks." As he points out, concluding a contract today for a party of goods at a particular price means the buyer takes the risk that products may become cheaper, while the seller takes the risk that the same goods could yield him a higher profit if and when sold when the price has risen. In this sense, the contract creates stability: by settling on a deal today, both buyer and seller assume a risk, but also mitigate a risk[219].

This elementary logic operates against a background of the market: the deal made today freezes the equilibrium reached between supply and demand on a market where prices can fluctuate. It is exactly for this reason that the bargain-based contractual model has such a strong hold on the legal imagination that it occupies much of the 'headspace' where treaties are located. It is here that the interim obligation of article 18 VCLT also comes in, as well as such institutions as the *inadimplenti non est adimplendum* rule in cases of breach: contractual regimes, writes Fried, "must maintain the integrity of bargains"[220].

This was even visible in the first attempts within the ILC to come to terms with treaty conflict: special rapporteur Lauterpacht, in his second report on the law of treaties, formulated as a general rule the proposition that a treaty is "void if its performance involves a breach of a treaty obligation, previously undertaken by one or more of the contracting parties"[221]. Lauterpacht subsequently had great difficulty, in related paragraphs, to point out that this was mostly concerned with important rules embedded in the earlier treaty, and that it could not apply to a whole range of (largely more or less legislative) treaties[222]. The point for present purposes is that his first instinct was to protect the original bargain, only to realize that such might not always be normatively desirable.

4. Or Managing Risk?

That said, possibly under the influence of International Relations theorizing, the notion of risk is usually associated with treaties in a different way: the "risks of international agreements" tend to be seen as the risks of losing out. Bilder identifies three kinds of risk: the risk of losing out on a better deal; the risk of a drop in "intrinsic utility" of the agreement; and the risk that the other side does not perform[223]. Where Fried suggests agreements (in his case: contracts) are a method for allocating risk, Bilder's conceptualization works the other way around: agreements are creative of risk, and such risks need to be managed.

This alone – the risks identified – suggest a bargain-based conception of treaties, and indeed, his choice of words often bears this out, in particular when it comes to the risks of a drop in utility and the risk of being cheated. The "intrinsic utility" of a treaty, for instance, is said to have everything to do with the underlying

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[217] Roxburgh (footnote 44), p. 5. Note that Roxburgh explicitly conceptualizes treaties as contracts.

[218] This refers to a category of treaties often associated with colonial or quasi-colonial domination. For excellent discussion, see Matthew Craven, "What Happened to Unequal Treaties? The Continuation of Informal Empire", *Nordic Journal of International Law*, 74 (2005).

[219] Fried (footnote 70), p. 59.

[220] *Ibid.*, p. 117.

[221] Hersch Lauterpacht, Second Report on the Law of Treaties, UN Doc. A/CN.4/87, in *Yearbook of the International Law Commission* (1954/II), pp. 123-139, 133, draft article 16(1).

[222] *Ibid.*, draft article 16(3) and 16(4).

[223] Richard B. Bilder, *Managing the Risks of International Agreement*, Madison WI, University of Wisconsin Press, 1981, pp. 14-15.

bargain: circumstances may arise which result in a state suffering a "net loss from the bargain"[224]. Likewise, he notes, when state A performs but its treaty partner does not, "A will have given something for nothing or for less than it expected, and may experience a net loss"[225]. This is not the kind of language that has much traction with human rights conventions or treaties for the protection of the global commons or even multilateral treaties generally; but the language does resonate with bargain-based contracts. By the same token, it is surely no coincidence that many of the examples he proffers, whether real or hypothetical, are examples of treaties involving a bargain of sorts: not only for the sale of territory or goods, but also others where a clear tit-for-tat construction can be identified, such as bilateral disarmament agreements[226].

C. The Second Circle

1. Allocating Authority

If quite a few bilateral treaties are concluded so as to allocate risk, quite a few others come closer to allocating authority, as Trachtman once put it: ".. treaties exist … to effect transactions in jurisdiction: to allocate or reallocate authority in legal form"[227]. Trachtman specifically mentions tax treaties and extradition treaties as examples of "transactions in jurisdiction", but suggests (somewhat less plausibly perhaps) that the same idea can also be applied to human rights treaties or treaties for the protection of the environment[228].

For starters, this suggests the fluidity of taxonomies: an extradition treaty can be seen as a transaction in jurisdiction, but also as a bargain-based contract: you extradite my suspects in exchange for me extraditing yours. And the same applies to tax treaties, typically dealing with double taxation: you refund my citizens in return for me refunding yours. The transaction here can be cast in terms of dividing authority, but also in terms of consideration.

2. Managing Common Projects

And both tax treaties and extradition treaties can be seen as belonging to what I refer to here as my 'second circle': the treaties, often bilateral, to give effect to a common project of sorts. Perhaps the most obvious example is formed by treaties for the management of boundaries and/or boundary rivers. These might be given the form of an international organization (small, with two member states), but cannot really survive comparison with the United Nations or the World Meteorological Organization. They also tend to have more far-reaching powers. The leading example is the grandly called International Boundary Commission set up between the US and Canada in 1908. Its main task is to maintain the long boundary (almost 8900 kilometers) between the two countries, and it has the power to decide on clearance, on any structure proposed within 10 feet of either side of the boundary, to launch inspections, et cetera[229]. Already earlier, in 1889, the US and Mexico established their International Boundary and Waters Commission, while

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[224] *Ibid*., p. 78.

[225] *Ibid*., p. 106.

[226] One of these consists of the bilateral SALT agreements between the USA and the erstwhile USSR: *ibid*., pp. 196-197.

[227] Joel Trachtman, *The Economic Structure of international Law*, Cambridge MA, Harvard University Press, 2008, p. 119. The conceptualization of treaties as engaged with the allocation of authority owes something to Trachtman's general economic approach to international law, holding that "efficiency in the allocation of authority" is of primary concern (p. 3).

[228] *Ibid*., p. 119.

[229] https://www.internationalboundarycommission.org/en/about/commission.php (visited 18 November 2024).

the waters between the US and Canada are under the jurisdiction of the so-called International Joint Commission since 1909.

Well-known from the case-law of the International Court of Justice is CARU, the Comisión Administradora del Rio Uruguay, which made a sustained appearance in the 2010 *Pulp Mills* judgment and is generally tasked with maintenance of the boundary river between Argentina and Uruguay[230]. Sometimes such joint commissions are set up for the duration of a particular project; this applies, e.g. to the Lesotho Highlands Water Project, a joint venture set up in 1986 between Lesotho and South Africa[231].

With or without their own secretariat, these treaties allocating authority require some form of regular application or even monitoring, and this sets them apart from the typically bargain-based contract. Treaties preventing double taxation can be seen to fall into this category, as well as the many social security treaties allowing migrant workers to move back to their country of origin while retaining social security benefits and pensions built up working abroad[232]. These are not one-off arrangements, but manage regular interactions. And much the same applies in the field of cooperation in criminal matters, which typically takes the form of mutual legal assistance treaties[233] or even treaties concerning extradition[234].

A separate group is made up of headquarters agreements or similar, such as agreements to open embassies[235], consulates, representations, trade missions, or to station troops abroad[236]. States conclude such agreements with one another, but also with international organizations. Some of these are meant to last for a long time (headquarters agreements of international organizations being a case in point[237]), whereas others might be planned to be of shorter duration. Indeed, sometimes it concerns very short-lived matters, such as the organization of a symposium – an example is the 2024 Exchange of Notes between the Netherlands and the International Civil Aviation Organization, on the organization of a three-day symposium on Assistance to Aircraft Accident Victims and their Families, containing details on privileges and immunities, security arrangements, the availability of premises, and liability issues, among other things[238]. But no matter whether of permanent duration or very short-term, the point is that such agreements tend to require some monitoring and management, governing, as they do, everyday relations.

D. The Third Circle

1. 'Bipolar' Treaties

[230] See *Pulp Mills on the River Uruguay* (Argentina v Uruguay), [2010] ICJ Reports 14.

[231] It is mentioned in Robert K. Hitchcock, "From Boardrooms to Field Programs: Humanitarianism and International Development in Southern Africa", in Ronald Niezen and Maria Sapignoli (eds.), *Palaces of Hope: The Anthropology of Global Organizations*, Cambridge, Cambridge University Press, 2017, and further discussed in Jan Klabbers, "Responsibility as Opportunism: The Responsibility of International Organizations", in Samantha Besson (ed.), *Theories of International Responsibility Law*, Cambridge, Cambridge University Press, 2022.

[232] An example is the agreement concluded between the Netherlands and Morocco in 1972, available at https://wetten.overheid.nl/BWBV0001012/2022-06-01#Citeertitel (visited 19 November 2024).

[233] Within Europe, the Council of Europe's 1959 European Convention on Mutual Assistance in Criminal Matters is of relevance: *European Treaty Series* No. 30.

[234] In the early 1970s, Shearer estimated there to be some 1500 bilateral extradition agreements in force. See Shearer (footnote 150), p. 35.

[235] The ICJ underlined that many acts relating to the establishment of diplomatic relations take place by mutual consent, involving the *agrément* of the host state. Whether these add up to treaties was left unspecified. See *Immunities and Criminal Proceedings* (Equatorial Guinea v France), [2020] ICJ Reports 300, § 63-68.

[236] A discussion of aspects of status of forces agreements is contained in Rain Liivoja, *Criminal Jurisdiction over Armed Forces Abroad*, Cambridge, Cambridge University Press, 2017.

[237] A.S. Muller, *International Organizations and Their Host States*, The Hague, Martinus Nijhoff, 1995.

[238] See *Tractatenblad* 2024, no. 133.

There are quite a few treaties in force that may be multilateral in form, but are effectively arranging bilateral relations between parties. Some have termed these treaties 'bipolar', a term with somewhat unfortunate medical connotations,[239] whereas others refer to them, quite accurately but not easily pronounceable, as 'multilateral treaty bilateral in application'[240]. Perhaps a better way to describe them therefore is to suggest they regulate relations between pairs, or dyads[241], of states[242]. This was, indeed, for a long time the normal state of affairs of the multilateral treaty. It was only from the early nineteenth century onwards that it started to appear "rational to replace a whole set of bilateral treaties by a single multilateral instrument", and even then "initially as a pure matter of form"[243].

2. Multilateral Treaties Replacing or Complementing Bilateral Treaties

Many multilateral treaties can be reduced to bilateral dyads, although the permutations may be complicated. The late James Crawford once presented a telling set of examples. A treaty with four parties gave rise to six distinct legal relationships, which seems workable enough. A treaty with 193 parties, however, ends up generating 18,528 bilateral relationships[244]. That treaties can be so reduced is easy to see with multilateral extradition treaties and mutual legal assistance treaties: these matters are almost by definition bilateral in nature, with state A requesting a suspect to be extradited from state B, or A requesting legal assistance from B. The treaty may be a multilateral instrument, as with the 1957 European Convention on Extradition[245], but the legally relevant relationships are between dyads of states: states A and B, or A and C, or B and F, as the case may be. Indeed, the example is especially poignant, as the European Convention on Extradition came to replace a number of existing bilateral treaties between European states. Its article 28 provides that the Convention shall "supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties". This technique (replacing sets of bilateral treaties by a single multilateral treaty) has remained rare, but some variations can be mentioned, as seen in the previous chapter. Thus, the 2014 Mauritius Convention on Transparency in Treaty-Based Investor-State Arbitration, a multilateral instrument, aims to complement existing bilateral treaties. Rather than re-negotiating all of these to add provisions on transparency, it was thought helpful to add a common set of provisions through a multilateral instrument[246]. Much the same applies, in even stronger form, to the Multilateral Instrument developed under the auspices of the Organization for Economic Cooperation and Development (OECD) in the framework of its Base Erosion and Profit Shifting initiative (known as the BEPS MLI). Where the Mauritius Convention complements existing bilateral treaties, the BEPS MLI modifies them, so as to prevent tax evasion[247].

At the time of writing (and perhaps for a considerable period thereafter still…) the same body that produced the Mauritius Convention – the United Nations Commission on International Trade Law, or UNCITRAL - is working on a possible unified investor-state dispute settlement regime, possibly replacing

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[239] Bleckmann (footnote 99).

[240] Bruno Simma, "From Bilateralism to Community Interest in International Law", (1994) 250 *Recueil des Cours,* vol. 250 (1994*),* p. 336.

[241] The concept of 'dyad' is borrowed from Joanne Gowa, *Ballots and Bullets: The Elusive Democratic Peace*, Princeton NJ, Princeton University Press, 1999.

[242] McNair would have preferred to refer to these as 'multipartite', as opposed to 'multilateral', but also realized this terminology was not commonly accepted. Lord McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, pp. 29-30.

[243] Reuter (footnote 113), p. 2.

[244] James Crawford, "Multilateral Rights and Obligations in International Law", (2006) 319 *Recueil des Cours,* vol. 319 (2006) p. 343, footnote 24. Thanks to Luíza Leao Soares Pereira for reminding me.

[245] European Treaty Series, No. 24.

[246] https://uncitral.un.org/en/texts/arbitration/conventions/transparency (visited 23 December 2024).

[247] The text can be found at https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/beps-mli/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.pdf (visited 23 December 2024).

(or modifying, or complementing) existing bilateral investment treaties. Negotiations in UNICTRAL Working Group III have been going on for several years; a draft text is scheduled to be discussed in February 2025[248]. According to this draft, a new Convention will refer to a set of new Protocols, allowing states to opt-in to any of these protocols with a view to governing their investor-state disputes.

3. Some Further Examples

Bleckmann mentions as a further example of bipolar treaties, treaties that involve several states but typically on two sides of an arrangement. To his mind, the Versailles settlement is an example, with Germany on one side pitted against the allied states on the other. And another example stems from the treaty practice of the EU, referring to what was when he wrote the Lomé agreement: with the EU and its member states on one side, and a number of states in the global south on the other side[249].

Be that as it may, the point to note is that quite a few treaties that are multilateral in form, can be reduced to governing sets or dyads of bilateral relations. Extradition and mutual legal assistance may be the most obvious candidates, but the same applies essentially to such large multilateral treaties as the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations – such relations being again characterized by their bilateral nature. But also trade law can take this form. The World Trade Organization is a multilateral framework governing essentially bilateral trade relations, with tariff concessions negotiated bilaterally between states. Trade law is, in fact, a curious mixture: those bilateral concessions are in turn 'multilateralized', so to speak, through the Most-Favoured Nation rule, but only to a limited extent. Pauwelyn provides a useful example. If Canada (for example) agrees to bind its tariff on computers to 5 % with the EU, it becomes (through the Most-Favoured Nation rule) a 5 % ceiling for all other WTO members. Still, if Canada raises the ceiling with Brazil to 10 %, this only means that Canada violates an obligation towards Brazil, not to anyone else. And as a result, only Brazil could lodge a complaint. Thus, Pauwelyn concludes that within the WTO, "the starting point or presumption must be that obligations are of a bilateral or reciprocal nature"[250].

4. The Role of Multilateral Fora

And then there are many bilateral treaties coming out of multilateral fora. The World Bank is an international institution comprising 189 states, but it typically concludes loan arrangements with individual states – these are typically bilateral treaties, even if one of the parties is a multilateral institution. The International Monetary Fund does something similar with its stand-by arrangements, but construes these not as treaties but as pairings of unilateral acts: offer and acceptance[251]. The UN's peace-keeping mission agreements, troop-contributing agreements, transit agreements and status of forces agreements are again bilateral treaties, with one of the parties being a multilateral organization[252]. It is clear though, under international law generally, that such treaties are bilateral in nature: they create legal relations between the

[248] UN Doc. A/CN.9/WG.III/WP.246.

[249] Bleckmann (footnote 99), p. 225. The Lomé Convention has since been replaced by the Cotonou Convention.

[250] Pauwelyn (footnote 156), p. 67. The example is provided at p. 66.

[251] For useful discussion, see Daniel Bradlow, *The Law of International Financial Institutions*, Oxford, Oxford University Press, 2023, pp. 143-144.

[252] For very brief discussion, see Stephen Mathias, "Treaty-Making at the United Nations: The View from the Secretariat", in Simon Chesterman, David Malone, and Santiago Villalpando (eds), *The Oxford Handbook of United Nations Treaties*, Oxford, Oxford University Press, 2019, p. 66.

state concerned and the World Bank or the UN – they do not create legal relations involving the individual member states of those organizations[253].

Needless to say, much the same applies to most treaties concluded by the EU. A treaty between the EU and Japan may require 29 expressions of consent to be bound (of the EU, its 27 member states (and perhaps a few from local authorities), and Japan), yet still be a bilateral treaty, as the EU and its member states, for such purposes, typically count as one single party. This may create all sorts of issues in terms of divisions of responsibilities between the EU and its member states – of who is supposed to implement what. These are matters of EU law, but not without relevance for the EU's actions on the international level[254].

E. The Fourth Circle: Integral Treaties

1. A Different Taxonomy

The ILC's third special rapporteur on the law of treaties, Sir Gerald Fitzmaurice, is well-known for having made the analytical distinction between what he referred to as reciprocating agreements (those which, even if multilateral in form, can be reduced to governing bilateral relations) and two additional categories: what he referred to as interdependent and absolute (or integral) treaties. Where McNair's division into four categories largely reflects different matters to be arranged[255], the great contribution of Fitzmaurice is that the focus came to rest not on subject-matter, but on the way legal relations are structured differently by different categories of treaties.

Given the formalist stance of the law of treaties, already long before the VCLT, this is the only workable approach. For one thing, dividing groups of treaties based on their substantive areas of law is always bound to remain problematic and will lead to borderline issues: is a treaty limiting trade in endangered species a trade agreement, or an environmental agreement[256]? Nor is a hierarchy possible, unless specified by a treaty itself, as does article 103 UN Charter; beyond this, all treaties result from consent, and all have to be as equal. More importantly though: in a formalist setting the only possible criterion can be one related to the structure of legal relationships. As Tony Carty once pithily put it, the idea of a political treaty "is an unrecogisable [sic] concept"[257].

2. Fitzmaurice's Work

Fitzmaurice had realized much the same early on. In his first report, he acknowledged that treaties may be classified in several categories "on grounds of practical convenience and for certain procedural purposes",

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[253] This was the gist of the discussion leading up to the 1986 VCLTIO. For insightful discussion, see Catherine Brölmann, "The 1986 Vienna Convention on the Law of Treaties: The History of Draft Article 36bis", in Klabbers and Lefeber (eds.) (footnote 22).

[254] The seminal (if by now somewhat outdated) study on so-called 'mixed agreements' is Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States*, The Hague, Martinus Nijhoff, 2001. Relations between the EU and the international legal order generally are sketched in Jan Klabbers, *The European Union in International Law*, Paris, Pédone, 2012. The leading text on the internal EU side is Panos Koutrakos, *EU International Relations Law*, 2nd edn, Oxford, Hart, 2015.

[255] This sort of approach has by no means been uncommon: see, e.g., Edwin Hoyt, *The Unanimity Rule in the Revision of Treaties: A Re-Examination*, The Hague, Martinus Nijhoff, 1959.

[256] Young (footnote 79).

[257] Anthony Carty, *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs*, Manchester, Manchester University Press, 1986, p. 78.

but that there was no "substantial juridical difference" between the various classes, since "they are all based on agreement, and derive their legal force from its existence"[258].

Fitzmaurice's reciprocating category covers the three first concentric circles mentioned above, containing reciprocal concessions and benefits; defining his other two categories was a bit more complicated though. Sir Gerald first elaborated his distinction in his second report, and did so in the context of discussing responses to breach of treaty. The key to the distinction, so he suggested, was the circumstance that with integral or absolute treaties, "the character of the treaty is such that, neither juridically, nor from the practical point of view, is the obligation of any party dependent on a corresponding performance by the others"[259]. And as possible examples he mentioned the Geneva Conventions, some labour conventions, or maritime conventions about standards of safety at sea, as well as human rights treaties. Indeed, the human rights example was the paradigm example: "… a fundamental breach by one party of a treaty on human rights could neither justify termination of the treaty, nor corresponding breaches of the treaty *even in respect of nationals of the offending party*"[260].

The integral treaty, in turn, could be distinguished from the interdependent treaty, where performance by a party would somehow have to depend on performance by the other parties. Here the example of choice was a disarmament treaty: "… the obligation of each party to disarm, or not to exceed a certain level of armaments, or not to manufacture or possess certain types of weapons, is necessarily dependent on a corresponding performance of the same thing by all the other parties, since it is of the essence of such a treaty that the undertaking of each party is given in return for a similar undertaking by the others"[261].

The distinction returned a year later in his third report, this time in the context of treaty conflict – which, on one construction, can also be seen as breach, in that a later treaty incompatible with an earlier one can be seen as breaching that earlier one[262]. The first group of treaties referred to "bilateral treaties and to those pluri– or multilateral treaties which are of the reciprocating type, providing for a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the others individually"[263]. Interdependent treaties were again defined in relation to breach, "where a fundamental breach of one of the obligations of the treaty by one party will justify a corresponding non-performance generally by the other parties, and not merely a non-performance in their relations with the defaulting party"[264]. Integral treaties, by contrast, are those "where the force of the obligation is self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others…"[265].

3. Some Remarkable Things

These attempts at definition throw up several remarkable things. First, the choice of words is at times a little odd: natural language does not make it much easier to actually define the 'integral treaty'. It is, for example, not at all clear what 'self-existent' means, or how obligations voluntarily entered into can

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[258] Gerald Fitzmaurice, Report on the Law of Treaties, UN Doc. A/CN.4/101, in *Yearbook of the International Law Commission* (1956/II), draft article 8.

[259] Gerald Fitzmaurice, Second Report on the Law of Treaties, UN Doc. A/CN.4/107, in *Yearbook of the International Law Commission* (1957/II), § 126.

[260] *Ibid*., § 125 (emphasis in original – JK). The italicized words suggest the extent to which this must have seemed a departure from legal thought at the time.

[261] *Ibid*., § 126.

[262] This is not the position adopted in the VCLT, but was the starting point of the discussion on treaty conflict by Lauterpacht (footnote 221) draft article 16.

[263] Gerald Fitzmaurice, Third Report on the Law of Treaties, UN Doc. A/CN.4/115, in *Yearbook of the International Law Commission* (1958/II), p. 27.

[264] *Ibid*., pp. 27-28.

[265] *Ibid*., p. 28.

nonetheless be considered 'inherent'. This alone indicates a conceptual struggle: it is not so much that Fitzmaurice did not know what he wanted to describe, but rather that he lacked the terminology – a situation sometimes referred to as *aphasia*[266]. In this light, it is no accident that the description only took on recognizable contours when examples were given: the Geneva Conventions, human rights treaties.

Second, there is the circumstance that the structure of treaties is evaluated in the context of breach, with also treaty conflict being conflated with breach. While it is possible intuitively to grasp what he must have in mind, one wonders whether the same would have transpired had the discussion of the various types of treaties been conducted in connection with, say, interpretation, or the interim obligation, or most obviously perhaps, in the context of reservations[267]. Fitzmaurice actually dealt briefly with reservations in his first report, distinguishing between bilateral treaties (and plurilateral treaties with a limited reach in terms of parties) and multilateral treaties, but without saying anything about the structure of treaties. Perhaps this found its cause in his conviction that the only sensible way to address reservations would be to revert back to the pre-war unanimity rule: if a state proposes a reservation which is objected to by even one other party, then the state proposing the reservation cannot join the treaty[268]. With such a rule, the structure of legal obligations is not all that relevant[269].

While special rapporteur Waldock faithfully reproduced Fitzmaurice's classification, he himself appeared rather less convinced, and did not make it do any work. Instead, he opined that while it may be true "that law-making treaties, treaties creating international régimes for particular areas and certain other types of treaty may establish obligations of an objective character, there remains a contractual element in the legal relation created by the treaty between any two parties"[270]. This effectively killed off Fitzmaurice's analytical distinction. Waldock's decision may have allowed the VCLT to be concluded, eventually: one can only imagine that discussions on how best to classify treaties are interminable. But it did so at a price: the VCLT, as a result of focusing on the "contractual element", turns out to be less helpful with respect to treaties where the contractual element is only minimally present – if at all.

And a third point relates to the interdependent treaty identified by Fitzmaurice. This is a strange category, which upon closer scrutiny would seem to collapse into the contractual treaty. At the core of the concept, for Fitzmaurice, seems to be the idea that interdependent treaties such as disarmament treaties are based on carefully balanced bargains involving more than two parties - otherwise there is little point in developing a separate category: with only two parties, the classic *inadimplenti non est adimplendum* principle could apply in case of breach by one party[271]. But even being based on a carefully balanced bargain involving three or more states it is questionable whether a separate category is warranted. Surely, breach of a disarmament treaty by one party would be met with corresponding behaviour not just by one of the other parties, but by all, and without anyone asking any questions. In a sense, such a treaty is synallagmatic between a number of states, not just two, and it is precisely the interdependence of the parties which makes this visible. A (hypothetical) disarmament treaty involving the US, Russia and China is a carefully balanced whole: if the US breaches it, it upsets the balance towards both Russia and China. Fitzmaurice's mistake here was, likely, to start the thought process by thinking of these as creating bilateral relations and then extrapolating: bilateral between the US and Russia, between the US and China and between China and

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[266] I borrow the term (for use in a legal context) from Michael Riegner, "Postkoloniale Erinnerungspolitik in Deutschen Recht", in Philipp Dann, Isabel Feichtner and Jochen von Bernstorff (eds.), *(Post)Koloniale Rechtswissenschaft*, Tübingen, Mohr Siebeck, 2022.

[267] Fitzmaurice, Report (footnote 258), p. 115.

[268] *Ibid*., draft article 39.

[269] After Fitzmaurice's resignation, the first subsequent report by special rapporteur Waldock dealt extensively with reservations, but did not refer to Fitzmaurice's classification of treaties. Humphrey Waldock, Report on the law of Treaties, UN Doc. A/CN.4/144 and Add.1, in *Yearbook of the International Law Commission* (1962/II).

[270] Humphrey Waldock, Second Report on the Law of Treaties, UN Doc. A/CN.4/156 and Add.1-3, in *Yearbook of the International Law Commission* (1963/II), pp. 76-77.

[271] Again, it may be wondered whether Fitzmaurice's focus on breach has clouded the issue.

Russia. But the balance here involves all three parties, with the result that breach by one of them upsets the balance with respect to both others, not just one of them[272]. In other words, there is no harm in labelling such treaties 'interdependent', but it is doubtful whether much is gained by viewing them separately from contractual bargains.

Be that as it may, as has been noted above, the VCLT has little to offer 'integral' treaties, ironically with the exception of the provision on material breach – which seems geared precisely towards coming to terms with integral treaties, and therewith occupies an outlier position in the general framework of the VCLT. Leaving the topic of breach out of consideration, this fourth concentric circle has little to expect from the VCLT.

F. The Fifth Circle: The Constitution

1. Res Inter Alios Acta

If the VCLT has not all that much to say about integral treaties as identified by Fitzmaurice, it has even less to say about the treaties establishing international organizations, but at least the silence here is self-conscious. Article 5 VCLT notes that the VCLT applies to treaties establishing international organizations and treaties adopted within such organizations, but does so "without prejudice to any relevant rules of the organization". Article 5 is replicated, *mutatis mutandis*, in article 5 of the 1986 VCLTIO, which likewise says to apply to treaties between states and international organizations which form the constitution of an organization or have been adopted within an organization, again "without prejudice to any relevant rules of the organization". The message is clear: neither the VCLT nor the VCLTIO claim to have much to say about such treaties – they are left to their own devices, i.e., to the rules of the organization[273].

This is highly sensible, and aligns nicely with the generally residual nature of the VCLT. Every treaty is, in Latin, *res inter alios acta* (a thing between the parties), and this applies, as a legal matter, even stronger to treaties establishing international organizations[274]. These form a world upon themselves, so much so that it can be doubted whether there is a general law of international organizations to begin with[275].

2. The Inapplicability of the VCLT

There are, e.g., staples of the VCLT that have little or no application with international organizations. Reservations are possibly the most prominent example: reservations to constituent instruments are few and far between, and even the academic literature on the topic is scarce[276]. And obviously, the VCLT regime on reservations would be completely unworkable. Treaties establishing international organizations are about as 'integral' as they come: they cannot be reduced to sets of bilateral dyads of relations. Imagine that Belgium would have a reservation concerning the UN Charter, refusing to respect the veto of the five permanent

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[272] Concretely, reneging on the (hypothetical) obligation to reduce possession of nuclear weapons to zero by the US would not only affect Russia, but also China – both would get very nervous, and understandably so.

[273] Excellent conceptual work on the relationship between treaties and international organizations include Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties*, Oxford, Hart, 2007; and Lorenzo Gasbarri, *The Concept of an International Organization in International Law*, Oxford, Oxford University Press, 2021.

[274] Practically, or sociologically, things are different, but this is a fairly recent insight, hinted at in Felice Morgenstern, *Legal Problems of International Organizations*, Cambridge, Cambridge University Press, 2024 [1986], p. 3, and further elaborated in Jan Klabbers (ed.), *International Organizations Engaging the World* Cambridge, Cambridge University Press, in press.

[275] Jan Klabbers, "The Paradox of International Institutional Law", *International Organizations Law Review*, 5 (2008).

[276] One of the very few exceptions is Maurice Mendelson, "Reservations to the Constitutions of International Organizations", *British Yearbook of International Law*, 45 (1971).

members. And imagine Germany and Japan accepting Belgium's reservation, while Russia and France would have objected, and the US would even refuse to have a treaty relationship with Belgium on this point. Chaos would ensue. If this is too implausible a scenario, even the mere facility of any reservations to any part of the institutional structure or decision-making procedures of the UN would be awkward and cumbersome. Reservations can generally be imagined with respect to substantive provisions (although with respect to the UN, one shudders to think of a state reserving its position on the collective security mechanism); one could imagine a state making a reservation concerning, say, the reporting obligation contained in the constitution of the World Health Organization[277] – this would be awkward, but not entirely unthinkable. But with respect to institutional structures and decision-making procedures, such is very difficult to imagine.

It is no coincidence perhaps that one of the better known 'reservations' is actually not a proper reservation to begin with. This refers to the US providing itself with the possibility of withdrawal from the WHO, whose Constitution has no withdrawal clause. When approving ratification of the WHO Constitution, Congress adopted the appropriate resolution with the proviso that withdrawal should be possible – and this seems to have been accepted by the WHO's membership at large. This is functionally as close to a reservation to a constituent instrument as it gets[278].

3. Amendment

Beyond this, international organizations usually also have their own rules on such issues as admission, and sometimes withdrawal or expulsion too[279]. They will have their own rules on amendment of the constituent treaty, typically involving a two-tier process: adoption of a proposed amendment in the organization's plenary, followed by ratification – although other practices also exist, such as that of concluding successive treaties: instead of amending an earlier one, an entirely new constitution is negotiated, with a view to entry into force for the entire membership. Those who do not ratify either cease to be members or remain members (very awkwardly in practice) of the organization in its previous incarnation[280].

That said, formal amendment of a constitution is often avoided. As the venerable Institut de Droit International put in some years ago, amendment procedures "are cumbersome"[281]. Formal amendment takes time and effort, while results are not guaranteed, and pesky parliamentarians in the member states may obstruct the entry into force of amendments by refusing to approve them – sometimes even for political reasons! As a result, much is made of utilizing the interpretation process in order to help adapt the organization, for "there are situations in which amendment procedures may impede timely change and be deemed inappropriate by the organization"[282].

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[277] Article 62 WHO provides that member states shall report each year on the action they have taken with respect to instruments adopted by the WHO.

[278] The situation is usefully explained in a brief from the US Congressional Research Service, at https://sgp.fas.org/crs/row/R46575.pdf (visited 8 January 2025).

[279] Useful works include Konstantinos Magliveras, *Exclusion from Participation in International Organisations*, The Hague, Kluwer, 1999, and Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy*, Cambridge, Cambridge University Press, 2011.

[280] A rare academic discussion (in Dutch, moreover), is G.W. Maas Geesteranus, "Recht en praktijk in het verdragenrecht", *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht*, 99 (1989).

[281] Institut de Droit International, "Are There Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organizations by the Internal Organs of Such Organizations (with Particular Reference to the UN System)?", *Annuaire de l'Institut de Droit International*, 80 (2019), p. 27.

[282] These words are part of the sixth recital of a draft resolution proposed to the Institute, reproduced in *ibid*., p. 29. This particular recital did not make int into the resolution as finally adopted – someone must have realized that for a group of leading lawyers to endorse circumventing legal procedure would not be a great look.

The best-known example of recent decades concerns the transformation of NATO[283]. After the fall of the Berlin wall, the self-defense alliance quickly realized that the long-time enemy had all but disappeared, and therewith NATO had lost its *raison d'être*. It could no doubt have been abolished, but international organizations rarely die[284]; instead, NATO transformed itself. It did so not, as may have been expected, through formal amendment of its constituent treaty, but by unanimous adoption of strategy papers[285] outlining a new role for NATO, coming closer to a global police force – a "crisis prevention and management organisation", as its website proudly proclaims[286]. And true to form, in the intervening years NATO has been actively engaged in missions well outside its original area of action, and well beyond its original mandate, taking part in actions in the former Yugoslavia, Afghanistan, and off the Somali coast, to name just a few.

The original NATO treaty, it should be pointed out, does not contain a proper amendment provision. The closest it comes is article 12, allowing for review of the treaty after the first ten years or at any moment thereafter, but without specifying a procedure. In such a situation the parties could ideally fall back on the amendment provision of article 40 VCLT, but this is curiously devoid of content. It addresses the position of states willing or unwilling to participate in amendment, but does not say anything about procedures to be followed, nor does it lay down a default rule about collective acceptance of an amendment. In other words, it does not offer any guidance to speak of. And where neither the rules of the organization nor the VCLT say anything helpful, it is no surprise that the organization takes matters into its own hands, as NATO did. One might have hoped for Rule of Law-advocating liberal states to do things 'by the book', but admittedly such is not made any easier by the absence of 'the book'.

As the NATO example suggests, there is a thin line between formal amendment and evolutive or dynamic interpretation; it is perhaps for this reason that in (still) its leading case on the topic, the ICJ adopted a rather conservative approach to interpretation – so as to discourage all too relaxed interpretations from taking the place of formal amendment[287]. In *IMCO Maritime Safety Committee*, it was asked whether membership of the Maritime Safety Committee should be decided in accordance with common usage of the terms mentioned in the organization's constitution, or whether, in filling a committee dedicated to safety, one of the concerns should be whether prospective members could contribute to safety. The Court stuck with traditional usage, meaning that 'the largest ship-owning nations' came to include Panama and Liberia, not normally known for their contributions to safety on board of ships or at sea more broadly[288].

G. Circle Zero: 'Unilateral Agreement'

1. Unilateralism

The VCLT explicitly provides that its field of application is the treaty involving more than one party. Article 1 specifies that the Convention "applies to treaties between States", which already suggests more than one party, and the definition of treaty in article 2(1)(a) further makes clear that for purposes of the

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[283] Useful is Stefan Bölingen, *Die Transformation der NATO im Spiegel der Vertragsentwicklung: Zwischen sicherheitspolitischen Herausforderungen und völkerrechtlicher Legitimität*, Saarbrücken, VDM, 2007.

[284] Susan Strange, "Why Do International Organizations Never Die?", in Bob Reinalda and Bertjan Verbeek (eds), *Autonomous Policy Making by International Organizations*, London, Routledge,1998.

[285] One of these was the new strategic concept adopted in 1991: https://www.nato.int/cps/en/natohq/official_texts_23847.htm? (visited 24 December 2024).

[286] https://www.nato.int/cps/en/natohq/topics_52060.htm (visited 24 December 2024).

[287] The EU Court too strongly urged against amendment procedures being circumvented, and did so early on: Case 43/75, *Defrenne* v *Sabena*, ECLI:EU:C:1976:56.

[288] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, advisory opinion, [1960] ICJ Reports 150. IMCO was later re-christened International Maritime Organization. The leading monograph on the topic is Tetsuo Sato, *Evolving Constitutions of International Organizations*, The Hague, Martinus Nijhoff, 1996.

VCLT, a treaty means an "international agreement concluded between States", confirming that it takes at least two to tango. Consequently, the VCLT does not, in its own right, apply to unilateral acts, even if those unilateral acts would together manifest a 'meeting of the minds'. For, ironically perhaps, if treaties are often "disagreement reduced to writing", unilateral acts may together show a form of agreement between states.

There are at least two settings where this may apply (a third, discussed below, is considerably less plausible), according to the case-law of the International Court of Justice. The first came most clearly to the fore in 1974[289], in the *Nuclear Tests* cases, and concerns the interplay between the unilateral promise, and possible reliance thereon. The second is hinted at in jurisdiction phase in the *Nicaragua* case, in 1984, and concerns the relationship established by unilateral declarations accepting the Court's jurisdiction. Perhaps not surprisingly, the unilateral declaration too has been studied by the ILC, which in 2006 adopted a set of ten Guiding Principles, prepared by special rapporteur Victor Rodriguez Cedeno, with respect to unilateral declarations capable of creating legal obligations – for it should be clear that not all unilateral declarations are capable of doing so: a declaration by a state that it recognizes another state will not, as such, generate any obligation – although the recognizing state may be estopped from later claiming it never did so[290].

2. The Unilateral Promise

At issue in *Nuclear Tests* was whether France could lawfully conduct nuclear tests in French Polynesia, despite nuclear fall-out reaching Australia and New Zealand. There was no readily available rule on the topic, but France, so the Court held, had made some declarations which could be taken as promises, promises to the effect of saying that soon, it would stop testing. Since Australia and New Zealand, according to the Court, could rely on these (and had done so, in the Court's view), the problem was solved: in effect, so the Court suggested, France had agreed with both Australia and New Zealand that no more nuclear testing would take place[291].

The Court's reasoning had some serious holes in it, but it did bring the case to an end. While France's declarations had been made in public, France had not made unconditional promises – at best, if its statements were promises to begin with, those promises were conditional. New Zealand and Australia had not actually relied on the French statements either; had they done so, there would have been not much need to seize the Court to begin with, other perhaps than to obtain a declaratory judgment. More generally, the Court seemed somewhat confused. It started its analysis by looking at the French declarations, and held that a declaration of this sort, "if given publicly, and with an intent to be bound … is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made"[292].

So far so good, and this would seem to clinch it. If the Court was indeed convinced that France's promises were made publicly (which was incontrovertible) and with an intent to be bound (the Court was keen to interpret them as such), then there would have been no need to continue the analysis, for this would

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[289] The PCIJ had already in 1933 dealt with a similar topic: the legal effect of a unilateral statement by Norway's Foreign Minister, in *Legal Status of Eastern Greenland*, [1933] Publ. PCIJ, Series A/B, no. 53, esp. 71. Interestingly, the Court holds it for established that Denmark wanted Greenland in return for leaving Spitsbergen to Norway, thus again suggesting something of a contractual alignment. The Court does not say much about why Norway's Foreign Minister's unilateral declaration would be binding, except for highlighting that it was issued by the Foreign Minister and was unconditional and definitive. Thus, the Court refers to status as well as contents, but not to a specific intention.

[290] The seminal study is Eric Suy, *Les actes juridiques unilatéraux en droit international public,* Paris, LGDJ, 1962.

[291] *Nuclear Tests* (Australia v France), [1974] ICJ Reports 253; *Nuclear Tests* (New Zealand v France), [1974] ICJ Reports 457.

[292] *Nuclear Tests Case* (Australia v France), § 43.

have demonstrated well enough that unilateral declarations can be binding. Nonetheless, the Court continued by undermining the very position it had just craftily built, highlighting the role of good faith and suggesting that actually, the binding force flowed from reliance. "Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus, interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected"[293]. And this move comes very close to the classic idea of contract, consisting of offer and acceptance, the one difference with 'regular' contracts being that France did not so much promise to deliver something, but was seen to have promised to stop doing what it had been doing. One could argue that it remains unclear what the consideration offered in return by Australia and New Zealand would consist of, but then again, consideration has never been considered hugely important in the formation of treaties[294].

But be that as it may, the Court got rid of an intractable legal issue this way (there not being any rule on nuclear testing), and it would confirm and defend its reasoning a little more than a decade later in the *Frontier Dispute* case: if declarations are made with a view to be relied on, then they may well create legal obligations, but not when the declaration is made without any such intention. In *Frontier Dispute*, the President of Mali had made a joke at a press conference, but this could not be taken as serious evidence of an intention to become legally bound. The Court, sitting as a smaller Chamber, further distinguished the French situation in *Nuclear Tests* by stating that France had not had any other alternative available than the unilateral declaration. "It is difficult to see", dixit the Chamber, how France "could have accepted the terms of a negotiated solution with each of the applicants [Australia and New Zealand – JK] without thereby jeopardizing its contention that its conduct was lawful"[295].

The Chamber's logic here is a little bizarre. Nothing would have stopped France, whether legally or as a matter of political wisdom, from concluding agreements with Australia and New Zealand without prejudice to the legality of nuclear testing. Surely, one can agree to put a stop to behaviour, even if said behaviour is perfectly legal. The only (and highly unrealistic) scenario in which the Court's position has some plausibility is the construction where France would have promised to stop testing for a great many years or in perpetuity – it might have wanted to keep some options open. But the difficulty then resides in the duration of the (hypothetical) agreement, not in whether the behaviour at issue would be considered legal.

And ironically perhaps, while denying that anything like an agreement was concluded and highlighting the inevitability of France expressing itself unilaterally, nonetheless the Chamber cannot help but ascribing a contractual intention to France – which it would have used if only it could have done so, if only that would have been a viable possibility. Then again, the Chamber was keen to distinguish *Nuclear Tests* from the case before it: in the dispute between Burkina Faso and Mali, it would have been perfectly possible for the two states to conclude an agreement on the course of the boundary: "… there was nothing to hinder the Parties from manifesting an intention" to come to an agreed solution[296]. And in order to make that point, the Chamber made it seem as if this had not been possible between France and Australia and France and New Zealand.

3. The Optional Clause System

[293] *Ibid*., § 46.

[294] See the discussion above, Section 3.B.2. Consideration is not even mentioned in many textbooks on the law of treaties: see, e.g., Aust (footnote 8); Elias (footnote 173); Robert Kolb, *The Law of Treaties: An Introduction*, Cheltenham, Edward Elgar, 2017. It is mentioned somewhat in passing and by distant analogy in Reuter (footnote 113), p. 147.

[295] *Frontier Dispute* (Burkina Faso/Mali), [1986] ICJ Reports 554, § 40.

[296] *Frontier Dispute*, § 40.

In addition to the unilateral promise, the ICJ has also hinted at a certain possible role for the law of treaties with respect to inter-related Optional Clause declarations, issued by states on their own under article 36 of the ICJ's Statute[297]. In *Nicaragua*, the US had tried to amend its declaration of acceptance of the ICJ's jurisdiction with immediate effect, in a fairly transparent move to make it impossible for the Court to exercise jurisdiction in the case brought by Nicaragua. The Court was none too happy. It started by noting that declarations "of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make." Still, so the Court continued, "the unilateral nature of declarations does not signify that the State making the declaration is free to amend the scope and the contents of its solemn commitments as it pleases"[298]. In fact, the Court observed, these declarations "establish a series of bilateral engagements"[299] with other states that have made them, and any reservations they have made will be part of their mutual relations. Together they form a "network of engagements"[300], in which good faith plays an important role. They cannot just be terminated at will: the Court made an explicit analogy with the law of treaties, which requires a reasonable period of notice in case of termination or withdrawal unless the treaty itself contains a specific clause. As the US Declaration had stated six months as the notice period, at the very least it followed that a period of a few days would not suffice.

The Court acknowledged that Nicaragua had made another law of treaties-based argument: it argued that the US attempt to amend the declaration with immediate effect would be invalid for failure to comply with domestic constitutional rules. The Court refused to address the issue, and for good reason: it had already decided that the US letter could not have the effect the US wanted it to have. The interesting point here, however, is that the Court saw no other reason not to address the issue, thus seemingly fully accepting the analogy between treaties and sets of optional clause declarations, and therewith seemingly also suggesting that there is a contractual nexus between states having made such declarations[301].

4. Unilateral Interventions?

A third possible manifestation – but this needs some serious reflection and analysis still, more serious than can be provided here – is the current (in the 2020s) popularity of the unilateral intervention in judicial proceedings. As is well-known, with respect to some pending proceedings before the ICJ, a number of states have issued 'declarations of intervention' in support of one of the parties. Two cases stand out. In the *Ukraine* v *Russia* case, no fewer than 32 states[302], all of them Western states, have filed a declaration to intervene, all of them in support of Ukraine. This has spawned a nice cottage industry: those declarations of intervention have provoked comments from both Ukraine and Russia, and some have been adjusted or amended since. In the likewise pending case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v Israel), ten states – counting Palestine – have issued a declaration of intervention[303]. These states are predominantly non-Western, with the

[297] For rare doctrinal analysis, see Malgosia Fitzmaurice, "Optional Clause Declarations and the Law of Treaties", reproduced in Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties*, The Hague, Eleven, 2005.

[298] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v USA), Jurisdiction and Admissibility, [1984] ICJ Reports 392, § 59.

[299] *Nicaragua Jurisdiction*, § 60.

[300] *Nicaragua Jurisdiction*, § 60.

[301] *Nicaragua Jurisdiction*, § 66.

[302] See *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v Russian Federation): see https://www.icj-cij.org/case/182 (visited 26 December 2024).

[303] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v Israel): see https://www.icj-cij.org/case/192 (visited 26 December 2024).

exception of Spain. And in the wake of especially the *Ukraine v Russia* case, several states have also intervened in the *Gambia v Myanmar* case, which was brought a few years earlier[304].

It seems most unlikely that such sets of unilateral declarations together add up to something akin to treaty relations. Unlike the promises in *Nuclear Tests* or the optional clause declarations discussed in *Nicaragua*, such declarations of intervention are better seen as expressions of support for beleaguered states or even diplomatic 'showboating' or 'virtue signaling', than as attempts to create new rights or obligations or exercise authority. It is not that such declarations are inconsequential: under article 63 of the ICJ Statute, any construction the Court will give to the multilateral treaty offering the basis for intervention will be binding also on intervening states[305]. But rather than being 'fundamentally norm-creating', to use a term launched by the ICJ itself[306], they reiterate preferred readings of the convention in question, sometimes over dozens of pages. In addition to being bound by a judgment in the case in which the state intervenes, the same state will no doubt be estopped from later claiming that the convention concerned warrants a different reading or should give rise to alternative results; but it is questionable whether the normative effect will go much further than the state putting its position formally on record. In a sense, the declarations of intervention collectively break through the traditional bilateral structure of international law, but they do not seem to be doing much more than that[307].

H. Final Remarks

The discussion of 'circle zero', the inter-related unilateral declarations, closes the circle, so to speak. This chapter has suggested that there are five major types of treaties (or six, for those who count those inter-related unilateral declarations), with the VCLT only being comfortable with the first type, i.e. the bargain-based contractual arrangement. And with the exception of article 60 on material breach (which is actually written with more complicated agreements in mind, in particular perhaps integral treaties), other provisions may be necessitated by the existence of complicated multilateral agreements, but do little to regulate their workings. This is most obviously the case with the regime on reservations, which has no application with respect to bilateral treaties, and can only work as long as multilateral treaties can be reduced to dyads of bilateral relations. Only in such a scenario does it make sense to sever the parties from the treaty, resulting in the possibility of a treaty having parties which nonetheless have no or only limited treaty relations with one another.

There is some evidence in international law to suggest that treaty provisions can exist side by side with customary rules whose content may be slightly different – the musings of the ICJ in the 1986 *Nicaragua* case may indicate as much. Here, unable to apply the UN Charter's provisions on the use of force, due to a US reservation in its optional clause declaration), the Court could apply customary international law which "continues to exist alongside treaty law"[308], even where the two are perfectly identical. But the Court also

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[304] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v Myanmar; Seven States Intervening): see https://www.icj-cij.org/case/178 (visited 26 December 2024). The seven intervening states of the subtitle have become eleven. Most, but not all, are Western.

[305] States may also ask leave to intervene under article 62 of the Court's Statute, if they feel their legal interests are affected by a dispute between others. This is not at issue with the wave of intervention under discussion ere, which are all done under article 63 of the ICJ Statute.

[306] In *North Sea Continental Shelf*, the Court held that in order to have the potential of becoming a general rule of law, a provision should be of a "fundamentally norm-creating character". See *North Sea Continental Shelf Cases* (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands), [1969] ICJ Reports 3, § 72.

[307] The thought was inspired by a question from a member of the audience during delivery of the lectures here published.

[308] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v USA), merits [1986] ICJ Reports 14, § 176.

strongly suggested that the two need not be perfectly identical: it is possible, for instance, that a treaty provision requires a customary rule to complement it. The Court made explicit reference to the Charter rule allowing for self-defense if an armed attack occurs, but which leaves 'armed attack' undefined. Here then, the treaty rule cannot stand completely alone.

Given the VCLT's ineptitude in dealing with most issues relating to multilateral treaties, the question might be asked whether there is a significant body of customary rules which does the trick. Courts have left that possibility open by holding, mostly, that any provision of the VCLT "in many respects" reflects customary international law – thus there is some room (in other respects) for divergence, at least on the level of hypothetical speculation. In practice, however, this seems unlikely. Even where courts have to address matters not technically governed by the VCLT, or address actors to whom the VCLT technically cannot apply, there is little indication of there being a more or less parallel regime available. In fact, quite the opposite is the case: whenever a treaty problem is thrown up, all eyes turn to the VCLT, with courts bending over backwards to make the VCLT applicable to the problem at hand, whether it concerns reservations, interpretation, the interim obligation, or termination or suspension. To the extent that there is a customary regime in place different from the VCLT, it can only relate to topics not covered by the VCLT, such as the effect of armed conflict on treaties. It is in this specific sense that customary international is broader then, and complements, the VCLT, but not so much in the *Nicaragua* sense with two norms of similar but non-identical content existing side by side. And given the circumstance that many of the VCLT rules are residual in nature, designed to complement whatever states themselves can agree to, this makes some sense[309].

[309] I have elsewhere argued that the rules on interpretation in particular, as methodological devices, are unsuitable for being seen as customary rules to begin with – this would be like saying that because carpenters may often use a hammer and hammers prove to be useful tools, they are not allowed to use any other devices to attach things. See Klabbers (footnote 95).

CHAPTER IV
THE CIRCUMVENTION OF DISAGREEMENT

A. Introduction

The previous chapters have suggested that much is wrong with the VCLT, and to the extent that the VCLT works, this is mostly in the context of treaties that embody bargain-type contracts. Beyond this setting, where the minds actually meet in the form of an offer and acceptance thereof, the minds of states and their representatives tend to meet less closely, and as a result, disagreement becomes more prominent. Even where states may agree on broad outlines ("Let's protect human rights!"), they might be less agreed on what constitutes human rights, how best to protect these, whether a monitoring body should be established, whether emergency escapes should be facilitated, et cetera. Hence, the previous chapter identified five different kinds of treaties, ranging from the bargain-type contract (which the VCLT can nicely accommodate) to the institutional arrangement (where the VCLT does not even bother, really).

The current chapter will be dedicated to various ways in which disagreement can be accommodated or circumvented or dissolved ('solved' being an unlikely scenario). The binding force of treaties can be partly (through reservations) or wholly (through the conclusion of non-legally binding agreements) avoided; meaning can be re-directed by means of rules of interpretation; any lingering disagreement can be avoided through termination of treaties; while sometimes the overlaps within the Vienna Convention can be strategically used to re-frame matters and therewith avoid unwanted consequences - unwanted by states, that is, rather than unwanted by others, including you and me.

B. Escaping Binding Force: Reservations

1. The Pre-War System

The backstory of the VCLT regime on reservations is sufficiently well-known not to be given too much attention in this chapter. Prior to World War II, if there was a general rule regarding reservations (i.e., unilateral claims by states to modify or exclude the operation of parts of a treaty), it was probably a rule to the effect that a proposed reservation was only deemed acceptable if consented to by all treaty partners.[310] This system, as Kolb recalls, was rooted in contractual notions itself: a reservation in effect would mean a changed offer, and thus require acceptance by all other parties. And this, in turn, also gave each and every party a veto power: a refusal to accept a proposed amendment would either exclude that state presenting the proposal, or force it to withdraw or amend its reservation[311].

The one major exception pre-World War II was the system applied in the Americas, sometimes referred to as the Pan-American system. This was based not so much on contractual understandings, but rather on a broad understanding of sovereignty: states planning to join a convention were free to make a reservation (unless the treaty itself would prohibit this), leaving it up to their prospective

[310] See, among many others, Ingrid Detter, *Essays on the Law of Treaties*, Stockholm, Norstedt, 1967, pp. 62-63.
[311] Kolb (footnote 294), pp. 64-65.

treaty partners to figure out whether they could live with it or not. And if one of them could accept the reservation, the state concerned was able to join the regime, although effectively it would have relations under that treaty only with the state accepting the reservation. And this in turn entailed that the faculty of reservations to multilateral treaties was only possible on 'breaking down' the multilateral treaty into dyads of bilateral legal relationships.

2. The VCLT Regime

The Pan-American system paved the way for the regime developed by the ICJ in the 1951 advisory opinion on *Reservations to the Genocide Convention*. Confronted with the question whether the USSR and its allies were allowed to make reservations to the dispute settlement clause (Article IX) of the proposed Genocide Convention, the Court found inspiration in the Pan-American rule. If a treaty is silent on reservations, so it held, then reservations are permitted as long as they are compatible with the object and purpose of the convention at issue. The object and purpose of the convention, so the Court held, "limit both the freedom of making reservations and that of objecting to them"[312].

This would become the heart of the VCLT regime as well. If a treaty remains silent on reservations, the decisive criterion is compatibility with the object and purpose of the treaty concerned. Here, however, there is a huge 'catch': neither the Court nor the VCLT developed a system for making this assessment. Consequently, every state is left to its own devices, its own reading of the object and purpose of a particular convention. Each and every treaty partner shall have to make up its own mind as to what a treaty's object and purpose is, and whether a proposed reservation is compatible with that object and purpose. And this, it seems, is often considerably more complicated than the Court assumed in the relatively easy setting of the genocide convention. And even here the Court was not without ambiguity. While most observers might think the object and purpose of a single issue convention such as the genocide convention is to arrange for the single issue (*in casu*: to get rid of genocide once and for all), the Court muddied the waters just a little when noting that the object and purpose of the Genocide Convention "imply that it was the intention of the General Assembly [under whose auspices the Convention was concluded – JK] and of the States which adopted it that as many States as possible should participate"[313]. This muddies the waters in that it lacks analytical rigour: the object and purpose of quite a few, perhaps most, multilateral treaties imply a broad range of participation, whether it concerns the prohibition of genocide or a convention on customs classifications, a convention on torture or one on medical nomenclature. And this would not have been a problem as such, except when launching the very notion of object and purpose as an analytical tool: this is supposed to be sharp enough to separate acceptable from unacceptable reservations.

Nonetheless, the concept of object and purpose became the sole criterion in the VCLT to test the acceptability of proposed reservations. The Court, in the *Reservations* opinion, attached to this the consequence that between the reserving state and the objecting state, there would not be treaty relations, even if both would become parties[314]. This now was a bridge too far for the VCLT, which

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[312] See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, advisory opinion, [1951] ICJ Reports 15, 24.

[313] *Ibid.*, 24.

[314] *Ibid*., 29, answer to question II a.

spells out that in the normal course of events, both reserving and objecting state will entertain the full set of treaty relations under their treaty, with one exception: the provision that is subject to the reservation. So it is not the case, as the Court had it, that absolutely no relations exist between them; it is rather the case that they treaty applies to them but minus the provision to which the reservation applies. And this, in turn, entails that the reserving state gets what it wants, regardless of whether its partners object, unless they actively rule out any treaty relations. The solution the Court thought of as a useful compromise has become the *ultimum remedium*.

The VCLT largely followed the *Reservations* opinion, but with the aforementioned twist: a state objecting to a proposed reservation cannot, in contrast to the *Reservations* dictum, "consider that the reserving State is not a party" to the treaty to which the reservation is made. This was too tall an order, rendering the patchwork of treaty relations that is a multilateral treaty, well-nigh completely unworkable: it could entail that under a multilateral treaty with, e.g., 100 parties, if 40 of these would have made objectionable reservations, the treaty would only create relations between 60 of them. Plus, it would be too strong a measure: discord over a single treaty provision should not, so it was thought, de-activate an entire treaty.

Hence, the regime in force, under the VCLT (and it should be remembered these are residual rules, with the parties allowed to choose different options) boils down to the following. If a state proposes a reservation, others can either accept it, remain silent, object, or seriously object. If that other accepts, the reservation will apply: the treaty will apply between them minus the provision to which the reservations applies. The same holds true, after 12 months, if a state remains silent. It even holds true if a state objects: even then the treaty will apply between the two states concerned minus the reserved provision - and then only to the extent of the reservation[315]. It is only when the objecting state indicates it wishes to exclude any treaty relations with the reserving state that the treaty does not apply between the two, and thus the reservation will have no effect. It is precisely this imbalance between reserving and objecting state that has been much contested: how can it be that the reserving state gets what it wants even when its reservation is objected to? How is it possible that the legal consequences of acceptance, tacit acceptance and objection are identical, unless the objecting state consciously excludes treaty relations to begin with?

3. Power and the Imbalance

This imbalance (for that is what it is, however inevitable) merely reflects how the general pendulum swings in the formation of treaties and contracts alike. "The offerer", writes Fried, "is master of the bargain"[316]. The person or state who makes the initial offer, in contract as well as treaty, calls the shots, at least until the moment the offeree decides to come with a counter-offer or proposed amendment: then the offeree holds the cards, having momentarily become offerer. Much the same holds with respect to treaties, even multilateral ones. The state convening the conference which should result in the treaty starts in a powerful position (and this irrespective of material power), but may be replaced by states preparing amendments, suggesting new provisions, or

[315] This was confirmed by the Court of Arbitration deciding the 1975 *UK-French Continental Shelf Case*, reproduced in 54 *International Law Reports* 6, § 61.

[316] Fried (footnote 70), p. 54.

suggesting the deletion of earlier proposed provisions. The pendulum of power is constantly swinging, even during negotiations[317]. And any equilibrium is always fleeting.

This is the case with reservations and objections thereto. Power rests with the state proposing the reservation, until other states respond: from that moment onwards, power rests with them. But once a state has responded, the pendulum swings again, and the choice before the ILC was, effectively, to find the right moment at which artificially to stop the pendulum: either have power rest with the reserving state, or with the objecting state – it cannot, by the nature of things, be divided. In such a setting, prioritizing the position of the objecting state would either mean that the reserving state would be forced to withdraw its reservation, or would feel compelled not to become a party. Prioritizing the position of the reserving state, by contrast, would merely mean that the objecting state would have to swallow its pride: the construction chosen by the VCLT, on the USSR's suggestion, it seems, makes it possible for both states to be parties to the same treaty, though without the provision that the reservation relates to[318]. In the greater scheme of things, prioritizing the position of the reserving state accomplishes more (both states can join, at little cost to either of them), and must thus have seemed far preferable[319].

Nonetheless, the VCLT regime has remained highly controversial, as it is seen to take the sting out of international obligations by allowing for reservations in such a way that, as Scheinin once put it, "at least seemingly, the reserving state always wins"[320]. One of the leading early commentators was highly critical, fearing that under the VCLT system, the reserving state would have little incentive to take objections seriously, while the onus of preventing any treaty relationship from arising might to too much to ask of smaller powers[321]. Later observers have simply addressed the system as "inadequate"[322].

4. Mitigating the Effects?

Some attempts have been made in practice to mitigate the effect of reservations and the unilateral system of assessment in place. Some tribunals have centralized the assessment of compatibility of a reservation with the treaty's object and purpose, perhaps most famously the European Court of Human Rights. In *Belilos* v *Switzerland*, the Court was confronted with a Swiss declaration aiming to limit the reach of article 6(1) of the European Convention on Human Rights

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[317] Which may help explain attempts to subject negotiations to rules, and turn it into a duty: a refusal to negotiate would be unlawful, and might therewith diminish the power of the refusing state. For a discussion, albeit in different terms, see Teklewold Gebrehana, *Duty to Negotiate: An Element of International Law*, doctoral thesis, Uppsala University, 1978. Note also that as late as the final ILC draft of the VCLT (in 1966), the "interim obligation" was proposed also to extend to the negotiation phase, in draft article 15(a). YBILC 1966, 202.

[318] The ILC's final draft still followed the ICJ's approach: an objection means the treaty shall not enter into force between the reserving and the objecting state.

[319] A young Tomuschat realized very well that sovereign equality was at stake, but drew the conclusion that therefore the reserving state should not be allowed to force through its reservation. See Christian Tomuschat, "Admissibility and Legal Effects of Reservations to Multilateral Treaties: Comments on Arts. 16 and 17 of the ILC's 1966 Draft Articles on the Law of Treaties", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 29 (1967), pp. 466-467.

[320] Martin Scheinin, "Reservations by States under the International Covenant on Civil and Political Rights and its Optional Protocols, and the Practice of the Human Rights Committee", in Ziemele (ed) (footnote 81), p. 42.

[321] Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn, Manchester, Manchester University Press, 1984, pp. 61-63.

[322] Daniel Hylton, "Default Breakdown: The Vienna Convention on the Law of Treaties' Inadequate Framework on Reservations", *Vanderbilt Journal of Transnational Law*, 27 (1994).

as far as Switzerland is concerned. The Court not only held that despite its label, this amounted to a reservation, but it also deemed the reservation to be in conflict with the rule on reservations contained in the European Convention itself[323]. But to some extent, important as it is that the Court worked on the assumption of having the final say on the compatibility of reservations, this was an easy case: the Court could apply the terms of the European Convention without having to address the VCLT regime.

More interesting is the advisory opinion of the Inter-American Court of Human Rights on the legal effect of reservations. The American Convention on Human Rights contains an explicit *renvoi* to the VCLT regime, providing in article 75 that the Convention "shall be subject to reservations only in conformity" with the VCLT. While this could entail a reference to the VCLT's decentralized evaluation system, the Inter-American Court held otherwise, and derived from the nature of the Convention as a human rights treaty a somewhat different approach, effectively stripping the other parties of their gate-keeping function (and thus appropriating that function for itself): "A treaty which attaches such great importance to the protection of the individual that it makes the right of individual petition mandatory as of the moment of ratification, can hardly be deemed to habe [sic] intended to delay the treaty's entry into force until at least one other State is prepared to accept the reserving State as a party. Given the institutional and normative framework of the Convention, no useful purpose would be served by such a delay"[324]. The court was savvy enough not to preclude further interpretation of article 75 American Convention[325], but the message was clear: testing the compatibility of reservations should ultimately rest with the Court. And as a matter of political philosophy (if you will), this can be justified by the circumstance that the Court can take binding decisions on the scope of human rights – and thus, logically enough, also on reservations aiming to limit or modify that scope. Later cases bear this out, with the Court typically assessing reservations without beating around the bush[326].

States too have made attempts to change the VCLT regime, perhaps most notably the attempt by the Nordic states, joined by a few others, to unilaterally de-activate the VCLT regime relating to objections. When objecting to unacceptable reservations, the states concerned would indicate that the reserving state 'shall not benefit' from its reservation. This turned out to have little actual legal effect (as it would amount to amending the VCLT unilaterally), but was perhaps best seen as an invitation to the reserving state to reconsider[327].

5. Back to the ILC

Against this background of dissatisfaction with the VCLT regime on reservations, it is perhaps no surprise that the ILC was asked to study the topic anew, and did so with vim and vigour between 1995 and 2011, under the inspiring leadership of Special rapporteur Pellet, who delivered no less than seventeen reports on the matter. The ILC's work culminated in a complex and lengthy Guide to Practice, mostly remarkable for 'solving' the problem of the imbalance between the reserving and

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[323] *Belilos* v *Switzerland*, reproduced in 88 *International Law Reports* 635.

[324] See *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, advisory opinion OC-2/82, § 34.

[325] *Ibid*., § 39.

[326] See, e.g., *Boyce y Otros* v *Barbados*, [2007] IACtHR Reports, Series C, No. 169, § 15.

[327] Jan Klabbers, "Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties", *Nordic Journal of International Law*, 69 (2000).

the objecting state by wishing it away. In doing so, Special Rapporteur Pellet follows a peculiar British position, according to which a reservation that is incompatible with the object and purpose of a treaty qualifies as an impermissible reservation, which does not require a response, let alone an objection[328]. Point 3.3.1 of the Guide to Practice holds such reservations to be impermissible; Point 4.5.1 establishes that such a reservation shall be null, and need not be responded to, as the "nullity of an invalid reservation does not depend on the objection or the acceptance" by any other party, under the first paragraph of Point 4.5.2. But much like the proverbial deity who giveth with the right hand and taketh with the left, in the next paragraph, paragraph 2 of Point 4.5.2, Special Rapporteur Pellet suggests that even in case of invalid reservations, it might be very good if the objecting state nonetheless provides reasons as to why it thinks the reservation is impermissible. While there is a practical argument in favour of this (reservations can also be invalid on procedural grounds, and it might be useful to figure out which ground of invalidity applies), nonetheless it does open up the door again for protracted debates on whether or not a particular reservation is compatible with a treaty's object and purpose and thus what the legal effect of an objection is – precisely the very reason for the very exercise to begin with.

As one commentator notes, with a sense of understatement, the practice of states regarding reservations "may be less decisive than the *Guide* suggests", if only because states "*do* object to reservations on object-and-purpose grounds" and "regard their objections as more than mere points of information"[329]. Moreover, there remains the question of whether an invalid reservation nonetheless affects treaty relations between reserving and objecting state. By and large, the Guide to Practice has come out on the side of the non-reserving, objecting state: the reserving state shall not benefit from an invalid reservation, but will be considered bound by the treaty as a whole, unless it expresses a contrary intention[330]. There is, however, a considerable snake hiding in the grass: under Point 4.3.8., the state making a *valid* reservation will be allowed to rely on its reservation, which once again raises the obvious question: how to distinguish the permissible (valid) reservation from the impermissible, invalid reservation? The problem may have been placed in a different box by Special Rapporteur Pellet, but all this means is that it is now to be found in a different box.

And this outcome was well-nigh inevitable, precisely because the VCLT, as argued above, lacks any serious normative profile. Treaty-making is not a matter of doing good in the world, but is merely a matter of finding evidence of formal consent. In a world characterized by pluralism and disagreement, where treaties are 'disagreement reduced to writing', some mechanism such as the reservation is inevitable to bring states with radically different opinions and position together and allow for accommodation, but doing so by definition will involve normative choices, and it is this that is utterly impossible under the VCLT as well as, eventually, the Guide to Practice. And where this is impossible, one just has to choose whether to side with the reserving state or the objecting state – but making this choice is inevitable.

6. Bilateralization

[328] Possibly the most authoritative articulation is Derek Bowett, "Reservations to Non-Restricted Multilateral Treaties", *British Yearbook of International Law*, 48 (1976-77).

[329] Edward T. Swaine, "Treaty Reservations", in Hollis (ed.) (footnote 7), p. 294.

[330] Guide to Practice on Reservations to Treaties, Point 4.5.3.

Indeed, the way the law on reservations, formalist as it is both under the VCLT and under the Guide, accommodates the different normative positions of states, is by adopting a formal attitude: the regime effectively breaks down into treaty relations between dyads of states, where a reserving state can have treaty relations under the same treaty with states that have accepted its reservation, that have silently accepted it, or even that have objected – unless they object with maximum effect, in which case the treaty shall not apply between reserving and maximally objecting state. But even this presupposes the bilateralization of relations under the multilateral treaty. On this conception a multilateral treaty does not represent a set of interlocking commitments, but effectively represents bilateral relations between parties A and B, A and C, B and C, et cetera. This is not much of a problem where the treaty is substantively 'breakdownable', i.e. where the treaty effectively embodies bilateral relations to begin with, as is for instance the case with extradition relations. This is typically a bilateral phenomenon, whether based on a bilateral or on a multilateral convention: it usually only affects relations between two states at the time: the requesting and requested states.

It is, as sketched above, the peculiarity of the VCLT regime that even when a state objects to a reservation, the reserving state nonetheless gets what it wants, unless the reservation is unanimously objected to by all other partners. For the reservation needs to be formally accepted by at least one state to make effective the reserving state's consent to be bound, in accordance with article 20(4)(c) VCLT; it is only then that the reserving state can be considered a party. This is not raising the bar very high, despite contestations to the contrary sometimes suggested in the literature[331]: there will not be many multilateral treaties where all parties have unanimously rejected a particular reservation so as to prevent the reserving state from becoming a party to begin with.

A peculiar feature of the reservations regime is that it works not only on the assumption of 'breakdownability', but also presupposes that treaties are severable, i.e. that parts of a treaty can be excluded between some parties without doing much harm. This idea is forcefully opposed in other parts of the law of treaties: article 44 VCLT provides that the right to denounce a treaty or withdraw from it (or suspend its operation) can in principle only apply to the treaty as a whole: states are not supposed to 'cherry-pick' the provisions they like and toss the remainder aside. The underlying idea will be obvious: allowing for this kind of cherry-picking would potentially upset the balance of concessions underlying a treaty – it would upset the bargain upon which the treaty is based.

There is, however, no corresponding provision in the VCLT's section on reservations – and the very phenomenon of the reservation is cherry-picking under a different name.

Severability has also been proposed when it comes to the instruments of ratification containing the reservation. The idea here, best formulated by Goodman, is that the reservation can be removed from the instrument of ratification, the justification being that states propose reservations not so much as expressions of their opinions on compatibility with object or purpose or to give a voice to their different values, but rather as bargaining chips[332]. Empirically the proposition is unproven – there is little concrete evidence that states actually think and act in these terms.

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[331] It is for this reason that Pellet and Müller claim that there is a world of difference in terms of legal effect between actually accepting a reservation and objecting to it. Technically they are correct, though in rather irrelevant manner. See Alain Pellet and Daniel Müller, "Reservations to Treaties: An Objection to a Reservation is Definitely Not an Acceptance", in Cannizzaro (ed.) (footnote 169). Full disclosure: Pellet and Müller take issue with my claim, expressed elsewhere, that acceptance and objection (except for the objection with maximum effect) under the VCLT have the same effect, giving the reserving state "what it desired": see Klabbers (footnote 327), p. 179.

[332] Ryan Goodman, "Human Rights Treaties, Invalid Reservations, and State Consent", *American Journal of International Law*, 96 (2002).

Still, Goodman's approach focusing on reservations as bargaining chips, while it may have little traction in the real world, has the great merit of suggesting a model aligned with the general tenor of the VCLT. It makes some sense, in respect of a convention modeled on treaties as contracts, to formulate an equally contract-based way to address outstanding issues[333]. However, if states do not act in this manner and actually base their opinions regarding reservations on the values they wish to support, then such an approach viewing reservations as bargaining chips will not get very far, illustrating once again that the VCLT's regime on reservations is bound to remain unsatisfactory. As Craven once noted in somewhat convoluted but astute terms, it is difficult to avoid thinking in contractual terms "as a result of a palpable lack of epistemic access to 'collective interests' when utilizing a methodology that begins and ends with individual states"[334].

C. Re-writing Binding Force: Interpretation

1. The Apparent Need for Rules

If treaties were indeed reflecting a meeting of the minds, manifesting full agreement between parties, there would be little need for rules of interpretation. In such a scenario, states would not only agree on the text of the treaty, but would also agree on the meaning of the words used and how best to understand them – at worst, there might some need to fill in the inevitable gaps[335]. This works best, in international law, with the bargain-based contractual treaty, the variety most closely based on contract law. Partly this is because typically only two parties will be involved – and it is easier to agree with two than with several dozens or more. Partly this is also because the undertaking will typically be very concrete: the sale of something for particular consideration. Such an agreement need not raise many interpretative issues, in much the same way as in contract law, attention for interpretation tends to be relatively minor, and even then often related to default rules or implied terms[336].

With other treaties, especially the larger, multilateral law-making undertakings, things are much more difficult, if only because such agreement as there is may either be agreement to disagree, or surface-level agreement of the sort that gives rise to phrases like 'sustainable development', a 'humpty-dumpty' phrase if ever there was one. In such circumstances, it becomes understandable to have some mechanisms to steer the process of giving meaning. Perhaps as a result, the topic of treaty interpretation has made a stellar rise in international legal scholarship (and

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[333] See further Jan Klabbers, 'On Human Rights Treaties, Contractual Conceptions and Reservations', in Ziemele (ed.) (footnote 81).

[334] Matthew Craven, "Legal Differentiation and the Concept of the Human Rights Treaty in International Law", *European Journal of International Law*, 11 (2000), pp. 505-506.

[335] Vattel voiced much the same sentiment: "If the ideas of men were always distinct and perfectly determinate, - if for the expression of those ideas, they had none but proper words, no terms but such as were clear, and susceptible of only one sense, - there would never be any difficulty in discovering their meaning in the words by which they intended to express it: nothing more would be necessary, than to understand the language." Emer de Vattel, *The Law of Nations*, Indianapolis: Liberty Fund, 2008 [1758], Haakonssen ed., p. 407.

[336] See, e.g., John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer*. Oxford, Hart, 2013; Jan Smits, *Contract Law: A Comparative Introduction*, Cheltenham, Edward Elgar, 2014; Bix (footnote 71).

practice as well) and, perhaps in line with a strong tendency to think that all things human can be captured in rules, the VCLT has come to contain some rules on treaty interpretation.

The assumption that interpretation is a rule-governed activity is of fairly recent origin, as is the enormous attention for interpretation to begin with. The classic authorities of international law typically devoted some attention to treaty interpretation, but rarely, if ever, in the form of rules. Grotius, e.g., developed a set of maxims[337], as did Vattel[338]. For them, treaty interpretation was not a mechanistic exercise in which a seemingly neutral rule should seemingly neutrally be applied, but rather an intellectual activity that typically should be inspired by one or several motives: to give full effect to the treaty; or to protect sovereignty; or to accept that including something means excluding its opposite; or the related *a contrario* idea according to which explicit reference to something can be seen as justifying the conclusion that something else is intentionally excluded. These were considered maxims: cognitive aides to interpreters, supporting them in trying to understand how to use a treaty text.

Those and other maxims still play a role, but have come to be overshadowed by the rules of the VCLT. These are no longer seen as cognitive aides, but rather as almost peremptory, even though interpretation is at bottom not best seen as a rule governed activity. Bianchi and Zarbiyev put it succinctly: "Understanding what something means … is not reducible to the application of rules. Instead, one must understand the language and its 'grammar' and be able to master its techniques" – here the grammar and techniques of the language of international law[339].

2. Puzzling Issues

There are, indeed, several puzzling issues relating to interpretation under VCLT rules. One is the question to whom these rules are addressed: are they addressed at states and considered binding on states? If so, their violation might result in responsibility, yet no state has ever been accused of wrongfully interpreting a treaty in isolation from the substantive rule that is being interpreted. Put differently: Russia's aggression in Ukraine is generally cast (and rightly so!) as a violation of the prohibition of the use of force – few have suggested that Russia has misinterpreted article 2, paragraph 4 of the UN Charter; and even fewer would suggest that Russia should incur 'double responsibility': responsibility for violating article 2, paragraph 4, and separately or additionally for violating the rules on treaty interpretation[340].

Further, would it even be possible to think of wrongful interpretation in complete isolation from a substantive rule? Would it be humanly possible to interpret a provision wrongly, yet apply it correctly (whatever those terms might mean)? Treaties containing a dispute settlement clause often provide that a tribunal may be seized in any dispute regarding interpretation or application of the treaty concerned, which suggests a firm distinction between interpretation and application – but

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[337] Grotius' discussion is instantly recognizable to today's contract lawyer, with various examples of what he referred to as 'conjectures', which come very close to 'implied terms'. See Hugo Grotius, *On the Law of War and Peace*, Cambridge, Cambridge University Press, 2012 [1625], Neff ed., pp. 238-251.

[338] Vattel started his discussion with some general maxims, and many of his further points likewise consisted of guidelines and maxims rather than rules: Vattel (footnote 335), pp. 408-443. As with Grotius, quite a bit entailed advice on 'implied terms'.

[339] Bianchi and Zarbiyev (footnote 52), p.14.

[340] Pioneering on the idea of misinterpretation, in the context of customary international law, is Noora Arajärvi, "Misinterpreting Customary International Law: Corrupt Pedigree or Self-Fulfilling Prophecy?", in Merkouris, Kammerhofer and Arajärvi (eds.) (footnote 53).

such a strong distinction cannot be maintained. To interpret often is to apply; and to apply invariably involves interpretation.

A further question that may be raised (and has been raised[341]) is, if one even must have rules on interpretation, whether it makes sense to have the same rule for all sorts of treaties. As will be discussed below, it seems obvious that the bargain-based contractual undertaking requires a different approach than the quasi-legislative instrument, let alone the constitution of an international organizations. At least with respect to the latter the VCLT contains the general savings clause of article 5: the VCLT applies without prejudice to any rules of the organization. But for all other treaties the same rules of interpretation seem to be prescribed. The same question also can be asked in terms of the much-discussed fragmentation of international law: should trade agreements be subject to similar rules as security agreements or human rights agreements[342]? The VCLT's rules on interpretation have the side-effect of elevating some to a position of expertise on particular classes of agreements, in line with a more general trend to functional differentiation in society. The process as such has been visible since at least the 1960s, and probably before[343], and would later come to be associated with a term such as 'epistemic communities'[344]. The quasi-objective nature of the VCLT rules helps solidify claims to particular expertise.

And then there is the circumstance that misinterpretation of a provision may often start from misinterpretation – or different interpretation - of the factual context, and yet it is often the reading of the factual context that is decisive. The dropping of bombs by NATO on Belgrade in 1999 can be seen as naked aggression, possibly with a view to imposing market-disciplines on Serbia, as has been suggested[345]. But it can also (and better) be seen as an attempt to stop the ethnic cleansing that was going on in Kosovo at the time. A different reading of the situation will result in highlighting different rules, regardless of how those rules eventually get to be interpreted. Sometimes, of course, context is transposed into interpretative discussions: witness the discussion, prompted in the early 2000s by the US invasion of Iraq, as to whether the rules on self-defense would include self-defense against attacks that may or may or may not happen in a distant future, a opposed to (literally) "if an armed attack occurs" or, in the *Caroline* phrasing, when such an attack is "imminent"[346].

3. The Role of the Rules

The point for present purposes is that the VCLT's rules on interpretation seem to perform a particular role, regardless of whether they are suitable for that role or whether it even makes sense to think in terms of that role and those rules. And that role is intimately related to fundamental

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[341] Rudolf Bernhardt, "Interpretation and Implied (Tacit) Modification of Treaties: Comments on Arts. 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the law of Treaties", (1967) 27 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 27 (1967), p. 494.

[342] See generally Koskenniemi (footnote 28).

[343] So already Tom Bottomore, writing in the mid-1960s: "… experts of one kind or another have come to predominate over the more literary and philosophical exponents of general cultural or social ideas". See T.B. Bottomore, *Elites and Society*, Harmondsworth, Penguin, 1964, p. 76.

[344] While Michel Foucault can be credited with giving prominence to the notion of *episteme*, the seminal piece is Peter Haas, "Introduction: Epistemic Communities and International Policy Coordination", *International Organization*, 46 (1992).

[345] Naomi Klein, *The Shock Doctrine*, London, Penguin, 2007, p. 328.

[346] The arguments are well-discussed in Christine Gray, *International Law and the Use of Force*, 3rd edn, Oxford, Oxford University Press, 2008, pp. 216-227.

disagreement: the conclusion of a treaty never marks the end of a political process of 'give and take'; it merely marks a moment in time, taking a photograph[347], but the 'give and take' will continue – politics cannot be frozen in time. This entails, quite obviously, that matters are never definitely settled when a treaty is concluded, but debate and discussion will continue; and that entails, in turn, that control over the process of interpretation may well come to be very valuable: whoever controls the interpretation process ends up controlling the meaning to be given to the treaty. Interpretation becomes an arena for power struggles, and as is usually the case, being able to invoke a rule that works in your favour provides a powerful legal argument. It makes a difference whether one proclaims "I think that such-and-such is the meaning of this provision", or whether one can proclaim "in accordance with the VCLT's rules on interpretation, such-and-such is the meaning of this provision"[348].

The drawback, at least with respect to the VCLT's rules, is that those rules can be invoked to support a wide array of different, even incompatible positions. It is generally held that the VCLT rules embody a compromise between two competing schools of thought on interpretation: the textual school, and the teleological school. The third main approach, the historical approach, is formally relegated to a supplementary (but not subsidiary) status, for reasons that are in themselves plausible enough[349]. As is well-known, article 31 holds that treaties shall be interpreted in good faith in accordance with the ordinary meaning of the terms in their context, and in light of the treaty's object and purpose. This brings together the idea that the text is eventually the objective manifestation of negotiations, and should be given pride of place, but in light of what the text aims to achieve – for any treaty aims to achieve something.

This still gives interpreters an enormous amount of leeway, all the more so as no serious international lawyer will willingly forego recourse to the *travaux préparatoires* if and when available, whether to bolster a conclusion reached textually or teleologically, or to contest a conclusion so reached. The meaning of rules cannot be carved in stone, also for good sociological reasons. There is the circumstance that particular formulations come to attain a meaning of their own – "prompt, adequate and effective compensation" in investment law represents a certain standard which outsiders, armed only with a dictionary, can only guess at[350]. Likewise, many bilateral agreements work with templates – boilerplates. This applies to investment agreements, to double taxation agreements, to the headquarters agreements of international organizations, et cetera; and individual samples only make sense against this boilerplate background. And some provisions acquire a meaning over time which differs from the ordinary meaning: anyone approaching article 27, paragraph 3 of the UN Charter for the first time may be forgiven for thinking that the reference to the 'concurring vote' of the five permanent members means they need to all vote in favour of a particular resolution lest it is blocked; in practice, with approval by the ICJ, 'concurring' merely means 'not voting against', rather than voting in favour[351]. Indeed, it is in part the role of legal

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[347] The ICJ analogized the moment at which a state succession occurs to a 'photograph' in the *Frontier Dispute Case* (Burkina Faso/Mali), [1986] ICJ Reports 554, § 30.

[348] The point is inspired by Kennedy (footnote 90).

[349] Jan Klabbers, "International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?", *Netherlands International Law Review*, 50 (2003).

[350] Klabbers (footnote 95).

[351] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, advisory opinion, [1971] ICJ Reports 16, § 22.

training to introduce students to the circumstance that words do not always say what they mean or mean what they say[352].

4. Institutional Factors

The example of the UN Charter's rule on decision-making in the Security Council contains the beginning of a suggestion that stability in interpretation (which is ostensibly the purpose of having rules on interpretation to begin with, so as to 'overpower' disagreement) may owe much to institutional factors. In domestic settings, this is often left to courts. Given the meagre presence of courts in the international sphere, meaning tends to be provided by institutions, either through their practices or through interpretative decisions, or both. One good example is provided by Venzke, suggesting that the relative importance of the principle of non-refoulement in refugee law, owes much to the work of UNHCR. On its face, the Refugee Convention is about providing shelter and asylum to those who fell their countries in fear of persecution and violence. And indeed, in the Convention, the non-refoulement principle is tucked away somewhere in the middle, in article 33, easily overlooked.

In his excellent study, Venzke demonstrates that the meaning given to the Refugee Convention owes much to the work of UNHCR[353]: crafting handbooks, guidelines, and manifesting epistemic authority in other ways[354]. Moreover, the relative prominence of non-refoulement in the practice of refugee law is no coincidence, but came to be the focus of UNHCR's work, to the detriment of the provisions of asylum[355]. This was inspired in part, no doubt, by a default approach: it may be difficult to persuade states to absorb refugees with finality; but it should be much more achievable to persuade them not to return refugees to the same violence and persecution they came from. Non-refoulement represent minimal protection, and was strategically prioritized by UNHCR: its interpretation of the Refugee Convention as a whole revolved around the importance of this minimal form of protection – and that provision itself then requires further interpretation[356].

5. Phronesis

But in addition to institutional factors, the rules on interpretation can also only work if applied with what Aristotle referred to as *phronesis*, roughly to be translated as practical wisdom or intelligence, or sound judgment[357]. Interpretation is not a matter for algorithms, but even on the assumption of it being rule governed (an assumption which, as noted, might not be tenable) can be done in better or worse fashion. In much the same way in which some pianists are just better at

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[352] Another well-known example: the limitation of the right of self-defense "if an armed attack occurs", under article 51 UN Charter, should not be taken literally – taken literally, it represents an 'idiot rule', as Franck called it: a rule that can be applied by idiots leading to idiotic results. Thomas M. Franck, *The Power of Legitimacy among Nations*, Oxford, Oxford University Press, 1990, pp. 75-77.

[353] Venzke (footnote 87), pp. 110-122.

[354] On epistemic authority generally, see Pertti Alasuutari and Ali Qadir, *Epistemic Governance: Social Change in the Modern World*, New York, Palgrave MacMillan, 2019.

[355] Venzke (footnote 87), pp. 132-133.

[356] See Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-refoulement: Opinion', available at https://www.unhcr.org/sites/default/files/legacy-pdf/419c75ce4.pdf (visited 15 December 2024).

[357] Aristotle (footnote 106). For in-depth philosophical discussion, see Daniel Russell, *Practical Intelligence and the Virtues*, Oxford, Oxford University Pres, 2009.

interpreting Beethoven or Mozart, and some people play tennis better than others, so too some treaty interpreters are better at it than others – Bianchi and Zarbiyev emphasize the relevance of the ''feel' for the game'[358]. This is difficult to capture in words (let alone in rules: "Be a better interpreter!" is hardly a viable injunction), but article 31 VCLT itself already makes an effort when proclaiming that treaties must be interpreted 'in good faith'[359]. The very reference suggests that treaties can also be read in bad faith or perhaps mediocre or neutral faith, and 'good faith' here can only refer to the mindset and attitude of the interpreter – there are no other options, it seems. Treaty interpretation depends, at the end of the day, as much on the virtues as it does on the injunctions of articles 31 and 32 VCLT: the interpreter may need to tap into honesty, courage, humility and magnanimity, and most of all, may need to display sound judgment[360]. And this applies all the more so where the treaty is a complicated, quasi-legislative multilateral undertaking based on fundamentally opposed political positions.

D. Ending Binding Force: Termination and Withdrawal

1. The Point

In the late 1990s, the European Court of Justice set an intriguing precedent when it effectively held that while *pacta* may well be *servanda*, they are *servanda* only as long as the parties still see the "point" of the *pactum*. In the case at hand, a German wine importer had objected against the suspension by the EU of the EU's free trade agreement with Yugoslavia, as this affected his business negatively. The EU argued that the suspension was necessitated by a fundamental change of circumstances, and the ECJ (now CJEU) agreed: there was "no point" in keeping the treaty alive, "no point in continuing to grant preferences, with a view to stimulating trade, in circumstances where Yugoslavia was breaking up"[361]. On some level the Court was correct, no doubt: why bother granting trade preferences to a partner in the process of breaking up? Except, whether or not there is still a "point" is not the test prescribed by article 62 VCLT, the article relied on by the Court in its customary law incarnation. Instead of assessing whether there is still a "point", article 62 VCLT suggests that the fundamental change of circumstances, the flipside of *pacta sunt servanda*, can only be relied on if performing the treaty has become practically impossible (if the extent of obligations still to be performed has been radically transformed), and if the circumstances concerned had been an essential basis for entering into the treaty to begin with. On this latter point the Court cast the net very widely, referring to peace and stable state institutions as the background[362] – this holds true for nigh-on all treaties (excluding conventions regulating hostilities, such as the Geneva Conventions), and thus cannot be a distinguishing factor[363]. And on the former, it was happy to think there was no longer a "point" to treaty performance, without investigating

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[358] Bianchi and Zarbiyev (footnote 52), pp. 276-283.

[359] The role of good faith in treaty relations was already discussed in Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, Cambridge University Press, 1953, pp. 105-120.

[360] See generally Klabbers (footnote 95).

[361] Case C-162/96, *Racke* v *Hauptzollamt Mainz*, ECLI:EU:C:1998:293, § 57.

[362] *Ibid*., § 55.

[363] Plus, on this logic, treaties protecting individuals during armed conflict could be terminated before they get a chance to be applied – such treaties presuppose the very absence here lamented by the Court.

whether this had truly become practically impossible. To add insult to injury, the Court itself innocently acknowledged that actually, under the same treaty, some trade had continued[364] – suggesting that indeed, this was not a matter of impossibility, but merely of cherry-picking reluctance[365].

2. Termination by Agreement

It is one of the delicious ironies of the law of treaties that terminating a treaty is actually best and easiest achieved on the basis of agreement between the parties. The VCLT explicitly envisages several ways of doing so by agreement. Under article 59, an earlier treatment can be implicitly terminated by concluding a new one, while under article 54 the parties can simply agree to terminate their existing treaty, either ex ante (e.g. by having it be in force for a limited duration) or by consenting to it. And it might further be possible to let a treaty lapse into *desuetudo*, effectively terminating it (by consent) through disuse[366].

In addition, however, the VCLT contains three possible grounds for termination (or suspension, or withdrawal) that could possibly be invoked unilaterally. Here too however, an agreement to terminate makes things considerably much smoother. Put differently, if both parties to a bilateral treaty agree that a fundamental change of circumstances has taken place which can be invoked to terminate, then they effectively agree to terminate – the ground (fundamental change) need not be specifically invoked. Indeed, the very idea behind the doctrine of the fundamental change of circumstances, as Arie David has it, "is to carry out the shared intention of the parties"[367]. And a few pages later he explains that by the time of the Franco-Prussian war, in 1870, the idea of unilateral action had come to be seen as too destabilizing, leading the great powers of the day, in 1871, to adopt the London Declaration[368]. This held that treaty termination would only be admissible by means of an "amicable arrangement"[369].

Even if on its face the VCLT contains three possible grounds for unilateral invocation, nonetheless the spirit of the London Declaration forms the background condition. Under article 56 VCLT, the default position is treaties without a termination, withdrawal or suspension clause cannot be terminated, and definitely not unilaterally. Two possible exceptions are mentioned. The first refers, not unexpectedly, to agreement between all parties concerned, albeit in somewhat lapidary, past tense, form: if "it is established that the parties *intended* to admit the possibility", suggesting they did so before they concluded the treaty concerned but forgot to put it in words. The ILC's 1966

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[364] Case C-162/96, *Racke* v *Hauptzollamt Mainz*, ECLI:EU:C:1998:293, § 57.

[365] That said, Carty's assessment of article 62 provides cause for reflection: "One might have thought that, if circumstances going to the basis of the agreement have changed, it would automatically come to an end. Similarly, if the obligations under a treaty are radically transformed, is it still the same treaty?" See Carty (footnote 257), p. 81.

[366] Article 42 VCLT might militate against this, as it specifies that termination can only be done of the basis of concrete provisions to that effect or on the grounds mentioned in the VCLT itself, but as article 57 does not mention a specific instrument for agreement to terminate, it is not impossible to bring this under the clause of article 57 VCLT. See also, for very useful discussion, Marcelo Kohen, "Desuetude and Obsolescence of Treaties", in Cannizzaro (ed.) (footnote 169).

[367] Arie E. David, *The Strategy of Treaty Termination: lawful Breaches and Retaliations*, New Haven CT, Yale University Press, 1975, p. 16.

[368] *Ibid*., pp. 26-27.

[369] The London Declaration actually meant to arrange relations between Russia and Türkyie, fifteen years after the fragile peace ending the Crimean War. For historical discussion, see David Bederman, "The 1871 London Declaration, Rebus Sic Stantibus, and a Primitivist View of the Law of Nations", *American Journal of International Law*, 82 (1988).

commentary (to what was at the time draft article 53) bears this out: the commentary too is cast in terms of the parties having intended (or not) to admit the possibility of termination. The most likely explanation is that at any rate, the parties can agree to allow for termination or withdrawal under article 54 (or suspension under article 57), meaning no special reference was needed under article 56. There is no mention of this consideration in the Commentary regarding article 56[370], but the Commentary to article 54 (then still draft article 51) does provide a general statement: "The Commission considered that, whatever may be the provisions of a treaty regarding its own termination, it is always possible for all the parties to agree together to put an end to the treaty"[371].

The other exception to the default position (under article 56) that no termination or withdrawal is allowed, makes reference to the 'nature' of the treaty concerned, and therewith marks one of the 'substantive' openings in the VCLT's otherwise highly formalistic regime. Regardless of whether consent to be bound or unbound has been expressed, the 'nature' of a treaty is invoked to signify that there are some treaties that occupy a special position, and such a special position can only be justified by means of substantive considerations. The question then is what kind (or kinds) of treaties this may apply to, and perhaps inevitably the ILC does not offer much to work with. The commentary to article 56 (then draft article 53) first singles out that with some treaties, their 'character' resist unliteral termination: this was said to apply to treaties of peace and treaties fixing boundaries.[372] This then creates a special class of treaties, and does so under reference to substance, under the heading of 'character'. On the other hand, some of the ILC's members suggested that with some treaties, there might be an 'implied' right of termination or withdrawal; this was said to apply to treaties of alliance[373]. Here then in one small move three categories of treaties were created under reference to their substance: those which cannot be terminated (at least not unilaterally), those where there is an implied right of doing so, and a presumably very large middle group. The point to note here, in light of the discussion above, is that treaty practice suggests a need to make distinctions between different classes of treaties; the formal 'consent' criterion, given pride of place in the VCLT, is unable to do this, and needs to be complemented by substantive considerations. And once those enter the picture, the dam breaks, as the discussion in the ILC on article 56 suggests.

The *rebus sic stantibus* doctrine fares best when states agree that a fundamental change of circumstances has occurred; where only one of the parties thinks this has happened, courts have been remarkable reluctant to honour the doctrine[374]. While courts typically acknowledge its existence, they equally typically refrain from applying it to the case at hand – the ECJ's *Racke* decision is a clear outlier, and was mostly a matter of administrative review at any rate: the Court satisfied itself that in suspending the Free Trade Agreement with Yugoslavia, the EU Council had made no "manifest error of assessment"[375]; it did not conduct its own in-depth investigation, as the cavalier reference to the EU not seeing the "point" of further application of the agreement also suggests[376].

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[370] ILC Final Report (footnote 57), pp. 250-251.

[371] *Ibid*., p. 249.

[372] *Ibid*., p. 250.

[373] *Ibid*., p. 251.

[374] Hungary invoked the doctrine in *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary/Slovakia), [1997] ICJ Reports 7, but the Court felt the requirements of article 62 VCLT (or rather, its counterpart in customary international law) were not met: § 104.

[375] Case C-162/96, *Racke* v *Hauptzollamt Mainz*, ECLI:EU:C:1998:293, § 56.

[376] Incidentally, the only issue the Court investigated (see *ibid.*) was whether the preamble to the decision to suspend, with the Council noting that a "radical change" had occurred which "calls into question" further application –

3. Force Majeure

Much the same applies to the other two seeming 'unilateral' grounds mentioned in the VCLT: the supervening impossibility of performance (article 61), and the material breach (article 60). here too, things are at their easiest when the parties in agreement that performance is no longer possible, or that termination would be the proper consequence of a material breach by one of them. There are few, if any, cases known in which article 61 has been invoked[377]. Hungary tried in *Gabcikovo-Nagymaros*, but the Court observed both that Hungary's interpretation of that provision did not align with a proper reading of the article (which does not see to financial difficulties making performance more onerous, against Hungary's contention), and added that at any rate, the supervening impossibility cannot be relied on by the party that is responsible for its occurrence by having breached the treaty in the first place[378]. Likewise an unsuccessful example is *Yollari* v *State Secretary for Transport*. England's Court of Appeal found that the occupation by Türkyie of Northern Cyprus did not result in a supervening impossibility of performance: the rights of Cyprus under the Chicago Convention "are capable of being exercised in respect of northern Cyprus even without effective control over the territory itself."[379]

4. Breach

Article 60 VCLT has a little more traction in state practice as well as judicial practice – it is not uncommon for states to accuse each other of breach of treaty, which may then possibly lead to one of three results: either the result envisaged in article 60 (if the breach can be said to be 'material'); or application of the classic *adimplenti non est adimplendum* principle, or possibly the application, under the law of state responsibility, of countermeasures. Either way, all three involve a prior breach by the other side, as the ICJ suggested in the *FYROM* case[380].

In a delightful separate opinion, Judge Simma took issue with the court's reluctance to say anything with greater finality. To his mind, there is no special place left for the principle *inadimplenti non est adimplendum*; breach is covered by article 60, and should be 'material' in order to trigger its application (leaving considerations of state responsibility aside). In his younger days (his "academic childhood"[381]), Judge Simma confessed, he had left room for a distinction between material and non-material breaches, but had become convinced that such served no

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this still falls short of investigating the propriety of the actual ground invoked. It is by no means impossible to hold that a "radical change" has occurred, but not one that meets the criteria of article 62 VCLT and its customary counterpart.

[377] Elias mentions a few unsuccessful invocations from the interbellum relating to financial hardship as possibly making performance impossible. Elias (footnote 173), pp. 128-134.

[378] *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary/Slovakia), [1997] ICJ Reports 7, § 102-103.

[379] *Yollari* v *State Secretary for Transport*, England Court of Appeal, [2010] EWCA Civ 1093, § 38.

[380] *Application of the Interim Accord of 13 September 1995* (FYROM v Greece), [2011] ICJ Reports 644, e.g. § 161. In the same paragraph, the Court circumvented the difficult question whether there is still a place in international law for the *inadimplenti non est adimplendi* principle, next to the codified law of treaties and the law of state responsibility. Since Greece had not demonstrated earlier breaches by FYROM, the Court considered it "unnecessary for the Court to determine whether that doctrine forms part of contemporary international law." For further discussion, see Serena Forlati, "Reactions to Non-Performance of Treaties in International Law", *Leiden Journal of International Law*, 25 (2012).

[381] *Application of the Interim Accord of 13 September 1995* (FYROM v Greece), [2011] ICJ Reports 644, Simma Sep. Op., § 7.

purpose. Curiously though, he did not quite provide argumentation, beyond referring to the procedural conditions included in article 60[382]. In other words, a separate role for *inadimplenti non est adimplendum* would not be subject to any specific procedure unlike, so the suggestion goes, an invocation of material breach, which would trigger the procedures envisaged in the VCLT, most notably article 65 perhaps[383].

The problem with this line of reasoning appears twofold. First, article 65 does not offer much beyond the very obvious: states should notify each other of their steps and resolve any disputes peacefully. Perhaps the best that can be said is that it reminds states that termination or suspension are not automatic upon invocation, and that is useful, albeit in a limited sort of way[384]. Second, not all breaches of treaty will pass the threshold set for the 'material' breach, and where the idea is that the *inadimplenti non est adimplendum* principle is the love child of fairness and reciprocity, it seems unfair to ask states to continue to apply treaties breached by the other side if the breach cannot be considered 'material', i.e. a breach of a provision essential to the accomplishment of the treaty's object and purpose – this potentially sets the bar quite high. *De minimis not curat lex* under article 60, as Judge Simma also acknowledges[385].

Perhaps the bigger issue here is that the principle *inadimplenti non est adimplendum* works best with the bargain-based contractual agreement and, perhaps more importantly, would be difficult – and often enough obnoxious - to apply to multilateral agreements of law-making ambitions[386]. Surely, should Greece violate the rights of a Turkish national under the European Convention on Human Rights, it would not be a great idea to let Türkyie do the same to Greek nationals – in this sense, it is perfectly understandable to limit the applicability of the *inadimplenti* principle, perhaps even to the point of talking it out of existence. On this construction, the sanctity of treaties outweighs the fairness underlying the *inadimplenti* principle – and it was indeed a major concern when the VCLT was drafted that the provision on breach should not too lightly be invoked[387].

Curiously then, article 60 occupies a very special place in the VCLT. Where most of the provisions of the VCLT work best with the bargain-based contractual agreement, with article 60 the reverse is the case: it does not work very well with such treaties, as the bar for invocation is set too high. It works better with the more complicated multilateral treaties. And to add paradox to paradox: the best way to terminate agreements is to agree on doing so, whether under article 60, 61 or 62[388].

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[382] "I doubt that it would make sense to let reactions to lesser, immaterial breaches off the leash set up by Article 60, particularly its procedural conditions." *Ibid*., § 22.

[383] Simma is weary of Greece's argument that the *inadimplenti* principle does not come with procedural elements; see *ibid*., e.g. § 9. In § 4, he notes that the argument is a rather convenient one.

[384] Mario Prost, 'Article 65 Convention of 1969', in Olivier Corten and Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, Vol. II, Oxford, Oxford University Press, 2011.

[385] *Application of the Interim Accord of 13 September 1995* (FYROM v Greece), [2011] ICJ Reports 644, Simma Sep. Op., § 22.

[386] Simma notes much the same, without emphasizing it. For instance, he observes after a brief discussion of "functional synallagma" that "complications brought about by the emergence of multilateral treaties did not unduly bother the bulk of the literature." *Ibid*., § 14. And later - § 18 - he notes that article 60 deals reasonably well with the "many complications" that come from application to different types of multilateral treaties."

[387] Rosenne (footnote 58).

[388] That is a point made much earlier by Bruno Simma, "Termination and Suspension of Treaties: Two Recent Austrian Cases", *German Yearbook of International Law*, 21 (1978).

This points to another tricky part: often, the remedy sought by the state invoking material breach is not termination or suspension, but rather continuation as originally scheduled – the *Rainbow Warrior* case, discussed in one of the earlier chapters[389], may well serve as a reminder, but is by no means the only example. The remedy of termination – being released from outstanding obligations – is typically appropriate for the bargain-based contractual arrangement: if A does not deliver, B should not have to deliver either. But this works considerably less well with common projects, let alone with larger multilateral, law-making undertakings. This therewith again suggests that article 60's material breach and the classic *inadimplenti* principle have a different scope: the former is drafted with a view to accommodating the non-contractual arrangement, and as such occupies a special place in the otherwise very contractually oriented VCLT.

To put it in yet different terms: with the bargain-based contractual arrangement, the breach of a provision essential to the accomplishment of object and purpose will typically be synonymous to a breach of the underlying bargain. There is little opportunity (let alone 'point') in making that distinction with respect to such contractual agreements – the only imaginable breach of an agreement ceding territory will be a breach of a provision essential to the accomplishment of its object and purpose, i.e. of the very cession provision. But with many more complicated or ambitious agreement it makes some sense to distinguish a breach of such a provision essential to the accomplishment of the treaty's object and purpose, from a breach of less central provisions – say, a reporting obligation. The stability associated with international law would be threatened if a breach of such a provision were grounds for termination or suspension, and as noted, this is often the last thing the aggrieved party wants.

E. Avoiding Binding Force: The (Ostensibly) Non-Legally Binding Agreement

1. Politics, Morality…

One of the more curious projects within the ILC is the attention paid to the distinction between treaties and what are sometimes referred to as non-legally binding agreements between states[390]. These are, so the argument often goes, agreements between states that will give rise to changes in behaviour (which means they are supposed to be binding), but for some reason they are not considered to be *legally* binding, and that reason is usually said to reside in the intentions of the drafters. In other words, or so it seems, states have the option to choose either to make agreements legally binding, or make them binding in some other way – often these are said to be 'politically' binding or 'morally' binding, though it has remained unclear what exactly 'politically binding' or 'morally binding' would entail.

Traditionally, international law did not contain such a distinction, and the distinction is still difficult to grasp (more on this below). Traditionally, treaties could be more formal or less formal, more solemn or less solemn, more serious or less serious, and more weighty or less weighty, but the thought that states could conclude treaties that somehow would not be 'treaties', despite having the same effects and being concluded with the same level of care and attention for detail, would have

[389] See above, chapter 1; see generally also Rosenne (footnote 58).

[390] By contrast, Gautier, in an authoritative contribution, pays no serious attention to the distinction: see Philippe Gautier, "Article 2 Convention of 1969", in Corten and Klein (eds.), Vol. I (footnote 384).

baffled international lawyers from Grotius to Oppenheim and even Elias[391] and Reuter[392], writing in the 1970s and 1980s.

Some have tried to argue that instruments of this kind could be seen as 'gentlemen's agreements', binding the gentlemen (always gentle*men*) concluding them but not their states, but as a matter of international law, such seems less than persuasive. Moreover, the earlier examples mentioned are typically examples of secret treaties whose contents have been leaked, which suggests that the 'gentlemen's agreement' was invented as a somewhat hasty fig leaf, a way for politicians to save face when confronted with upset constituencies.[393] And a different attempt to distinguish between treaties properly speaking and so-called 'agreements in simplified form' came to naught – the two categories contained much the same types of instruments.[394]

Yet, the distinction between legally binding treaties and non-legally binding agreements has become highly popular, and has (curiously perhaps, given their ostensibly non-legal status) given rise to deep studies and intense debates in no less than three legal organs in recent years. Temple Law School professor Duncan Hollis wrote six reports on the topic for the Judicial Committee of the Organization of American States, which subsequently adopted a set of guidelines[395]; German law professor Andreas Zimmermann has reported on the topic for the ad hoc committee of Legal Advisers on Public International Law of the Council of Europe; and the ILC has appointed its member professor Mathias Forteau as special rapporteur on the matter. That is quite a bit of attention from the legal community for a phenomenon that is said to be non-legal.

As it turns out (and as was to be expected perhaps), the boundary between law and non-law cannot be strictly maintained. Questions that keep occurring include how to distinguish the treaty from the non-legally binding agreement, and mostly whether the non-legally binding agreement can or cannot have so-called 'indirect' legal effects – sometimes construed in terms of a 'risk'[396]. This may happen through notions such as good faith or estoppel or the protection of legitimate interests, and perhaps even more through the customary process: practices undertaken under the guise of non-law will nonetheless be seen as state practice for the building of customary international law[397]. These are not novel arguments: they were already made, with a keen eye for inconsistency, by one of the leading defenders of the proposition that agreements can be binding but not *legally* binding, Anthony Aust[398].

2. *Fawcett's Role*

[391] Elias (footnote 173), p. 13.

[392] Reuter (footnote 113), p. 26.

[393] Pierre-Michel Eisemann, "Le gentlemen's agreement comme source de droit international", *Journal du Droit International*, 106 (1979).

[394] Fuad S. Hamzeh, "Agreements in Simplified Form – Modern Perspective", *British Yearbook of International Law*, 43 (1968/69).

[395] CJI/RES 259 (XCVII-O/20).

[396] Thus, Zimmermann and Jauer claim non-legally binding agreements "bear the risk of *indirectly* giving rise to important legal consequences". Andreas Zimmermann and Nora Jauer, "Possible Indirect Legal Effects under International Law of Non-Legally Binding Instruments", *KFG Working Paper* 48, May 2021, p. 6 (emphasis in original – JK).

[397] That said, the next thing states may think of is a disclaimer with respect to their practices: claiming that these are not intended to contribute to customary international law.

[398] Anthony Aust, "The Theory and Practice of Informal International Instruments", *International and Comparative Law Quarterly,* 35 (1986).

The idea of the non-legally binding agreement can be traced back to 1953, when James Fawcett (the grandfather of Britain's later prime-minister Boris Johnson, it turns out) published a piece in the *British Yearbook of International Law* under the title 'The Legal Character of International Agreements'[399]. The core of his argument was as follows. When states reach agreement, they do so through negotiations and therewith as a matter of politics. As a result, one might well say, according to Fawcett, that all agreements are somehow politically binding. However, in order to become also legally binding, something additional was needed: agreements would only become legally binding if intended to be legally binding, and such intention would first and foremost be manifested by clauses on dispute settlement[400].

There is much that is deeply mistaken and contestable about Fawcett's claim. Thus, the assumption that law is only truly law when courts can be involved is seriously misguided. Furthermore, it remains unclear what 'politically binding' means for Fawcett. Likewise, the idea that a special intention is needed to turn agreements into legally binding agreements is untenable – at least historically. And last but not least, if taken seriously, large numbers of instruments usually considered treaties would actually not be legally binding, for there are many treaties without dispute settlement clauses, with states simply reaching agreement on what to do together without feeling a need to also think of courts to back it up. To make a trite observation, not even the UN Charter has such a clause, despite containing a handful provisions on the International Court of Justice which, after all, is one of its principal organs.

To be sure, Fawcett's idea did not come entirely out of the blue, or rather, he pushed open a door which had been left ajar by Sir Hersch Lauterpacht. Lauterpacht, the ILC's second special rapporteur on the law of treaties, in his first report had thought it necessary to define the object of a convention on the law of treaties: the notion of treaty. While this seems an obvious move, it need not have been: later special rapporteur have sometimes astutely refrained from abstract attempts at definition – one would look in vain for a definition of 'state responsibility' in the article on the responsibility of states for internationally wrongful acts, prepared by special rapporteur James Crawford, or a definition of 'international organization responsibility' in the articles on the responsibility of international organizations prepared by special rapporteur Giorgio Gaja – although the latter contains something of a definition of international organization.

According to Lauterpacht's definition, "Treaties are agreements between States … intended to create legal rights and obligations of the parties"[401]. In defining treaties this way, he attempted to distinguish them from 'statements of policy' such as the Atlantic Charter or the Universal Declaration on Human Rights. This was a little deceptive, in particular with respect to the Universal Declaration which, as a General Assembly resolution, can only have the legal effect of such a resolution as envisaged in the Charter. The 1941 Atlantic Charter is much better characterized as a statement of policy: it contains a set of desiderata about the possible post-war world order, but little or no promises. Be that as it may, Lauterpacht explained that what mattered to him was the presence or absence of a "true contractual nexus" between the parties – therewith demonstrating the extent to which thinking in contractual terms influenced the drafting of the VCLT[402].

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[399] For a genealogy, see Klabbers (footnote 139).

[400] Fawcett (footnote 137).

[401] Hersch Lauterpacht, Report on the Law of Treaties, UN Doc. A/CN.4/63, in *Yearbook of the International Law Commission* (1953/II), p. 90.

[402] *Ibid*., p. 97.

In referring to the intentions of the parties, Lauterpacht may unwittingly have opened the door for Fawcett's construction. Lauterpacht's immediate predecessor as special rapporteur, James Brierly, had presented a somewhat different definition, less reliant on the intentions of the drafters. For Brierly, the decisive element was not whether states intended a particular result, but whether a particular result was established: a treaty "is an agreement … which establishes a relation under international law between the parties thereto"[403]. And Brierly explained that this criterion of the relation under international law served to distinguish the treaty from agreements "referable to the context of some other system of law, such as a domestic system"[404].

Where Brierly clearly implied that binding force would automatically involve law, with the only option between to choose among legal systems, and Lauterpacht innocently distinguished the legally binding treaty from the non-binding policy statement, Fawcett adopted the far more radical position that states could choose among normative orders. At the very least he should have explained then what it means for an agreement to be politically binding: does this entail 'political' obligations? And how then are these different from 'legal' obligations? What, even, is the advantage (if any) of making such a distinction? As it is though, Fawcett addressed none of these issues, but did appeal to the soft underbelly of the international lawyer.

For Fawcett, in a world dominated by states and their relative power positions, it seemed obvious that law should reflect power relations. Anything else could only result in a defeat for law – insisting on immutable rules and concepts in the face of political contestation can only make law less valuable, and thus law should be softer, more malleable. Hence, states should be free to change their mind, even having agreed to do something, and despite the *pacta sunt servanda* principle. And this would mean that whatever they agreed on would merely create the flimsiest of bonds, unless and until accompanied by an intention to be legally bound. The construction not only made international collaboration more easy (if less stable), but had the added advantage of bypassing control by parliamentarians and even domestic courts, although for lawyers raised in the UK's dualist system this is probably less of a concern[405].

Despite the many shortcomings in Fawcett's paper, his position became a very popular one, no doubt precisely because it tapped (and taps) into perceived advantages about flexibility. These advantages are very real, in a sense: a non-legally binding agreement can, in principle, be set aside with great ease, and perhaps amended or adapted with great ease as well, but those advantages have little to do with the perceived rigidity of the VCLT. Nothing prevents states from agreeing that their legally binding treaties shall enter into force upon signature only; nothing prevents them agreeing that termination can be done with immediate effect. Whatever obstacles there may exist, are obstacles typically erected by domestic constitutional provisions, and these are typically meant to guarantee democratic processes and individual rights. Small wonder that state authorities in their wish to 'get things done' may wish to circumvent these, but the non-legally binding agreement barks up the wrong tree, so to speak.

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[403] J.L. Brierly, Report on the Law of Treaties, UN Doc. A/CN.4/23, in *Yearbook of the International Law Commission* (1950)/II), p. 226.

[404] *Ibid*., 228.

[405] And thus precisely why in particular UK international lawyers can be rather cavalier about the non-legally binding agreement. See also Jan Klabbers, "Not Re-visiting the Concept of Treaty", in Alexander Orakhelashvili and Sarah Williams (eds.), *40 Years of the Vienna Convention on the Law of Treaties*, London, BIICL, 2010, p. 37.

3. Identification and International Case-Law

The two topics most often addressed in connection with the non-legally binding agreement are both borderline issues, so to speak: the identification issue (how to tell the legally binding from the non-legally binding) and do non-legally binding agreements nonetheless engender legal effects? The first question is usually answered under reference to the intentions of the drafters, making use of the space opened up by Lauterpacht: if the drafters intend a non-legally binding agreement, then a non-legally binding agreement it is. As Kolb curtly puts it: "If an instrument is not purported to have legal effects, it cannot be a treaty…. the States committing themselves through these acts do not want to assume legal obligations"[406]. This is curious, but in line with the sovereignty-focus of international law generally, where it seems a truism that one cannot make sovereign states do things they do not wish to do – and thus if they do not wish to become legally bound, they shall not become legally bound. This either ignores that the legal order (in this case: international law) may have something to say about the legal effect of agreements reached, or (best representation) may suggest that the legal order specifies that the intentions of the drafters are decisive.

The problem then is that there is little evidence that this is what the legal order says. If anything, international law, as voiced by both the International Court of Justice and the International Tribunal for the Law of the Sea, may say the opposite: the subjective intentions of the drafters may not be relevant if what they objectively create is an agreement containing identifiable commitments. This was already implied in the ICJ's decision in 1978 in the *Aegean Sea Continental Shelf* case, where it saw no problem in treating a press communiqué as a possible treaty, albeit one with different contents than one of the parties contended. Greece had invoked it to seize the ICJ in its dispute with Türkiye over the continental shelf; the Court found that it could not base its jurisdiction on the text of the agreement. Importantly though, the Court did not question whether agreement could take the form of a press communiqué.

Sixteen years later the Court would be more explicit. In a similar dispute over the continental between Qatar and Bahrain, it did not hesitate to apply 'agreed minutes' concluded between the two states, even though Bahrain claimed no legally binding intent had been involved – merely a political commitment. The court held, in no uncertain terms, that the Agreed Minutes concluded between Qatar and Bahrain "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"[407]. The phrasing is remarkable, and remarkably powerful. The use of the word "thus" suggests that wherever there are identifiable commitments, there is an agreement, and any agreement contains rights and obligations in international law, and therewith constitutes a treaty. To the extent that subjective intentions do enter the picture, it is in the wording of agreements – these can be softly worded ('the parties endeavour to undertake X') or more forcefully ('the parties shall do X'); this does obviously affect the *scope* of the agreement, but not its very existence – if there is an identifiable commitment, then there is an agreement[408]. Also the label has not been considered decisive by the ICJ: it found without much ado that a so-called memorandum of Understanding

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[406] Kolb (footnote 294), p.19.

[407] *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v Bahrain), Jurisdiction and Admissibility, [1994] ICJ Reports 112, § 25.

[408] A few years later, the ICJ also dismissed an argument to the effect that ratification is needed under international law: *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v Nigeria; Equatorial Guinea intervening), judgment, [2002] ICJ Reports 303, §§ 263-264.

concluded between Somalia and Kenya in 2009 was to be considered a treaty under international law[409], regardless of musings holding that the label MOU often signifies a non-legally binding agreement[410].

This approach was confirmed by the International Tribunal for the Law of the Sea in a boundary dispute between Bangla Desh and Myanmar. A conditional agreement, laid down in Agreed Minutes concluded between the parties in 1974 was not considered legally binding, precisely because it was conditional: "The Tribunal notes that the circumstances in which the 1974 Agreed minutes were adopted do not suggest that they were intended to create legal obligations or embodied commitments of a binding nature"[411]. More generally, it seems that this is the line usually followed by courts and tribunals, international as well as domestic. There is little evidence that judicial authorities have bought into the idea that states can actually conclude something that looks like a treaty and is supposed to have similar effects, only to claim that it is not a treaty but something else. The non-legally binding agreement, in yet other words, may be hugely popular among diplomats and state representatives (for the obvious reason that it leaves them much leeway) and among academics (eagerly parroting those same diplomats), but considerably less so with judicial authority.

4. Indirect Legal Effects?

The second issue often raised is whether the non-legally binding agreement, assuming it is a meaningful category to begin with, can have indirect effect. If it is indeed the case that, as many propose, the status of agreement depends on the intentions of the drafters, and those drafters intend to conclude something extra-legal, then the question itself becomes incoherent: if intentions need to be respected, then surely no legal effects should allowed through the backdoor either. If an agreement is consensually non-legal, then none of the parties, e.g., can claim it gives rise to legitimate expectations which warrant legal protection; nor should it be considered to give rise to estoppel or to the creation of customary international law – after all, at least *ab initio* the required *opinio juris* will be lacking; all there will be, is an *opinio politicis*[412].

The possibility of an estoppel was raised by Bangla Desh in its boundary dispute with Myanmar, but was quickly dismissed by the International Tribunal for the Law of the Sea for lack of evidence that Bangla Desh had relied to its detriment on Myanmar's behavior which, so Bangla Desh claimed, had been in harmony with the 1974 Agreed Minutes. The Tribunal said little of principled value here; the most that can be said is that it did not dismiss the possibility of estoppel altogether but then again, there was no need for it to do so[413].

ILC special rapporteur Forteau identifies a third question, but perhaps more to appease diplomatic audiences than that there is a real issue here, and that is the question whether, despite ostensibly being non-binding, such agreements are nonetheless governed by international law. Not

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[409] See *Maritime Delimitation in the Indian Ocean* (Somalia v Kenya), preliminary objections, [2017] ICJ Reports 3, § 50.

[410] Aust (footnote 8).

[411] *Dispute Concerning Delimitation of the Maritime Boundary in the Bay of Bengal* (Bangla Desh/Myanmar), [2012] ITLOS Reports 4, § 93.

[412] In a similar vein (though they keep their options slightly open), Zimmermann and Jauer (footnote 396).

[413] *Dispute Concerning Delimitation of the Maritime Boundary in the Bay of Bengal* (Bangla Desh/Myanmar), [2012] ITLOS Reports 4, § 125.

surprisingly, he answers generally in the negative, but does raise some interesting points. Thus, he suggests that in cases a non-legally binding agreement is in conflict with a treaty, the treaty will prevail. This, however, may be too quick: taking the conversation at face value, such a conflict would involve different normative orders, and therewith raise the meta-question of a conflict between the international legal order and whatever other order would govern the non-legally binding agreement, whether 'international politics' or 'international morality'. Put in these terms, it is by no means obvious that law should prevail; one might just as easily claim the primacy of the political, or the primacy of morality. At the very least such would warrant further justification, but that said, it is good to see the question being addressed on the level of the ILC[414].

Special rapporteur Forteau also notes that a non-legally binding agreement should not run against *jus cogens*. This strikes as correct, and follows from the very nature of *jus cogens*. Beyond this though, his is mostly a comforting discussion: diplomats need not be worried that the non-legally binding agreement turns out to be governed by the law of treaties. As he soothingly puts it, "these agreements are not, as such, governed by the law of treaties"[415].

Whatever international tribunals may say, states seem to have seized the possibility of avoiding legal commitment altogether by concluding so-called non-legally binding agreements, and can conceivably claim doing so is made possible by the VCLT itself. This specifies, after all, that a treaty needs to be "governed by international law" which, some claim, mean it may also be governed by something else: such as 'politics' or 'morality'. Put like this it sounds faintly ludicrous. Saying an agreement is "governed by international politics" or "governed by international morality" sounds hugely implausible and raises all sorts of questions as to how such may come about and what it means in practice; but saying an agreement is 'politically binding' or 'morally binding' has a far nicer ring to it. Either way, the practice of concluding ostensibly non-legally binding agreements suggests a curtsy to politics, to the perceived needs of politicians and diplomats to just get things done, without too much interference by existing legal rules and procedures. In the 'theory' of the non-legally binding agreement, such rules and procedures only get in the way, and their circumvention is thus considered justified.

5. *The Contractual Analogy Vanishes*

It is here also that the contractual analogy reaches the vanishing point, and rather dramatically so. While contract law may recognize such things as the letter of intent, there is no such thing as the 'non-legally binding contract' – such would be seen as a contradiction in terms[416]. No one in their right mind (or even their wrong mind) would dream of selling something or buying something but doing so in a sphere outside the law; indeed, the very point of the contract is to give the transaction the force of law, and therewith aim to control economic and financial risk, the risk of non-performance, by the other side. It is precisely the 'shadow of the law' which controls unpleasant

[414] The possibility of conflict involving different normative orders was raised in the mid-1990s in Klabbers (footnote 4), p. 121.

[415] Mathias Forteau, First report on non-legally binding agreements, UN Doc. A/CN.4/772, p. 50.

[416] Ironically, Aust suggests that many non-legally binding agreements address very mundane matters, typically falling into the first or second concentric circles identified in the previous chapter and thus themselves based on rather contractual ideas: I do something for you, and you give me something in return. See Aust (footnote 8), p. 52.

impulses in contract law[417]; ironically, it is often seen to work the other way around in international affairs.

The perceived need for flexibility, seemingly served by circumventing legal force, also suggests that agreement is typically feared to be short-lived. The underlying worldview is one of states pursuing their interests and every now and then reaching some fleeting agreement, or perhaps a simulacrum of agreement, but terrified of being sold short, being deceived, or being expected to live up to commitments no longer deemed worthwhile. That scholars of international relations adopt such a position is perhaps not surprising[418]; but to see international lawyers singing from the same hymn sheet is far more surprising – and perhaps a little disturbing.[419] Agreement, in other words, is the exception, and fleeting and often only seemingly existing at that; the natural state is a state of disagreement, in which the non-legally binding agreement plays a useful role: it allows for the Houdini-like trick of being bound without really being bound; escape is always an option, and is facilitated by the very concept of the non-legally binding agreement.

This is normatively problematic, even regardless of the hopelessly underdeveloped philosophical aspects. The latter include such questions as to what does it mean to be politically bound? Can one intentionally become morally bound? Can the law be intentionally de-activated, and if so, how then? Does it suffice to merely say 'this instrument does not bind at law'? What to do when norms from different normative orders collide? That sort of thing. Fawcett should have addressed these, and had peer review existed in in legal studies in the 1950s, the reviewers would have raised at least some of those issues, it is hoped[420].

6. Exit Democratic and Judicial Control

But the normatively problematic nature of the non-legally binding agreement also rests elsewhere. As noted, it facilitates the circumvention of democratic control – not something any liberal government should be proud of. It also facilitates the circumvention of judicial review – again, not something any liberal government should want on its resumé, least of all those who profess to be supportive of the Rule of Law; and those are often liberal governments[421]. But in a different register, the non-legally binding agreement is normatively questionable in that it contributes to the dilution of the idea of law. It seems to suggest that law is optional, is whatever states make of it (which, on a deep philosophical level, is no doubt accurate enough), and can be cast aside when deemed too inflexible, or not very instrumental.

This need not be the case. Some of the advantages (*vel non*) of thinking in terms of possibly non-legally binding agreements can be maintained without giving up on the role of law itself, most

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[417] Stewart Macauley, "Non-Contractual Relations in Business: A Preliminary Study", *American Sociological Review*, 28 (1963).

[418] Seminal is Charles Lipson, "Why Are Some International Agreements Informal?", *International Organization*, 45 (1991).

[419] See, e.g., Bilder (footnote 223).

[420] At least one of Fawcett's contemporaries took issue: F.A. Mann observed that to the extent Fawcett presumed all agreements to be legally non-binding, in practice this presumption would "always and automatically be rebutted." See F.A. Mann, "Reflections on a Commercial Law of Nations", *British Yearbook of International Law*, 33 (1957), p. 31.

[421] On the Rule of Law generally, see Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge, Cambridge University Press, 2004; on some of the pitfalls in trying to implement it within the UN context, see Noora Arajärvi, "The Rule of Law in the 2030 Agenda", *Hague Journal on the Rule of Law*, 10 (2018).

obviously by coming to think of law-making and agreement-conclusion in terms of presumptions[422]. On this line of thinking, agreements can be presumed to be legally binding unless there is clear evidence that they are not – like any presumption, the presumption of legally binding force must be rebuttable. Evidence of non-legal force might relate to subject matter: an agreement between political leaders assembled at a summit meeting to have their picture taken at noon is clearly not something that the law should have much to say about. Such evidence might also relate to the identities of those concluding the agreement: an agreement between the unauthorized might not survive closer scrutiny. And obviously also the wording of an agreement may be conclusive evidence: if there is merely a commitment 'to consider future action', or a commitment to 'possibly endeavour, within available resources, to contemplate doing X', then there is not much of a commitment to be identified – although even such a commitment, 'soft' as it is, is not entirely empty and would need to be applied in good faith.

F. Re-Directing Binding Force: Framing and Re-Framing

1. The General Idea

The law of treaties, like all law, can profitably be compared to a large railway station. Once it is decided which track the train will depart form, that same train inexorably head to its destination – it will be difficult, sometimes impossible or not worthwhile, to change direction once the journey has begun. So too with the law: with any legal dispute, the first thing that has to be done is find the proper 'track' where the dispute can be sent along, and often, there is quite a bit of room for discussion. Thus, should it happen that an employee of an international organization is harassed by her superior, various possible legal tracks present themselves. The matter could be treated as something internal to the international organization concerned (although this is less likely than it used to be). It could be treated as a matter of labour law, triggering the application of labour law. It could also be treated as a matter of administrative law, given that the employees of international organizations are usually seen as international civil servants, especially if appointed on the basis of an administrative decision. And at a further remove, human rights law may enter the picture, especially if the employee is denied access to justice. The problem is that none of these avenues are self-evident: one of them will be chosen, and while often enough precedent and experience will play a role in making that choice, there is no rule in existence dictating that one track must be chosen, and the other tracks must be ignored. In other words, much comes to depend on what might be called the 'politics of framing' – in the absence of a clear rule (and to be sure, no such rule exists), any decision to use *this* track rather than *that* track will to some extent be arbitrary.

The reason why this is a relevant concern is because different tracks lead to different destinations, and thus may lead to different results. Treating the matter as one of labour law will likely (if there is substance to the grievance) result in a victory for the employee concerned; treating

[422] This builds on Jan Klabbers, "Law-Making and Constitutionalism", in Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law*, Oxford, Oxford University Press, 2009. See for further reflection also Joost Pauwelyn, Ramses Wessel and Jan Wouters, "Informal International Law as Presumptive Law: Exploring New Modes of Law-Making", in Rain Liivoja and Jarna Petman (eds), *International Law-Making*, London, Routledge, 2014.

it as a matter of international organizations law, however, will typically mean that the organization can invoke immunity from suit, unless local courts are courageous enough to hold that harassment is not within the official activities of the organization concerned.

2. Framing and the VCLT

Something similar applies even within the law of treaties. Few topics fall 'naturally' in one category or another; instead, quite a few can be addressed in a variety of ways. Think, e.g., of a convention prohibiting torture (of which there are some in existence), and two parties to that convention concluding a later agreement between them in which they agree to the facility of 'extraordinary rendition', i.e. facilitating the transfer of individuals suspected of very serious crimes who may or may not be subjected to torture in one or both states. How I such a later agreement to be seen, and what are the legal consequences?

A first option is simply to view it as a *breach* of the torture convention, by two parties. Here the consequence may be that the torture convention may be suspended between all other parties and the two renditioners – this, needless to say, is not a very desirable outcome: it would allow the two states to get away with something deviating from a valued multilateral undertaking. But while the consequence is unpleasant, the construction is not implausible.

It is also possible to view it, *ex hypothesi,* as a *modification* of the torture convention between two of its parties *inter se*[423]. This scenario is less plausible, as article 41 VCLT sketches two conditions to which such a modification must conform. First, a modification should not affect the enjoyment by other parties of their rights; in the example, this is unlikely, as long as the rendition remains limited to nationals of the two modifying states. The second requirement however is less easily met: a modification may not result in undermining the effective execution of the object and purpose of the overarching convention, here the torture convention[424]. In *casu*, it may be the case that allowing for two states to resort to torture means jeopardizing the effective execution of the torture convention, and would thus not be considered acceptable.

A third option is to view this as a matter of *treaty conflict*, triggering article 30 VCLT. Under article 30, as recalled, earlier, when the parties are identical, the later in time will prevail; when the parties to both treaties are not identical (as in our hypothetical example), article 30 leads, again, to counterintuitive results: under article 30(4)(a), eventually the later in time prevails between those who are parties to both the earlier and the later treaty – meaning that the renditioners would get away with their unpleasant later rendition agreement.

Fourth, the rules on treaty interpretation may offer yet another set of alternatives. Thus, it might be possible to view the later rendition agreement as either *subsequent practice* or *subsequent agreement*, not perhaps sufficiently strong to be applied in its own right but to be applied as an aid in interpreting the multilateral convention. Should several other sets of states conclude similar agreements, this may eventually erode the original rule, modified as it then is by the parties' subsequent activities.

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[423] This is to be distinguished from modification through practice involving all parties. On the latter, see Irina Buga, "Subsequent Practice and Treaty Modification", in Bowman and Kritsiotis (eds.) (footnote 124).

[424] Article 41(b)(ii) puts it in somewhat more convoluted form: the modification should "not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole".

And then there is, last but perhaps not least, the further possibility of '*systemic integration*', again possibly with counterintuitive effect. Under article 31(3)(c), when interpreting a treaty, any relevant rules of international law applicable between the parties should be taken into account. At the very least then, interpretation of the multilateral agreement should take into account the later agreement between the renditioners, although the reverse should also apply: the rendition agreement should be interpreted taking into account the multilateral torture convention.

Obviously, the theoretical soup will rarely be consumed at the temperature at which it is served, and the example at hand will normally be speaking be further influenced by considerations of customary international law and quite possibly *jus cogens* – if the torture prohibition is a *jus cogens* rule, then the final scenario will be the easiest and the most normatively pleasing: the rendition agreement will be *declared invalid* due to it being in conflict with a *jus cogens* norm, under article 53 VCLT.

Therewith, article 53, with its reference to *jus cogens*, offers precisely the sort of justice-based yardstick that is so sorely lacking from the VCLT and which, dixit Gordley, has generally dropped out of sight in transformations of contract law after Aristotle and Aquinas[425]. For the striking result of the discussion above of the various frames offered by the VCLT is that, with one (further) exception, they all end up facilitating the application of the unpleasant rendition agreement, at the expense of the earlier torture convention. This finding is somewhat disturbing, and finds its cause precisely in the VCLT's incapacity to apply normative ideas to treaties. The VCLT is a highly formalist exercise, as seen earlier, where all that matters is the consent of states. And in such a setting, later manifestations of consent need to be prioritized over earlier ones, for it could not be otherwise: later consent has to overrule earlier consent, because it is the more recent expression of the prevailing political configuration. It is scarcely a coincidence that the one exception (in addition to the jus cogens scenario) is when the rendition agreement is treated as modification between parties inter se, for it is only here that the relevant VCLT provision (article 41) likewise makes an overtures to justice, in the form of the reference to the object and purpose of the earlier convention.

G. Final Remarks

It may well come to matter what frame is adopted, and the VCLT does not offer a rule (a meta-rule) on frame selection, thus leaving the choice to the parties. Where these are in agreement on the frame to be used matters will be simple, however normatively displeasing perhaps. But what further complicates the issue is that typically, in matters involving multilateral law-making treaties, it is not only the position of states that matters, but also the rights of individuals may be at stake. And then it really comes to be of relevance which frame is chosen: if the rendition agreement of the hypothetical example above is simply seen as the later in time or as subsequent agreement, then torturing individuals will be facilitated – and one can only hope that courts will be in a position to put a stop to this. It will scarcely be a coincidence that in a (rare) show of agreement states sometimes refer to their rendition agreements – when these first emerged they were sometimes

[425] As discussed in chapter 2 above. The reference is to the magisterial study by Gordley (footnote 103).

referred to as ‘diplomatic assurances’ - as non-legally binding[426], precisely with a view to extricating their application from possible judicial review.

This chapter has suggested that disagreement is at the heart of some of the more important doctrines of the law of treaties: reservations, interpretation, breach, and non-legally binding agreements, while the politics of framing suggests a further way to avoid being bound. The contractual idea here plays a curious role. There is actually something to be said for discussing reservations in contractual terms, even if multilateral treaties are typically not very ‘contractual’. And where most of the VCLT is geared towards the contractual type of treaty, surprisingly the article on ‘material breach’ is not: it is perhaps the one provision in the VCLT which is better equipped to address the law-making than the contractual.

[426] See Gregor Noll, “Diplomatic Assurances and the Silence of Human Rights Law”, *Melbourne Journal of International Law*, 7 (2005). For judicial confirmation specifically on the diplomatic assurance, see the decision of the UK Supreme Court in *Secretary of State for Foreign and Commonwealth Affairs* v *Rahmatullah*, 31 October 2012, [2012] UKSC 48, § 15.

CHAPTER V
CONCLUSIONS: RE-THINKING THE VIENNA CONVENTION?

A. Introduction

The previous chapters have made clear that the VCLT is in a rather messy state, and have demonstrated that to a large extent this is the result of its underlying contractual conceptualization: when treaties are like simple contracts, the VCLT can usually do its job; when treaties are more complicated, the VCLT becomes less useful. There are, of course, additional factors: some provisions are just poorly drafted or empty of contents, or both. Think for instance of article 25 VCLT, merely stipulating that the provisional application of treaties is possible but without providing any normative guidance, or article 40 VCLT, which protects states against unwanted amendments but does nothing to streamline the process of amendment of treaties itself. And then there is the nigh-on schizophrenic relationship between article 42 (aiming to close off the VCLT and turn it into a self-contained system with respect to validity and termination) and article 31(3)(c), aiming to open up the VCLT when it comes to interpretation – and invoking termination in particular is unthinkable without interpreting the treaty concerned[427].

The purpose of this final chapter is to bring some thoughts together and draw some conclusions, in particular perhaps about where this leaves the discipline of international law. After all, the treaty is the essential instrument of international law, and it would probably be considered useful to have some clear and well-functioning rules rather than the crumbling edifice that the law of treaties is currently best characterized as. Obviously, to speak in terms of usefulness implies that there is a goal to work towards to, and relativists might acknowledge that no such single goal exists – one should be highly reluctant to speak of the 'goals' or 'purposes' of international law, let alone of the international community, whatever that term may still mean these days. Nonetheless, most observers would probably agree with the more modest idea that a certain measure of stability and predictability and certainty in the global legal order is not a bad thing; from this, it follows that a 'better' law of treaties might be useful.

B. Some Conclusions

1. The Role of the Contractual Analogy

The main conclusion to be drawn from the above is the by now familiar thought that the VCLT works much better, as a general rule, with simple, bargain-based contractual undertakings, than with complex, quasi-legislative arrangements. The four ILC special rapporteurs who prepared the VCLT (Brierly, Lauterpacht, Fitzmaurice and Waldock) all hailed from a jurisdiction where private law thinking is hugely prominent, whereas the arguably most influential member of the ILC at the time, Shabtai Rosenne, likewise had received his initial legal training in English law. This cannot but have left a mark on the final result: if one thinks of treaties as if they are contracts, then it becomes

[427] This is further discussed in Klabbers (footnote 49).

difficult to apply the same reasoning to instruments that lack this contractual character – even if these are also, somehow, 'treaties'.

This contractual analogy manifests itself, one might say, in two ways. First, it is hugely visible with respect to some of the more salient provisions of the VCLT, such as article 18, containing the interim obligation not to defeat the object and purpose of a treaty pending ratification or entry into force. The underlying logic here is to protect the bargain giving rise to the agreement, to maintain the balance of concessions, and that is contractual thinking par excellence[428].

Second, it is manifested by the need to reduce multilateral agreement into sets of bilateral agreements. This is visible in such pivotal areas as reservations or treaty conflict, where the VCLT can only manage things by turning complex multilateral agreements into simple bilateral sets of legal relationships. And the VCLT is not alone in this: pre-VCLT, a similar technique was already practiced by the European Court of Justice. Its first decision involving a conflict between EU law and a commitment under a different treaty – the General Agreement on Tariffs and Trade - towards a fellow member state of the EU was 'solved' by suggesting that the scope of the relevant EU provision (the predecessor to what is currently article 351 TFEU) was limited to protecting the rights of third parties, not the rights of other member states. Doing so presupposed, again a bilateralization of multilateral relations (*in casu*, between Italy, the offending state, and any other member of the EU or any other member of GATT) in combination with speaking in terms of individualizable and corresponding rights and obligations – this is the sort of language that is appropriate to contracts, more so than to legislation[429].

2. The Role of Disagreement

But there is more to the ailments of the VCLT than merely a contractual analogy. It is also demonstrated above that bits and pieces of the VCLT are essentially written in order to facilitate and manage disagreement. Again, reservations stand out. The very reason why reservations are made to begin with is because states feel they did not get what they were aiming for during negotiations, and this in itself is a decent definition of disagreement. And if you cannot get what you bargain for, you might have little choice but to propose a reservation, so as to try and protect your interests or, more often, your conception of the 'good life'. Sometimes reservations are proposed so as to safeguard the domestic legal order, with states sometimes needing time to bring their domestic law into line with the new international treaty commitment. And sometimes they are proposed to protect a domestic value system, and here it typically involves situation where the domestic value system clashes with the value system underlying an international treaty. The state concerned can then opt either not to join at all (which may be undesirable for both the state itself and for the international community), or opt to join but reserve its position on certain topics. Hence, reservations are inextricably tied to fundamental disagreement. Put differently: if full agreement would always be within reach, the very idea of the reservation would not be needed.

Much the same applies elsewhere. If full agreement would exist, there would be little need for rules on interpretation – if states would fully agree, after all, they would also be expected to agree on the meaning of the very terms they use in their treaties and on how best to understand these.

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[428] This is further discussed in Chapter 2 above.

[429] The case is sometimes referred to as *Radio Valves*, Case 10/61, *Commission* v *Italy*, ECLI:EU:C:1962:2. For further discussion, see Klabbers (footnote 153).

Consequently, the very existence of rules on interpretation suggests that agreement is not always forthcoming or, if it is, tends to be fleeting in nature, with disagreement being the more natural and more lasting state of affairs.

The so-called non-legally binding agreement is also based, eventually, on disagreement: its raison d'être, so it is often stated, is the need for quick conclusion, quick adaptation, and quick and painless termination if and when circumstances so demand. These instruments are considered pivotal in 'managing the risks of agreement', to paraphrase Bilder[430], and this, ironically, suggests that their own existence presupposes fundamental disagreement. States that are deeply in agreement neither need nor possibly even want quick adaption or termination procedures; in fact, they might wish their arrangements to be lasting for a long time.

And the ultimate facilitator of disagreement is the withdrawal clause. Article 54 VCLT acknowledges that treaties may terminate due to the agreement of states (it speaks of 'consent') – in this case then, clearly the agreement is an agreement not to agree anymore, an agreement to disagree. And while article 56 VCLT aims to close the door for termination or withdrawal without a clause, it cannot do so, having to keep it open for those case when the parties "intended to admit the possibility" or when such can be "implied by the nature" of the treaty concerned – which in both cases translates as termination or withdrawal on the basis of an agreement to do so.

3. The Role of Formalism

In addition to the contractual analogy and its pitfalls, and the pivotal role of disagreement, yet another set of issues stem from the strongly formalist orientation of the VCLT. While formalism has its merits, as discussed above[431], and there is much to be said for a 'culture of formalism', it is nonetheless a somewhat impoverished system that exclusively relies on formal manifestation of consent as the sole criterion of legal validity. And the VCLT, quite obviously, cannot rely on formalism alone. This is already apparent in the reference to the "nature" of treaties in article 56; it also is evident from the various references to the "object and purpose" of treaties and the need to act "in good faith"; it is clear from the idea that a treaty, even if consented to, is invalid if concluded under coercion; and it manifests itself most of all in the notion of *jus cogens* – a treaty is invalid if concluded in violation of some fundamental substantive considerations, even if based on consent. What seemingly is a highly formalist legal system then, cannot help but open the door to non-formal considerations – and some have theorized that this kind of oscillation is a structural feature of international law generally[432].

This introduction of substantive considerations creates other problems, of course, as the endless discussions in the academic literature on *jus cogens* have made abundantly clear. *Jus cogens* presupposes some fundamental and widespread agreement on values shared by well-nigh everyone; such agreement is hard to come by, no matter how much wishful thinking is poured into the analysis, and to date only a few norms are considered genuinely as *jus cogens*, most of all the prohibition of genocide. The net result seems to be this: since the VCLT is essentially in the

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[430] Bilder (footnote 223).

[431] See chapter 2 above.

[432] The classics are David Kennedy, *International Legal Structures*, Baden-Baden, Nomos, 1987, and Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Helsinki, Finnish Lawyers' Publishing Co., 1989.

business of managing disagreement, it cannot do things that require fundamental agreement among states, other than by merely vaguely hinting at them: 'object and purpose', the 'nature' of a treaty, *jus cogens*. The VCLT is caught in a paradox: in order to insert considerations of justice it would have to give up its formalist stance, and yet it is this formalism which allows for the VCLT to do what it does best – which is to manage disagreement. As long as states express consent to be bound, all is well, regardless whether the consent is purely cosmetic, and regardless whether it is 'procured' with the help of reservations, the promise of later interpretation, the prospect of committees to settle treaty conflicts, et cetera. The rules themselves do not offer much solace; they merely tend to steer towards a particular direction.

C. The Invisible College

1. The Reification of Practice

While much of the above is hardly based on novel insights, the 'invisible college of international lawyers'[433] has nonetheless not done a lot to come to terms with it. This is the result of a particular professional deformation of international lawyers that is hard to overcome: the tendency to ascribe normative effects to practice, to what the law's subjects actually do (or say they do). Partly this stems from the professional training of international lawyers, with one of the traditional building blocks of international law being customary international law, authoritatively defined in the Statute of the international Court of Justice as evidence of a "general practice, accepted as law". In other words, the international lawyer is socialized early on into thinking at the very least that practices may become normative, in ways that do not quite apply to other branches of law. While customary rules, *ex hypothesi*, play a role in each and every legal system, their role in international law has traditionally been much stronger than in modern state legal orders.

As a result, international lawyers are quick to attach normative consequences to practices – even with respect to treaties.[434] In most cases, there is nothing wrong with this: if states habitually do something, it is only natural that their behaviour comes to be accompanied by the normative expectation that they will do so next time as well. There is an important caveat though: this applies, and can only apply, to rules of behaviour. If, to name one example, states habitually suspend their treaties in case of armed conflict between them, one might well reach the conclusion, at some point, that suspending treaties is the thing to do in times of armed conflict, and one might even feel justified in thinking this is accompanied by a sense of legal obligation: the 'general practice' being 'accepted as law'. The international lawyer thus will not so much critically interrogate practice, but rather welcome whatever she sees happening around her – she will tend to see it as the manifestation of a customary rule. Even seeming breaches of existing rules are often viewed through these lenses, and depicted not (or not only) as breaches, but rather (or also) the start of a

[433] The term 'invisible college' is often attributed to Oscar Schachter, but was already coined five years before he wrote by Diana Crane, I*nvisible Colleges: Diffusion of Knowledge in Scientific Communities*, Chicago IL, University of Chicago Press, 1972. For Schachter's text, see Oscar Schachter, "The Invisible College of International Lawyers", *Northwestern University Law Review*, 72 (1977).

[434] Georg Nolte, "Treaties and Their Practice: Symptoms of Their Rise or Decline", *Recueil des Cours*, vol. 392 (2018).

new practice which could result in a new customary rule. In the classic formulation of John Merrills, "law breaking is an essential method of law making"[435].

There are two curiosities to note though. First, it is remarkable to observe that for all the reification of the practice of governments, the practice of judicial organs is often by and large ignored. Surely, the proponents of the non-legally binding agreement will have a hard time aligning their views with those of courts which, as demonstrated in the previous chapter[436], are considerably less keen to accept the proposition that an agreement can bind in some normative order other than law. The courts follow Jellinek's classic and rather nice observation that it is impossible to want something and simultaneously not to want it[437]: one cannot wish to be bind and subsequently deny the force that provides the bindingness. The second thing to note is that often enough, contrary practice is either ignored or summarily dismissed. Almost hilarious is how Aust can happily note that agreements he considers non-legally binding that have been registered with the UN (usually, registration is seen an indication of legal force) must have been so registered "presumably in error"[438].

2. Deference

Combined with this (and probably related) is a strong deference to whatever it is states do or say they do. The international lawyer tends to work on a twofold set of assumptions. First, there is a strong assumption that states know what they are doing when they make statements that have a bearing on international law. It follows, that the international lawyer will not often think that the state representative mixed categories, presented a questionable interpretation, simply got it wrong, or even may have invented a convenient new term that has no particular recognized legal meaning but sounds plausible enough: think of Bush's 'illegal combatant', or Putin's 'special military operation'.

The second assumption is that not only do states and their representative know what they do, they also mean every word they say. When they make a public proclamation, they mean it. When they vote in the plenary of an international organization, they mean it. This used to have a more plausible origin: when communication was not all that well-developed, states could for the better part only be judged by their actions – and one can safely presume that when a state seizes a foreign fishing vessel in times of war, or allows diplomatic mail to go unopened, it must mean it. But that connection is less clear when states use words or when the sole practice they engage in is voting, for votes can be issued for all kinds of reasons (and, whisper it, might even be bought and sold), and words can be used honestly or with less than full sincerity or transparency. In other words, relying on the practice of states is not without risks.

But, as noted, doing so is defensible when rules of behaviour are at issue. Doing so is less obviously sensible when legal concepts are at issue. Surely, states could not get away with violating their obligations and then saying "we do not recognize this as giving rise to state responsibility";

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[435] J.G. Merrills, *Anatomy of International Law*, London, Sweet & Maxwell, 1976, p. 8.

[436] See chapter 4 above.

[437] "… es ist unmöglich, Etwas zugleich zu wollen und nicht zu wollen..."; roughly translated as "it is impossible at the same time to want something and not to want it", or one cannot blow hot and cold, in colloquial English. See Jellinek (footnote 3), p. 57.

[438] Aust (footnote 8), p. 36.

they cannot engage in a practice and then claim "this practice should not be seen as contributing to customary international law". And yet, this is what happened with the so-called non-legally binding agreement, whose widespread use, in the words of a major proponent, "results solely from state practice"[439]. Indeed, the same author works on the basis of the strong assumption that there is much practice in concluding non-legally binding agreements, and that this practice is legally relevant. For Aust, the matter is clear: states, in their practice, either conclude treaties or conclude non-legally binding agreements. And since there is an "extensive practice"[440] of resorting to non-legally binding agreements, it follows that this must be a viable category. State practice here is seen to influence not so much a rule of behaviour, but the legal concept of treaty; creative of not just a new legal rule, but of an entire (extra-)legal concept.

Be that as it may, there is additionally a strong inclination on the part of many academic lawyers to somehow be seen to work for practice, to have their work seen as being of practical relevance. Some academic international lawyers spice up their resumés by highlighting when they are cited by courts or in the briefs of litigants; others are keen on maintaining close ties to chancelleries, foreign ministries, or international organizations. And to be sure, much of this is commendable, if only because legal practice, in one way or another, forms part of the empirical basis of what it is international lawyers do: it is very difficult to be a good academic international lawyer without having an understanding for how things actually work and what the role of legal doctrines is, and often poor legal scholarship suffers precisely on this score, as does much work about law or law-related topics in neighbouring disciplines[441]. The drawback however is to ignore that legal practice and academic work are distinct activities. The academic needs to take note of what happens in practice, but should not, ideally, be submerged so as to lose her critical faculties.

D. What Then?

1. More Rules, More Tribunals?

The problems of the law of treaties, as these lectures have suggested, run deep. Consequently, a little tinkering here and there will not be very helpful, as the record bears out. The regime on reservations has kept the ILC and special rapporteur professor Alain Pellet busy for a protracted period of time, but has not improved dramatically – at best it has substituted a different imbalance for the earlier imbalance, as argued in the previous chapter. Neither has the other 'repair work' of the ILC, whether on interpretation or provisional application, had much immediate impact – possibly the one outlier here might be the work on jus cogens, which has taken a firm stand on some issues which might come to be accepted in state practice and judicial activity as well.

This lack of success is no surprise, precisely because the VCLT's problems are structural rather than incidental. Where the VCLT is based on a contractual analogy, it is to be expected that it has problems with non-contractual, legislative or regulatory undertakings; where the VCLT employs a

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[439] Aust (footnote 8), p. 38.

[440] *Ibid*., p. 50.

[441] To provide but one example: the highly sophisticated theorizing by Hooghe and colleagues on international organizations would have greatly benefited from a basic familiarity with the 'implied powers' doctrine, massaging the relationship between international organizations and their constituencies. See Liesbet Hooghe, Tobias Lenz and Gary Marks, *A Theory of International Organization*, Oxford, Oxford University Press, 2019.

formalist attitude, no wonder substantive considerations are difficult to capture; and to consider that it is built around accommodating disagreement helps makes parts understandable, but does not necessarily make it more workable. Given this background, the international lawyer's kneejerk reflexes when things do not work quite as hoped for, offer little solace. There is little point in trying to create more rules, or better rules, or more fine-grained rules, if those rules do not address the underlying issues – and doing so would be quite difficult. Indeed, sending matters back to the ILC has made this perfectly clear. And by the same token, the other standard suggestion ("Let's set up a specialized court"), will not help much, partly for the same reason, partly also because the law of treaties is not on a par with most other branches of international law. One can think of refugee law or investment law or the law of the sea in relatively isolation, which might warrant the setting up of specialized tribunals, but the law of treaties affects all branches of international law: it is cross-cutting rather than a (potential) silo, and thus not particularly suitable for a specialized tribunal to begin with[442].

2. The Possible Fragmentation of the Law of Treaties?

At any rate, the creation of new rules (let alone a specialized tribunal) would involve intense negotiations. While the mind can imagine a Convention on Integral Treaties (to employ Fitzmaurice's term), chances are that negotiations would get stuck very early on. It might as such not be a terrible idea to have a separate Convention on Integral Treaties, if only because it is clear that the VCLT cannot do justice to such treaties. But it would in all likelihood be impossible to draft provisions on such elementary things as the scope of such a convention, let alone on what sort of regime it should contain, whether consent would have the same pivotal role as in the VCLT, who could respond to reservations or breaches, et cetera. It is no surprise perhaps that, as far as I am aware, no such convention has ever even been proposed.

What has been proposed in the literature is a special law of treaties regime for the EU, doing justice to the specific characteristics of the EU and the idiosyncrasies (my word) of its treaty practice, characterized as it is by the interplay of a multiplicity of possible treaties[443]. The EU itself concludes treaties with third parties, in its own right. The EU concludes treaties with third parties together with its member states. The EU member states have concluded treaties with third parties before the EU existed or before they joined the EU. The EU member states conclude treaties with each other on topics related to EU law, and on occasion the EU might conclude a treaty with one or more of its member states. The array is wide and bewildering, with the greatest legal issues arising towards third parties. Small wonder then that a special law of treaties regime for the EU has been advocated: it would serve to create some clarity for third parties, but at the expense (if that is the word) of accommodating the internal political niceties of the EU. Put differently, the federal USA has its own niceties, as do other federal states – and that is not even to mention Belgium, with several local authorities having some external relations powers. In such a setting, it becomes

[442] The analogy is facile, but one might observe that there is no specialist journal on the law of treaties either. Such a specialized journal, were it to exist, would either occupy a very peculiar niche (for afficionados of ratification and depository tasks) or, given the central role of treaties, would be a journal on nigh-on everything that takes place in international affairs.

[443] Delano Verwey, *The European Community, the European Union and the International Law of Treaties*, The Hague, TMC Asser Press, 2004.

difficult to justify accommodating the EU, but not others. There have been earlier pleas in the literature to more generally recognize the special position of federations[444], but those calls have died down, and have died down, one imagines, for the good reason that in the world of sovereign equals, international law cannot afford to single out any particular political regime or form of political organization. If a number of states in Europe wish to collaborate, perhaps even form an 'ever closer union', that is their prerogative, but it cannot be expected of third parties that they bend over backwards to accommodate this.

And the law of treaties can probably not afford to become fragmented. In a sense, it already is, with two separate conventions, one for states and one for international organizations. telling is, moreover, that both are about as identical as it gets: the basic rules have to be the same in order to keep the system workable. Already things are complicated enough if and when international organizations conclude treaties with states[445]; things would become far more complicated still if there would be discrete conventions to govern the treaties concluded by discrete organizations – or other actors, for that matter.

E. Final Remarks

There is, at the end of the day, no alternative to just muddling through with the VCLT as it is – it will be near-impossible to amend it, and as noted above, even complementing it with new, additional rules to make it suitable for treaties other than the contractual, will encounter huge difficulties. To the optimist international lawyer (and aren't all international lawyers optimists by vocation?), this may sound like a pessimist conclusion, but it need not be. A proper understanding of the reasons why the VCLT says what it says, and why it may not always work, will already be helpful. I have tried, in these lectures, to provide such an understanding, by digging a little below the surface and trying to flesh out what assumptions the VCLT and its various provisions are based on. Those assumptions themselves are likely based on deeper-lying tropes or *topoi*[446], such as 'cooperation between states is always a good thing', or 'some agreement is always better than no agreement at all' (the justification for much that is usually referred to as 'soft law'), or even 'the end justifies the means'. These and others may prove helpful in understanding the popularity of the non-legally binding agreement, for instance, but such an excavation will have to wait for another day.

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[444] Ivan Bernier, *International Legal Aspects of Federalism*, London, Longmans, 1973.

[445] See E.W. Vierdag, "Some Remarks on the Relationship between the 1969 and the 1986 Vienna Conventions on the Law of Treaties", *Archiv des Völkerrechts*, 25 (1987).

[446] The seminal text is Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge, Cambridge University Press, 1989.