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Klabbers, Jan

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The Validity and Invalidity of Treaties

Jan Klabbers

Introduction

It may well be the case, as a seasoned international law practitioner once suggested, that the validity or invalidity of treaties is a topic of no practical significance whatsoever.[1] Few treaties have ever been declared invalid and, indeed, it is quite rare for States even to argue that a treaty they are parties to should be declared invalid.[2] Moreover, it is by no means clear who should declare a treaty invalid and whether, for instance, this could be done by a court in one of the States that are parties to the treaty – although this sometimes happens, as will be discussed below. In short, validity is a topic shrouded in mystery and practically not terribly relevant. And yet, the 1969 Vienna Convention on the Law of Treaties (VCLT) would have had a gaping hole in its middle if it had not paid any attention to the validity or invalidity of treaties: no legal system can do without rules on the validity of legal instruments, be it legislation, contracts, or treaties.

[1] See A Aust, *Modern Treaty Law and Practice* (CUP, Cambridge 2000) 252 ('It has to be said . . . that the subject is not of the slightest importance in the day-to-day work of a foreign ministry'). In the second edition, the statement has been toned down a little. See A Aust, *Modern Treaty Law and Practice* (2nd edn CUP, Cambridge 2007) 312.

[2] While I would hesitate to make the absolute claim that no international tribunal has ever found a treaty to be invalid, the fact is that I have been unable to find examples of such findings.

This chapter aims systematically to discuss the rules on validity of treaties as laid down in the VCLT, while paying attention (if and when appropriate) to the corresponding position under the 1986 Vienna Convention[3] as well as the presence (or lack) of relevant State practice (Part III). Before doing so, it will address a few peculiarities about the function of validity that underlies the Vienna Convention(s) (Part II), and it will start with some general reflections on validity (Part I), inspired by the curious circumstance that each and every lawyer will have some intuitive understanding of what validity refers to, yet scholarly exposés on validity are few and far between.

I. The Concept of Validity

Legal systems typically need rules to establish whether the norms prevailing in them are valid or invalid, and they need these rules for at least two reasons. A first reason is to enable the legal system to distinguish between law and non-law. After all, it cannot be the case that every utterance of normative import or intent will be seen as law: a formal criterion of legal validity serves to distinguish the legal from the moral, the social, or the courteous, and serves to distinguish the accepted from the merely desirable. Such a criterion may focus on the identity of the aspiring law-giver, or may focus on the law-making process itself. Thus, most international lawyers would probably maintain that the Pope cannot make law for the global society: he lacks the power to do so these days, even though a few centuries ago this was less clear. Whatever the Pope says may be authoritative, but it will not be regarded as international law. That is not to say that the Pope cannot make law at all, but merely that he cannot make valid international law. Likewise, treaties consented to by States tend to be

[3] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) [1986] 25 ILM 543 ('1986 VCLT').

regarded as law (or at least as sources of obligations[4]), even though other instruments accepted by States and their representatives—think of resolutions adopted at ministerial conferences or within international bodies—may not qualify as law.

A second reason why legal systems insist on rules on validity is to protect basic values of the system. Few domestic legal systems will recognize a contract to kill as a valid legal contract, simply because few domestic legal systems think murder is a great idea. Less obviously, many legal systems will insist that the signing of wills be witnessed by several people so as to establish that those wills are the result of an underlying intention rather than the result of coercion, and likewise insist on marriages being witnessed and performed by duly authorized individuals. Here then, the value to be protected is the reality of the consent of the author. And as the examples already suggest, both reasons for having validity rules—to distinguish law from non-law and to protect basic values—tend to shade into each other. Thus, formal thresholds ('a valid decision requires a 2/3 majority') typically exist to protect a minority, because protecting minorities against the tyranny of the majority can be seen as a value in its own right. Discussing validity then is by no means an exercise in fatuousness or eccentricity, much less even legalism; instead, validity 'deals with the practical problem of determining what rules are to be used in legal reasoning, a choice on which the freedom or the well-being of individuals or communities depends'.[5]

The statement that a rule or an instrument is valid, then, typically suggests that it is applicable within a certain community, and must be accepted as such by the members of that community. It does not necessarily follow that such a rule or instrument is also binding.

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[4] On the distinction, see GG Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in FM van Asbeck et al (eds), *Symbolae Verzijl* (Martinus Nijhoff, The Hague 1958) 153–76.

[5] See G Sartor, 'Legal Validity as Doxastic Obligation' (2000) 19 Law and Philosophy 585, 611.

While, arguably, it used to be the case that there was a high correspondence between 'legally valid' and 'legally binding' rules and instruments (so much so that in Kelsen's days, the two concepts could still be treated as synonymous[6]), it is now quite plausible to suggest that documents devoid of legally binding force should nonetheless be tested for validity. Surely, a General Assembly resolution endorsing genocide should be held invalid regardless of its non-legal nature because it undermines a fundamental community value, in much the same way as a General Assembly resolution 'adopted' by only five member States will not be considered valid: it will be deemed to lack the required support.[7]

It bears repetition to say that validity is not the same as 'bindingness'; rather, it is to say that the binding nature of an instrument follows—or may follow—from its validity.[8] Consequently, the binding nature of an instrument can be affected by considerations of validity or invalidity, but also by other concerns. Thus, it may happen that a treaty never enters into force: it never becomes binding law, but not because of a defect relating to its validity. Or a treaty may be terminated, in which case it stops being valid and binding law

[6] In his *Principles of International Law*, Kelsen clearly thinks of validity and bindingness as one and the same when observing that the validity starts when the treaty enters into force and may be affected by, eg, dissolution of the treaty by mutual consent. See H Kelsen, *Principles of International Law* (Rinehard, New York 1952) 355–6. MacCormick is not entirely convinced that this was actually Kelsen's position; referring to Kelsen's *Pure Theory of Law*, he speaks of this being Kelsen's opinion 'or perhaps of his translators'. See N MacCormick, *Institutions of Law: An Essay in Legal Theory* (OUP, Oxford 2007) 160–1.

[7] See similarly IF Dekker, 'Making Sense of Accountability in International Institutional Law' (2005) 36 Netherlands Ybk Intl L 83–118.

[8] See MacCormick (n 6) 162–3.

but, again, its bindingness does not end because of a transgression of any of the grounds of validity.[9]

Following Kelsen, norms or instruments are valid along a number of different dimensions. Writing almost a century ago, Kelsen distinguished two such dimensions, holding that a valid norm is always valid in relation to time and space: 'That a norm is valid will always mean that it is valid in some space or another and for some time or another . . .'[10] Later, in the specific context of international law, Kelsen added that the sphere of validity of an international legal norm also encompasses the personal and material spheres: whose behavior does the norm regulate, and which behavior does it regulate?[11] Importantly though, for Kelsen the first two spheres (time and place) pertained to the rule or instrument as such, whereas the personal and material spheres pertained to the human behaviour that the rule or instrument applied to: hence, the latter two have different objects, so to speak. In other words, following this model, the Genocide Convention is valid law for many States (place) since its entry into force in 1951 (time), telling States and other actors (persons) not to engage in genocide (material).

Much confusion concerning the idea of validity has stemmed from the circumstance that different approaches to law entertain different criteria of validity: positivists typically rely on procedural processes to determine validity, while naturalists emphasize axiological validity, and realists tend to think that a rule is valid only if it is actually respected. Still, as Giovanni Sartor has pointed out, for everyday purposes these distinctions need not detain any

[9] See similarly M Kohen, 'Article 42—Convention de 1969' in O Corten and P Klein (eds), *Les Conventions de Vienne sur le Droit des Traités: Commentaire Article par Article* (Bruylant, Brussels 2006) 1593, 1598–600.

[10] See H Kelsen, *Introduction to the Problems of Legal Theory* (Litschewski Paulson and Paulson (trs), Clarendon Press, Oxford 1992) (first published 1934) 12.

[11] See Kelsen, *Principles* (n 6) 93.

analysis. For everyday purposes, it suffices to proclaim that validity is doxastic in nature: what matters is that valid norms need to be accepted by their audiences, not why they must be so accepted.[12] That is not to say such grounds are irrelevant: they will, for example, come back in discussing whether instruments need be considered invalid in their entirety, or whether they are only partly invalid. The positivist position often boils down to stating that no severance is possible: adoption via the wrong procedure affects the entire instrument, not just a part of it. On the other hand, the naturalist and the realist may well be able to live with severance. Chances are, that a treaty contains many provisions which are just or which are respected, and only a single provision that is considered unjust, or that is ignored in practice.

The international legal order, unwritten and especially unsystematic as it mostly is, has rules on validity just like any legal order, but few of these are explicitly formulated for the purpose of establishing validity. International law is mostly concerned with facilitating agreement, and thus not 'big' on formalities, and this circumstance, as we will see, will affect the rules on validity considerably. Although seemingly international law is stricter when it comes to the identity of possible law-makers (not everyone is entitled to participate), even here the law seems to facilitate and follow political necessity.[13] The tension, in other words, is between formalism (with which validity rules are usually associated) and the pragmatics of political agreement. This is, to some extent, a false tension, but that does not render it less relevant, if only because it is often repeated. One of the reasons why this is a false dichotomy

[12] See Sartor (n 5).

[13] It is, for example, rarely argued that liberation movements cannot conclude valid agreements because they are not among the generally accepted subjects of international law just yet. See in more detail J Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-state Actors' in J Petman and J Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff, Leiden 2003) 351–69.

is that with respect to treaties, as discussed below, the main validity requirement resides in State consent: without consent, there will be no valid treaty. This is not to say that consent is necessarily the only validity criterion (it is not, as *jus cogens* considerations may also play a role), nor is it automatically to suggest that all instruments consented to are therefore treaties (although an argument can be made that consent creates a rebuttable presumption that a treaty has actually been concluded). What it does suggest though, is that the formalism often associated with validity criteria and the pragmatics of political agreement, when it comes to international law, tend to go hand in hand: if States reach political agreement, the most relevant validity requirement (for all practical purposes, that is) has been met.[14]

International law's validity rules are not, however, limited to the role of consent in treaty-making. Notwithstanding the informality of the international legal order, with some deduction one can identify other rules of validity; for example the rules on decision-making within international organizations (IOs). It is clear that the UN General Assembly needs to be able to command a majority for most of its binding decisions on topics such as the UN budget; a decision endorsed by a mere minority will not be accepted as valid. Likewise, a binding decision by the Security Council will only be deemed valid if it commands a three-fifths majority and as long as this majority includes the concurring votes of the permanent members. While admittedly the meaning of 'concurring vote' has undergone some change

[14] I explore this in greater detail in Chapter 3 of J Klabbers, A Peters, and G Ulfstein, *The Constitutionalization of International Law* (OUP, Oxford 2009).

since the Charter was concluded,[15] the basic principle still stands: a decision which is not supported by the concurring votes of the permanent members will not be considered valid.[16]

International courts and tribunals have not been overly verbose on validity in international law, perhaps because there is room for the argument that validity can practically only be enforceable in a highly institutionalized legal order comprising compulsory jurisdiction. Although it is, one would think, only open to courts or similar institutions to declare legal instruments to be invalid (a statement to that effect by, say, the President of the United States, or the Queen of the United Kingdom, will always run the risk of being considered self-serving), the international legal order is not quite sufficiently organized. Indeed, typically, decisions on validity (at least practically, if not necessarily conceptually) presuppose compulsory jurisdiction: where two States agree that a treaty concluded between them is invalid, such invalidity is difficult to disentangle from, eg, termination by common accord.[17] Moreover, it can be postulated that the efficacy of a system of rules on validity benefits from being embedded in a hierarchical and harmonized legal order: an instrument cannot be considered invalid in one corner of the legal system, yet be considered valid in a different location within that same legal system.[18] Here Kelsen's four dimensions of validity

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[15] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 297 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 [22].

[16] Much the same applies to the rules on admission or expulsion of member States. See *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4 ('*UN Admissions* case').

[17] See already B Simma, 'Termination or Suspension of Treaties: Two Recent Austrian Cases' (1978) 21 German Ybk Intl L 74–96.

[18] The rationale is that a number of important procedural issues remain open unless there is some organized legal order within which validity issues are embedded, with one pressing example being the question whether a court should only look into validity if it is raised by one of the parties to a dispute, or whether it should do so *ex*

may prove illuminating: a treaty between Germany and France is valid law for those two States, but inapplicable (rather than invalid) elsewhere, and it would be inappropriate to proclaim it valid for Germany but invalid for France.

It is precisely this problem which has caused such an uproar in the wake of the decision of the Court of Justice of the EU in *Kadi*. The Court's decision to invalidate (in part) the EU Regulation implementing Security Council sanctions strongly suggests that there is a problem with the underlying Security Council resolution: if invalid in the EU, can these sanctions still plausibly be considered valid elsewhere? On the other hand, *Kadi* raises the question whether a domestic or regional legal order can substitute its own validity criteria (*in casu*: EU Regulations should conform to EU human rights standards, even when importing verbatim Security Council resolutions) for those of the more centralized legal order?[19]

Perhaps because of the above-mentioned conceptual and political issues, the International Court of Justice (ICJ) itself has not been very outspoken. On some occasions it has addressed the validity of decisions of IOs, but without being able or willing to produce a general theory on validity or invalidity. In *IMCO Maritime Safety Committee*, the ICJ held that a decision had been adopted in violation of IMCO's constituent document.[20] In *WHA*,[21] it found that the World Health Assembly lacked the power to ask the same ICJ for an advisory opinion (although it seemed to found its decision predominantly on the basis, not of the

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officio. In *Oscar Chinn*, for example, the Permanent Court of International Justice (PCIJ) chose to stay close to the parties' arguments. See *The Oscar Chinn Case (UK v Belgium)* [1934] PCIJ Rep Series A/B No 63.

[19] See Case C-402/05 P, *Kadi v Council and Commission* [2008] ECR I-6351.

[20] See *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 171.

[21] See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66.

World Health Organization (WHO) Constitution, but on the place of the WHO within the UN family—a position that is not explicitly written down anywhere[22]). By contrast, in *Certain Expenses* it accepted that UN organs are presumed to act *intra vires* and are themselves to be the first arbiters of the legality of their own action.[23] And in *Namibia*, the ICJ had no problem accepting that the procedure for making valid decisions by the Security Council had changed through practice.[24] The one thing connecting these four decisions would be the proposition that the Court is reluctant to subject the activities of the leading political institutions of global governance to strict legal scrutiny (something also confirmed by its reluctance to engage with an argument that the Security Council had unwittingly contributed to the Bosnian genocide[25]), but that it is a bit quicker to do so when the activities of politically less important institutions (IMCO, WHO) are at stake. Yet even this highly abstract conclusion is possibly not airtight: in *Admissions II*, the ICJ accepted that the two main political organs—the General Assembly and the Security Council—are engaged in some kind of institutional balance.[26] This, in turn, would suggest that even their freedom is hemmed in—at least in situations where they threaten to step on each other's toes.

Be that as it may, the ICJ has offered no consistent or coherent view on the validity of international institutional law, let alone international law more generally. And the ICJ is not alone: none of the other relevant international law actors have pronounced, let alone agreed,

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[22] See J Klabbers, 'Global Governance at the ICJ: Re-reading the WHA Opinion' (2009) 13 Max Planck Ybk UN L 1–28.

[23] See *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 168.

[24] See *South West Africa* case (n 15) [22].

[25] See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia (Serbia and Montenegro))* (Order) [1993] ICJ Rep 325.

[26] See generally *UN Admissions* case (n 16).

on the issue. As such, a general theory on (in)validity in international law remains to be formulated.

II. Validity and Treaties

The only explicit validity rules circulating in the international legal order are the rules on validity and invalidity of treaties, as laid down in Articles 46 through 53 of the VCLT. In essence, most of these (Articles 46 through 52) deal with defects in the consent of a State to be bound, underlining the point made above that consent is practically speaking the most relevant general validity requirement when it comes to treaties.[27] Such defects can have three broad sources: they can be based on improper procedure or authorization; they can be the result of something misleading; or they can be the result of coercion. In all cases, the underlying rationale is that the consent to be bound has been affected: but for the affecting circumstance, the State concerned would not (or would most likely not) have expressed its consent to be bound.[28] The one remaining article deals with the substance of a treaty: a treaty concluded in violation of a *jus cogens* norms is void. The emphasis on defects in State consent makes theoretical sense. Treaties are typically conceptualized as the result of a *consensus ad idem*; if so, a premium is placed on the reality of this *consensus*, and if the *consensus ad idem* is affected by fraud, coercion, or misrepresentation, it follows that there is

[27] There are implicit rules hidden in the definition of treaties in the 1969 and 1986 VCLT, to the effect that, for purposes of those conventions, treaties can only be concluded by States or IOs. This is without prejudice though to the possibility of other actors concluding agreements which, under customary international law, could qualify as treaties.

[28] The International Law Commission (ILC), in the commentary accompanying its final draft articles, made this point explicitly when discussing fraud. Fraud would potentially nullify a treaty, if it would have induced a State 'to give a consent to a treaty which it would not otherwise have given'. See [1966] YBILC, vol II, 177, 245.

not really a *consensus ad idem* and thus, in a meaningful way, no treaty. The required underlying political agreement[29] would be absent.[30]

In light of earlier work on validity, it is useful to note that the VCLT's drafters no longer regarded treaty conflicts as sources of invalidity. Amongst pre-Vienna Convention legal thought, the connection of treaty conflict to invalidity had been par for the course. In one of the few monographs on the topic, Vitta devoted quite a bit of attention to conflicts with other treaties and with existing norms of customary international law as potential sources of invalidity,[31] as did McNair in his *magnum opus*.[32] Indeed, the International Law Commission's (ILC's) second Special Rapporteur on the law of treaties, Hersch Lauterpacht, started his discussion of treaty conflict with a draft article to the effect that treaties which would conflict with other treaties would be invalid, only to realize quickly that such a rule would be too rigid to be of much use: subsequent paragraphs of the same draft article allowed for some broadly worded exceptions.[33]

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[29] Note that the term 'political agreement' here is not used as an alternative to 'legal agreement', but rather as the first step towards the latter: States reach agreement in the body politic which, if it passes the validity test, automatically becomes a legal agreement. For further detail, see J Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International, The Hague 1996).

[30] Note, however, that consent in the law of treaties may derive its very meaning from being central to the conclusion and validity of treaties. For further discussion see M Craven 'The Ends of Consent', in MJ Bowman and D Kritsiotis (eds.), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP, Cambridge 2018) 103-135.

[31] See E Vitta, *La validité des traités internationaux* (Brill, Leiden 1940) 172–215.

[32] See A McNair, *The Law of Treaties* (Clarendon Press, Oxford 1961) 213–36.

[33] For brief discussion, see J Klabbers, 'Beyond the Vienna Convention: Conflicting Treaty Provisions' in E Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (OUP, Oxford 2011) 192–205.

Still, decent policy arguments could be invoked for viewing treaty conflict as an issue of validity.[34] Two arguments in particular come to mind. First, there is the argument that allowing for treaty conflicts would amount to stimulating the breach of existing treaties: nullity here would be conceptualized as the sanction for such a breach. Second, this would apply with special force if the earlier treaty has a legislative or even constitutional character, as judges Van Eysinga and Schücking found in the 1934 *Oscar Chinn* case.[35] To their mind, a bilateral Anglo–Belgian agreement on trade and transport in the Congo ran foul of an earlier multilateral treaty establishing the general legal framework for the treatment of Africa by its European colonizers, and thus should have been held invalid.[36]

The ILC's first Special Rapporteur on the law of treaties, JL Brierly, never got around to discussing validity and quickly resigned, having confessed to being less than fully interested in codification generally.[37] His three successors (Lauterpacht, Fitzmaurice, and Waldock), however, all devoted considerable attention to issues of validity, and it is fair to say that at least in quantitative terms, the topic of validity ranks among the more central ones of the VCLT.[38] The Convention not only contains eight articles detailing grounds of invalidity, but also four articles devoted (in part) to setting up the role of invalidity provisions,[39] and another four devoted (again, in part) to elements of procedure.[40] In addition,

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[34] For a more general discussion, see Chapter 18 ('Treaty Conflicts and Normative Fragmentation').

[35] See *Oscar Chinn* (n 18) (dissenting opinions of Judges van Eysinga and Schüking).

[36] It is possibly a useful reminder of the contextuality of most things that many might nowadays agree that the earlier agreement—the General Act of the Berlin Conference—itself would be invalid due to its conflict with a *jus cogens* norm.

[37] See JL Brierly, 'The Codification of International Law' (1948) 47 Michigan L Rev 2–10.

[38] For brief and convenient discussions on an article-by-article basis, see ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden 2009).

[39] VCLT Arts 42–5.

the VCLT has three articles spelling out the consequences of invalidity.[41] Hence, almost a quarter of the VCLT's eighty-five articles have to do, in one way or another, with the invalidity of treaties. This contrasts sharply to other branches of the law of treaties, which (regardless of their pivotal importance and intellectual complexities) have been dealt with in far fewer provisions. For example, the regime on reservations, arguably the central topic of the VCLT, is addressed in five articles (six, if the definition of Article 2, paragraph 1(d) is included).

One of the hallmarks of the VCLT's approach, and a clear indication that the intention was to create something of a 'self-contained regime', ie a regime that tolerates no interference from elsewhere,[42] is the circumstance that Article 42(1) stipulates that the validity of a treaty 'may be impeached only through the application of the present Convention'. In other words: the list of grounds of invalidity is meant to be exhaustive, no reasons for invalidating a treaty can be put forward which cannot be found in the Vienna Convention. Still, the ILC did not pay too much attention to this in its commentary, mostly justifying the closed nature of its listing of grounds of invalidity by reference to the need for 'stability of treaties'. Validity was supposed to be the normal state of affairs, 'which may be set aside only on the grounds and under the conditions provided for' according to the draft of what would become Article 42.[43]

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[40] VCLT Arts 65–8.

[41] For ease of reference, I include Art 64 (on the later emergence of a new *jus cogens* norm). The other two are VCLT Arts 69 and 71.

[42] See eg M Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission* (Erik Castrén Institute, Helsinki 2007) [124].

[43] See [1966] YBILC, vol II, 236.

Yet, closing off the Convention's validity regime is awkward, for a variety of reasons. First, it may be difficult to squeeze some past examples into the VCLT framework. For instance, it is sometimes claimed that the infamous Munich agreement, by which Hitler's Germany gained control over Czechoslovakia, should be declared invalid, but on which exact ground remains an open question. Reuter, in his classic textbook, treats 'Munich' as an example of fraud,[44] but this, somehow, is less than fully convincing. Hitler's intentions, one might surmise, were perfectly clear: those intentions were nasty, no doubt, but not necessarily fraudulent.

Second, and related, there is the jurisprudential staple that rules are by their very nature both over-inclusive and under-inclusive.[45] In particular, the latter is relevant here, as it suggests that occasions may arise where something happens that would warrant the treaty to be invalidated, yet that would be impossible to fit plausibly into the VCLT categories.[46] One example may be bribery of a negotiator that is not attributable to a State, yet without which the treaty would not have been concluded. As a matter of legal systematics, so the Commission must have thought, such a case has no place in the law of treaties, dealing as it does with relations between States. Yet surely, as a practical matter, bribery by the private sector may be the more obvious concern. Following the letter of the Vienna Convention and

[44] See P Reuter, *Introduction au droit des traités,* Cahier (ed) (3rd edn Presses Universitaires de France, Geneva 1995) 156–7 and accompanying endnote.

[45] The best treatment, quite possibly, is F Schauer, *Playing by the Rules: A Philosophical Examination of Rule-based Decision-making in Law and in Life* (Clarendon Press, Oxford 1991).

[46] The ILC, it seems, was well aware of the issue, given the care with which it made clear that obsolescence and desuetude would be instances of termination by common agreement, and thus covered by the parallel idea relating to treaty termination.

its legislative history,[47] it would be very difficult to invalidate a treaty on grounds of private sector bribery of a State representative.[48]

Third, it was probably a bit naïve at any rate to suppose that political practice could be closed off by means of a rigid, if reluctant, *Grundnorm*, as I have called it elsewhere (with a wink and a nod to Kelsen).[49] Post-Vienna Convention practice suggests that authors and even courts do not hesitate to bring within the VCLT's reach all sorts of activities that the VCLT itself excluded from its scope. In particular, arguments have been made to the effect that the classic maxim *rebus sic stantibus* (which, to be sure, is not a ground of invalidity but justifies unilateral treaty termination or suspension[50]) covers occurrences such as a succession of States[51] and even the outbreak of armed conflict.[52] But, the VCLT explicitly excludes these from its own scope and thus, logically, also from the scope of the *rebus sic stantibus* maxim.[53] Even the circumstance that an entire convention has been devoted to State succession in respect of treaties (or that, later, the effect of armed conflict on treaties has

[47] The ILC explicitly explained that in order to nullify a treaty, 'the corrupt acts must be shown to be directly or indirectly imputable to the other negotiating State'. See [1966] YBILC, vol II, 245.

[48] Incidentally, 'buying' votes or trading votes at law-making conferences may come close, but at least the latter is often seen as fairly innocent. See eg O Eldar, 'Vote-trading in International Institutions' (2008) 19 EJIL 3–41.

[49] See J 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 M Craven, M Fitzmaurice, and M Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff, Leiden 2007) 141–61.

[50] The unilateral nature of such termination, incidentally, seems highly questionable: see A David, *The Strategy of Treaty Termination: Lawful Breaches and Retaliations* (Yale University Press, New Haven 1975).

[51] See eg S Oeter, 'State Succession and the Struggle over Equity' (1995) 38 German Ybk Intl L 73–102.

[52] See Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECR I-3655.

[53] VCLT Art 73 provides: 'The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.'

come to be regarded as a topic fit for separate study and perhaps codification by the ILC) has not deterred such arguments.[54] In this light, it was not too difficult to predict that, all good intentions on the part of the ILC notwithstanding, the closing off of the invalidity and termination regimes would not meet with great success.

Those intentions of an exhaustive list were furthermore dealt something of a blow when the same ILC saw fit, in the same Vienna Convention, to include a rule that goes a long way towards establishing the opposite of what Article 42 aims to achieve. Whereas Article 42 aims to turn the law of treaties into a self-contained regime, Article 31(3)(c), containing the so-called principle of systemic integration,[55] aims to do the opposite.[56] It opens the door for all possible arguments in interpreting treaties. This too was, no doubt, defensible in its own right, if only to underline that international law is something of a unitary legal order, but the combination of the two was always likely to be problematic.[57] As things stand, it is unlikely that Article 42 either reflected customary international law in 1969 or has since crystallized into customary international law, if only because, as a provision, it is geared to the internal workings of the VCLT itself, and can have no meaningful existence outside the scope of the Convention. That does not mean, however, that no additional grounds of invalidity can be found, and as noted, a case has been made for conflicting treaties to result in invalidity. While this is no longer done (partly, no doubt, because inapplicability of conflicting provisions is so

[54] This refers to the 1978 Vienna Convention on Succession of States in Respect of Treaties (concluded 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3, and to the ILC's ongoing study of the effect of armed conflict on treaties, carried out by Ian Brownlie and, since 2009, Lucius Caflisch.

[55] See generally C MacLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279–32; M Koskenniemi (n 41).

[56] VCLT Art 31(3)(c) holds that in the interpretation of treaties, due account shall be taken of 'any relevant rules of international law applicable in the relations between the parties'.

[57] See further Klabbers, Reluctant *Grundnormen* (n 48).

much less dramatic than invalidity, and thus politically far more opportune), it cannot be excluded that other grounds of invalidity may arise or, alternatively, that considerations which are now seen to lead to termination, such as the fundamental change of circumstances, may come to be treated as grounds of invalidity.

III. The Grounds of Invalidity

As noted, the Vienna Convention's provisions on validity largely focus on defects in the consent of treaties. This is most readily explained by the circumstance that the VCLT focuses on treaties as instruments, rather than as obligations.[58] Treaties, in other words, are conceptualized not in terms of their substance, but as agreements (or, more likely perhaps, disagreements[59]) reached by States and reduced to writing: form takes precedence over substance. This orientation automatically turns the prism towards the formal characteristics of treaties, ranging from means of expressing consent to be bound to means for limiting consent, and including defects in the consent. There are, in the Convention, only two exceptions to this: one is the reference to *jus cogens* as a validity criterion, the other is formed by the repeated references to the 'object and purpose' of treaties.[60] That is not to say that international law is 'big' on formalities after all, but it is to say that considerations of form help the system to channel substance and, what is more, this emphasis on form in the VCLT is required in particular so as not to interfere with substance. Simply put, international law is

[58] See generally S Rosenne, 'Bilateralism and Community Interest in the Codified Law of Treaties', in W Friedmann, L Henkin, and O Lissitzyn (eds), *Transnational Law in a Changing Society: Essays in Honor of Philip C. Jessup* (Columbia University Press, New York 1972) 202–27.

[59] In Philip Allott's lovely phrase, treaties are a 'disagreement reduced to writing'. See P Allott, 'The Concept of International Law' (1999) 10 EJIL 31, 43.

[60] On the latter, see J Klabbers, 'Some Problems regarding the Object and Purpose of Treaties' (1997) 8 Finnish Ybk Intl L 138–60.

(barring *jus cogens* considerations) simply not interested in what States agree, but only in that they reach agreement.

A. Constitutional concerns

The first two grounds of invalidity as mentioned in the VCLT and the 1986 VCLT relate to the propriety of a State's consent in light of its own constitutional order. Article 46 does so explicitly under reference to a State's treaty-making rules,[61] while Article 47, in less spectacular fashion, deals with a representative's authority to express consent to be bound.[62] The ILC, in its commentary, made abundantly clear that in both cases the provisions represented an *ultimum remedium*. Given the expectation that governments should know what they are doing and that they have all sorts of possibilities to intervene between signing a treaty and its eventual entry into force,[63] Articles 46 and 47 should not be invoked too lightly.[64] This is reflected in their wording which, in both cases, is cast in negative form: the grounds should not be invoked, unless there is a very good reason to do so.

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[61] VCLT Art 46 provides, in relevant part, that a State 'may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance'.

[62] VCLT Art 47 provides: 'If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.'

[63] Even in respect of treaties in simplified form, a government has 'the necessary means of controlling the acts of its representative and of giving effect to any constitutional requirements'. See [1966] YBILC, vol II, 242.

[64] Additionally, the ICJ hinted that acquiescence may play a role here as well: in a boundary dispute between Cameroon and Nigeria, it noted that Nigeria only invoked invalidity a few years after the agreement had been

Article 46, as noted, addresses a violation of domestic treaty-making provisions, providing that a State may not invoke a violation thereof unless the violation concerned a rule of fundamental importance and was manifest. The initial ILC draft had clearly been considered inadequate, as it never defined what 'manifest' meant, and made no distinction between fundamental and less fundamental domestic provisions. Consequently, both elements were added at the Vienna Conference, partly on the basis of an amendment proposed by the United Kingdom.[65]

The requirement that the domestic rule at issue must be a rule of fundamental importance is sometimes taken to mean that only violations of constitutional provisions can qualify under Article 46,[66] but this, surely, is untenable. For one thing, it would be difficult to pinpoint with any precision which rules in the United Kingdom, in the absence of a single written constitutional document, qualify as 'constitutional'. More importantly though, it would amount to ordering States what to put in their constitutions: there are States where the constitutions remain silent on the precise treaty-making procedure to be followed and where, instead, the matter is organized in generic legislation.[67]

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concluded, and had even failed to do so when the treaty was amended. See *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* [2002] ICJ Rep [267].

[65] The definition of 'manifest' was proposed by the United Kingdom; the limitation to rules of fundamental importance seems to have been added by the Drafting Committee, in the spirit of an adopted but differently worded amendment proposed by Peru and Ukraine. See UN Conference on the Law of Treaties, Official Records: Documents of the Conference (1969) UN Doc A/CONF/39/11/Add.2, 165–6.

[66] See SE Nahlik, 'The Grounds of Validity and Termination of Treaties' (1971) 65 AJIL 736–56.

[67] An example is the Netherlands, where treaty-making is governed by a State Act. For a general overview in Dutch, see EW Vierdag, *Het Nederlandse Verdragenrecht* (Tjeenk Willink, Zwolle 1995); for a brief discussion in English, see J Klabbers, 'The New Dutch Law on the Approval of Treaties' (1995) 44 ICLQ 629–43.

Still, it is clear that elements of domestic procedure laid down in some inter-ministerial circular or internal memorandum will not qualify. The least one can do is expect governments, if they want their treaty-making provisions to be taken seriously, to take them seriously enough themselves to be given some recognizable and cognizable legal form. This also follows from the requirement that a violation must be 'manifest': this is defined by Article 46(2) of the VCLT as 'objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith'. It will normally be next to impossible for a treaty partner to know the contents of a circular or aide-memoire in force in the other State. Indeed, it is no coincidence that the one time the ICJ addressed Article 46, the claim faltered precisely on this ground. Cameroon, so the Court stipulated, could not have known the details of Nigeria's treaty-making provisions when Nigeria invoked Article 46 to get a boundary agreement declared invalid. The Court drily suggested that limitations on a Head of State's treaty-making capacity could not be relied upon 'unless at least properly publicized', and even more drily remarked that 'there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States'.[68]

It is perhaps no surprise that the arena for making 'Article 46 arguments' is the domestic political arena rather than its international counterpart. It turns out that the Article is sometimes invoked as a domestic politico-legal argument by domestic forces opposed to a

[68] See *Land and Maritime Boundary between Cameroon and Nigeria* (n 62) [265], [266] respectively. In a similar vein, the arbitral panel in *Guinea-Bissau v Senegal* reached the conclusion that a 1960 boundary agreement concluded between colonizers France and Portugal had been validly concluded because France was entitled, in good faith, to expect that the treaty was valid despite not being submitted to Portugal's Parliament. Note though that the tribunal explicitly did not base itself on VCLT Art 46 which, in 1960, did not yet exist as such. See *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* 83 ILR 1 [54], [59].

particular treaty. Thus, the Article 46 argument was made by members of the US Senate in objection to the conclusion of the Panama Treaty in 1977.[69] Still, such appeals are bound to remain unsuccessful and, in the curious way of some law, self-defeating: a veritable Catch-22. The very invocation of Article 46 domestically would seem to suggest that there is some uncertainty as to the treaty-making procedure to be used; and if that is the case, then a violation can hardly ever qualify as 'manifest'.

That said, there have been cases where domestic courts have held that a treaty-making act had been concluded in violation of that state's domestic treaty-making procedures. This can be read, e.g., in the decision of Sri Lanka's Supreme Court in *Singarasa* v *Attorney-General*, rendered in 2006.[70] The Court held that in accepting the Optional Protocol to the ICCPR, Sri Lanka's President had acted ultra vires, and the Court frames the President's actions in terms of inconsistency with Sri Lanka's domestic law rather than in terms of Article 46; indeed, Article 46 is never referred to.[71]

By contrast, a 2017 decision of Ghana's Supreme Court does refer to Article 46, and holds that an agreement concluded by Ghana's President, seemingly as a non-legally binding administrative agreement, with the USA concerning the resettlement of two former Guantanamo detainees from Yemen into Ghana, is 'unconstitutional'.[72] The Court does not go as far as to declare the agreement invalid under international law, and arguably it could not have done so unilaterally. Subsequent to the judgment, the agreement was ratified by

[69] See generally T Meron, 'Article 46 of the Vienna Convention on the Law of Treaties (*Ultra Vires* Treaties)' (1979) 50 BYBIL 175–99.

[70] Reproduced in 138 I.L.R. 469.

[71] To be sure, Sri Lanka is neither a signatory nor a party to the VCLT.

[72] https://ghalii.org/gh/judgment/supreme-court/2017/21 (accessed 24 April 2019).

Ghana's Parliament, therewith overcoming the 'Article 46' problem.[73] In passing, the Court all but denied the possibility of non-legally binding administrative agreements and, more worryingly, suggested that states have the duty to conduct 'basic due diligence' on the domestic treaty-making procedures of their prospective treaty partners, and in doing so flatly contradicted the ICJ's approach in *Land and Maritime Boundary between Cameroon and Nigeria*, as discussed above.

The 1986 VCLT, although not in force, adds that the validity of IO treaties can possibly be affected by the rules of the organization but, again, in very limited circumstances. The Court of Justice of the EU (CJEU) seems to have relied to some extent on this provision when suggesting in the case *France v Commission* that an agreement concluded by the European Commission (instead of the EU—or, at the time the European Community—as such) would nonetheless be seen as binding upon the EU. In doing so, the Court rejected the Commission's claim that it had merely concluded an administrative agreement, and seemed to suggest that even if internally ultra vires, the agreement would still produce legal effects under international law.[74] Admittedly, the Court did not specifically refer to Article 46 or its counterpart in customary international law, but it seems likely that its opinion was informed by Article 46, as something of a background consideration. Indeed, the Court must have realized that an appeal to internal EU rules as grounds for invalidity would not be likely to impress the Commission's treaty partner too much.[75]

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[73] See further L Helfer, 'Treaty Exit and Intra-Branch Conflict at the Interface of International and Domestic Law', elsewhere in this volume (Do I presume this correctly?).

[74] See Case C-327/91 *France v Commission* [1994] ECR I-3641. Bothe reaches a similar conclusion: see M Bothe, 'Article 46—Convention de 1986', in *Les Conventions de Vienne* (n 9) 1719, 1721.

[75] As a technical matter, the EU is neither bound by the 1969 nor the 1986 VCLT. Still, the CJEU (as well as the General Court, previously known as the Court of First Instance) has on various occasions applied the law of

Whether Article 46 qualifies as customary international law would seem debatable. There is little practice, after all, and while the rule is sometimes invoked, it is rarely honoured. But this perhaps points to a more general theoretical problem: the rules making up the law of treaties are not quite comparable to 'regular' rules of behaviour. Whereas it makes sense to discuss, say, diplomatic relations in terms of customary law, the law of treaties is largely residual in nature, and facilitates the creation and maintenance of legal relations between States. It does not, however, consist of clear injunctions or prohibitions, with one or two exceptions.[76] Hence, it may not be all that useful to discuss the law of treaties in terms of customary international law to begin with. That said, a provision such as Article 46 makes eminent sense, but does so perhaps more as a logical necessity than as the crystallization of many instances of State practice.[77]

More generally, in light of the wide variety of possible ways to express consent, which may include opting-in or opting-out procedures, it becomes even more difficult than before to get a sense of each other's treaty-making provisions and whether these have actually been respected. Much the same applies to domestic procedures, where phenomena such as tacit approval by parliaments may be difficult to distinguish, from the outside, from situations where parliaments are not consulted or their prerogatives circumvented. All this conspires to make successful invocation of Article 46 less, rather than more, likely.

B. Error, fraud, corruption

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treaties, typically by invoking the customary status of the rule concerned. See generally J Klabbers, 'Re-Inventing the Law of Treaties: The Contribution of the EC Courts' (1999) 30 Netherlands Ybk Intl L 45–74.

[76] The interim obligation of Article 18 for instance seems to be the sort of rule that states are unlikely to contract out of.

[77] What I have in mind here is an argument comparable to Fitzmaurice's claim that *pacta sunt servanda* is best seen as a kind of natural rule, natural in the sense that it would be difficult to imagine a legal order without such a rule. See Fitzmaurice (n 4).

Article 48 addresses the issue of errors in the formation of treaties, and specifically excludes linguistic errors from its scope: these can be rectified in accordance with Article 79.[78] If linguistic errors do not, as such, affect a treaty's validity, then the most common errors will be geographical representations. However, as these typically illustrate graphically what is also expressed in words and in terms of geographical coordinates, maps too are unlikely to be declared invalid. That leaves, for all practical purposes, a fairly empty category: the error may only be invoked if it 'relates to a fact or situation which was assumed' to exist at the time of conclusion, and if it formed 'an essential basis' of a State's consent to be bound. Indeed, Article 48 was largely drawn from the ICJ's reasoning in the *Temple* case, which declined to find that an error in a map invalidated a border treaty, since errors to which a State has itself contributed cannot be invoked by that same State, if the State knew of the error, or if it was 'put . . . on notice of a possible error'.[79]

In this light, it is perhaps no coincidence that one of the few examples ever mentioned is a hypothetical, launched by the US representative to the 1968 Vienna Conference, Richard Kearney. Kearney, worried about an earlier draft which suggested that the error could only be invoked if it was literally part of the treaty, provided the example of a treaty for the sharing of hydroelectric power. Such a treaty, he opined, might be based on a mistaken calculation of the capacity of turbines, and thus give rise to all sorts of mistaken figures.[80] By the same token, one might consider an agreement on fisheries, based on assumptions regarding the

[78] VCLT Art 48 provides in relevant part that a State may invoke an error in a treaty to invalidate consent 'if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty'.

[79] See *Case concerning the Temple at Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6 [26].

[80] See UN Conference on the Law of Treaties, Summary Records of the First Session (26 March-24 May 1968) UN Doc A/CONF/39/11, 249 ('Vienna Conference, First Session').

whereabouts of the fish stock, to be invalidated on ground of error should those assumptions prove wrong.

Kearney's main concern with respect to his turbine example was that the underlying calculation would not necessarily itself be part of the treaty, and that thus a requirement that the error be 'in the treaty' might be too strict. The US tabled a formal amendment to delete the words 'in a treaty', but withdrew it upon the explanation of Special Rapporteur Sir Humphrey Waldock that the reference was meant so as not to broaden the scope by allowing States to refer to all possible sorts of facts so as to invalidate a treaty. Creating a nexus to the treaty itself was considered necessary and, apparently, this reply persuaded the US representative.[81]

Generally, errors are not lightly to be presumed. A political miscalculation by a statesman can hardly qualify. Accordingly, the claim that Norway's Foreign Minister Ihlén did not realize the consequences of what he was doing when he promised not to contest Denmark's sovereignty over Eastern Greenland was rightly dismissed by the Permanent Court of International Justice (PCIJ).[82] After all, allowing such a claim to serve as a ground of invalidity would open Pandora's Box: it is part of the art of statesmanship that one can (or should) make a reasonable assessment of the consequences of political action.

Sometimes errors may be the result of deliberate misrepresentations, or fraud. Fraud is dealt with in Article 49 and, again, the practical utility would seem limited.[83] As noted, Hitler's conduct at Munich is sometimes treated as fraudulent, but this has neither resulted in

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[81] See ibid 254.

[82] See *Legal Status of Eastern Greenland* [1933] PCIJ Rep Series A/B No 53.

[83] VCLT Art 49 reads: 'If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.'

the formal invalidity of the Munich agreement nor has it been established that his conduct was, in fact, fraudulent. More generally, it would seem that there are no recorded instances of fraud,[84] although it cannot be excluded that this owes something to possible embarrassment on the part of States having been defrauded. The ILC, in the commentary to its 1966 draft articles, defined fraud as including 'any false statement, misrepresentation or other deceitful proceedings by which a State is induced to give a consent to a treaty which it would not otherwise have given'.[85] This then helps distinguish fraud from error: fraud is by definition deceitful, whereas errors may also be the result of an honest mistake.

If fraud needs to be distinguished from error, it also needs to be distinguished from corruption of a State's representative, which is addressed in Article 50.[86] Tellingly perhaps, both (draft) articles were discussed together during the 1968 Vienna Conference, and several possible examples were listed which could fall within either category—or both. Courtesies, small gifts, and honorary decorations would not be unusual in diplomatic practice, but would hardly amount to fraud or corruption, so the *communis opinio* held. As a result, the entire discussion of fraud and corruption got mired into discussion of either what the two terms mean in various domestic legal systems, or whether the consequence of their presence should be relative or absolute invalidity of the treaty concerned. And as if that discussion was not unstructured enough, the representative of the Holy See (French law professor René-Jean Dupuy) felt the need to introduce the desirability of *jus cogens* at this juncture, blissfully

[84] See Aust, 2nd edn (n 1) 316.

[85] See [1966] YBILC, vol II, 245.

[86] VCLT Art 50 holds: 'If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.'

oblivious as to whether or not this was the relevant moment for discussing *jus cogens*.[87] In all, the preparatory works on both Articles 49 and 50 therewith ooze a rarefied atmosphere, akin to people desperately trying to remember why, on the hottest day during an extremely warm summer, they brought their winter coats with them. Moreover, there is the risk, elegantly formulated by the UK representative, Sir Ian Sinclair, that where practice is very rare, trying to regulate it may be counterproductive. As Sir Ian put it, aiming to include fraud as a ground for invalidity 'might encourage States to invoke grounds of fraud more frequently'.[88]

As with Article 46, it is difficult to maintain that the provisions on error, fraud, and corruption have crystallized into customary international law. Useful as such provisions no doubt are, practice would simply seem to be too scarce to meaningfully speak of customary international law. Again, the better view may be that such provisions need a place in any legal order for the simple reason that one cannot do business on the basis of error, fraud, or corruption. Doing business, whether between individuals or States, needs to be based, to some extent at least, on mutual trust, so it makes sense to have rules protecting this minimum amount of trust.

C. Coercion

Politically, the more relevant concerns relate to coercion of States and their representatives, and these are dealt with in two separate articles (Articles 52 and 51, respectively). In both cases, the result will be absolute nullity. Originally, the big political issue was the discussion of how exactly to define coercion: would it cover only military coercion, or also pressure by

[87] See Vienna Conference, First Session (n 73) 258–9.

[88] Ibid 261.

other means, such as economic or political pressure? In this light, Article 51 is the relatively simpler of the two, dealing with coercion against a State's representatives.[89] What the Commission had in mind, it seems, was physical violence: it referred to 'third-degree methods of pressure' being employed against Czechoslovakia's President and Foreign Minister by Nazi-Germany, aspiring to create a German protectorate over Moravia and Bohemia.[90] In addition to physical violence though, the ILC also memorably remarked that a threat to ruin a diplomat's career 'by exposing a private indiscretion' could qualify as coercion.[91]

Note that Article 51 is drafted in a peculiar manner. Taken literally, the text suggests that what is invalidated in case of coercion of a representative is the act by which the State expresses consent to be bound, rather than the treaty itself. Taken literally, this may have serious consequences, as the treaty—in case of bilateral treaties—then remains unfinished (ie not concluded). The legal effects of a treaty not being concluded differ from those of an invalidated treaty, especially if the defect has been identified only after the treaty already entered into force.

Perhaps surprisingly, during the Vienna Conference the US tabled an amendment allowing for relative nullity. As Herbert Briggs, a member of the US delegation (as well as the US member of the ILC) argued, it might be the case that the State whose consent is procured by the coercion of its representative nonetheless finds that, on balance, the agreement is worth keeping. If so, absolute nullity appears to be too strong a sanction.[92]

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[89] VCLT Art 51 states: 'The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.'

[90] See [1966] YBILC, vol II, 246.

[91] Ibid.

[92] See Vienna Conference, First Session (n 73) 267.

While some western States endorsed the US proposal, the US amendment and similar ones tabled by Australia and France were eventually rejected, and one can only speculate that their western origins did them no favours: in all likelihood, rich nations are the ones expected to be most likely to engage in subtle forms of coercion.

Again, there is (fortunately perhaps) a dearth of actual cases, and it would for that reason be difficult to maintain that the coercion of representatives is part of customary international law. Again though, it cannot completely be excluded that the lack of cases owes something to the understandable reticence of those who have been coerced to make the coercion public, in particular when it concerns 'private indiscretions' being exposed.

Rather more explosive was the situation concerning coercion of the State itself, which eventually found provision in Article 52 of the VCLT.[93] The underlying idea is simple enough: States should not impose their wills on other States, and every treaty resulting from an attempt to do so suffers from a lack in the required *consensus ad idem*. Still, to give effect to such a position is not at all easy: Grotius already struggled with it. Curiously, when discussing promises, Grotius claimed that while a coerced promise is binding, the coercing agent should release the promisor of his obligation.[94] This would have the dual advantage of keeping the sanctity of promises intact, while securing the justice of preventing damage. More generally, he pointed out that fear has no place in the formation of contracts,[95] and that the conclusion of unequal treaties was not a particularly good idea.[96] Here too, problems of delimitation came up. Thus, Grotius noted that treaties between victors and vanquished may

[93] VCLT Art 52 reads: 'A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.'

[94] See H Grotius, *On the Law of War and Peace* (Kelsey (trs), Clarendon Press, Oxford 1925) 334.

[95] See ibid 348.

[96] See ibid 396.

qualify as unequal treaties, but that such treaties could also be concluded 'between more powerful and less powerful peoples that have not even engaged in war with each other'.[97]

Indeed, it turned out that these two examples of unequal treaties (victory treaties, and treaties between States with huge power differences) would create systemic puzzles for international lawyers. The first is the phenomenon of the peace treaty which, almost by definition, is the result of coercion, and thus raises the issue of demarcating the just from the unjust use of coercion. The easy answer is to refer to the prohibition of the use of force contained in the UN Charter, and Article 52 of the VCLT duly takes this step: coercion is defined as the use of force 'in violation of the principles of international law embodied in the Charter of the United Nations'. While this may be easy to apply in some cases (think of the Iraqi invasion of Kuwait in 1990), difficulties may nonetheless occur. It might be difficult to identify which of the parties used force in violation of the Charter's principles, and which party used force in legitimate self-defense. Perhaps then the smarter cause is to forego the temptation of imposing an all too victorious peace treaty upon the vanquished—something Woodrow Wilson repeatedly advocated during the First World War when publicly announcing to be striving for a 'peace without victory'.[98] Even so, his attempt to secure a peace without victory after the First World War bore no fruit. The Versailles Treaty, negotiated without Germany's participation between the victorious powers, is often seen as the textbook example of a treaty procured by means of coercion.[99]

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[97] Ibid 397.

[98] See the fine biography by JM Cooper, Jr, *Woodrow Wilson: A Biography* (Knopf, New York 2009).

[99] For further discussion, see also J Klabbers, 'Clinching the Concept of Sovereignty: *Wimbledon Redux*' (1998) 3 ARIEL L 345–67.

During the 1968 Vienna Conference, a number of mainly non-aligned nations tabled an amendment that the notion of coercion should not only address military force, but also the more subtle emanations of political and economic pressure. This came as no surprise: a similar discussion had taken place within the ILC, as the Commission's final report recalled.[100] The amendment would eventually not be taken on board and would not even be voted on. While many States had expressed their support, others found that the inclusion of economic and political pressure would fatally undermine the stability of treaty relations, and it was even pointed out that economic and political pressure can take many forms: the industrial State without natural resources can just as easily be bullied into accepting a treaty by a State richer in natural resources as the other way around.[101] In order to prevent a stalemate, the Dutch representative, Willem Riphagen, proposed to append a declaration condemning the use of political and economic pressure in the conclusion of treaties while keeping Article 52 limited to coercion as embodied in the UN Charter. This was accepted; the earlier amendment was dropped without a vote, and the Final Act of the Vienna Conference included a declaration condemning coercion also by non-forceful means.[102]

While Article 52 gave rise to lots of discussion both before and during the Vienna Conference, its practical impact seems to have remained fairly limited, at least if discussion in the literature is a reliable yardstick: relatively few scholarly works have been devoted to coercion in the law of treaties, and those which touch upon the topic tend to focus either on

[100] See [1966] YBILC, vol II, 246.

[101] The point was made by Eduardo Jiménez de Aréchaga, the representative of Uruguay. See Vienna Conference, First Session (n 73) 277.

[102] See ibid 328–9.

the use of force in general,[103] or concentrate on the category of unequal treaties and tend to do so from a largely historical perspective.[104] Likewise, there is little recorded State practice. Aust mentions the possible example of a military agreement concluded between the Federal Republic of Yugoslavia (FRY) and NATO, with the FRY complaining about duress, only to dismiss it.[105] Perhaps this follows logically from the problem of delimitation between justifiable and unjustifiable pressure, and the intricate problem of proving coercion in the conclusion of treaties. As the Court of Arbitration deciding the *Dubai-Sharjah Border Arbitration* sensibly remarked, pressure of some sort or another is endemic in international negotiations, yet '[m]ere influences and pressures cannot be equated with the concept of coercion as it is known in international law'.[106]

D. *Jus cogens*

By contrast, much ink has been spilt on the concept of *jus cogens*—the idea that there are certain peremptory norms of international law that States cannot derogate from via treaty.[107] The idea of *jus cogens* gained momentum when the Nazi-regime in Germany prompted

[103] The same is observed by HG de Jong, 'Coercion in the Conclusion of Treaties' (1984) 15 Netherlands Ybk Intl L 209–47.

[104] A fine example is M Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74 Nordic J Intl L 335–82.

[105] See Aust, 2nd edn (n 1) 318.

[106] See *Dubai-Sharjah Border Arbitration* (1981) 91 ILR 543, 571.

[107] Some of the more useful works include L Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Finnish Lawyers' Publishing Company, Helsinki 1988); G Gaja, 'Jus Cogens Beyond the Vienna Convention' (1981/III) 172 RcD 271–316, and, more recently, A Paulus, '*Jus Cogens* in a Time of Hegemony and Fragmentation—An Attempt at a Re-appraisal' (2005) 74 Nordic J Intl L 297–334. A broader critique of some of the thinking underlying the *jus cogens* idea and similar trends is P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413–42.

Alfred Verdross to write a brief note on forbidden treaties in international law.[108] Still, the notion is problematic within the VCLT system. Since the Vienna Convention conceptualizes treaties as instruments rather than obligations, it follows that considerations relating to the substance of treaties (as opposed to their formal characteristics) have a hard time being integrated. Yet *jus cogens* focuses precisely on considerations of substance: it aims to limit the contractual freedom of States by stipulating that States are not allowed to conclude treaties to engage in certain activities. This is intuitively attractive: inasmuch as domestic legal orders are unwilling to accept and recognize certain contracts (eg a contract to kill), so too is international law unwilling to allow States to conclude treaties providing for genocide, slavery, aggression, or racial segregation. What renders this problematic are two factors. First, there is little agreement as to which norms belong to the corpus of *jus cogens*; second, there is a lack of clarity as to how norms come to be recognized as such.

The first of these did not bother the ILC too much: it felt confident that the 'full content of this rule' could be elaborated in State practice and in the case law of international tribunals. This had the advantage, from the drafters' point of view, of not closing off the discussion: it allowed for the inclusion of new rules over time, and ensured that the drafters did not have to make difficult, perhaps impossible, choices. Put differently: it is unlikely that any list of *jus cogens* norms would have been accepted by the Vienna Conference, and even if such a list would have made the grade, it would probably have deterred quite a few States from ratifying the Vienna Convention. Hence, playing down the relevance of such a list was useful for purposes of completing the Convention, but has resulted in a veritable explosion of suggestions since 1969.

[108] See A Verdross, 'Forbidden Treaties in International Law' (1937) 31 AJIL 571–7.

That would not be much of a problem, arguably, if it would have been possible to find a workable method for the identification of *jus cogens* norms. Article 53 does prescribe such a method: a rule of *jus cogens* is defined as a norm 'from which no derogation is permitted' and which is 'accepted and recognized by the international community of States as a whole' as such a non-derogable norm.[109] There is some agreement that it relates to norms of high moral fibre (the prohibitions of genocide, torture, apartheid, slavery, and aggression are often mentioned), but even this does not close the ranks. Much trouble is caused by the absence of an international legislature to decide on what counts as a *jus cogens* prohibition. Article 53 tries to compensate for this by suggesting that it is 'the international community of States as a whole' which decides, but given that no such community exists in institutionalized form, authors have had a free hand in suggesting norms for inclusion, and have not hesitated to utilize this freedom.

The ICJ has been rather quiet on this front: it took until 2006 before the Court was willing to classify the genocide prohibition as a *jus cogens* norm, while simultaneously noting that violation of such a norm as such would not grant the Court jurisdiction.[110] In earlier decisions and opinions, the Court had sometimes hinted at *jus cogens*, but never actively used

[109] VCLT Art 53 reads: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' It follows, that agreement between a group of like-minded States on the non-derogability of a certain norm does not automatically turn that norm into a norm of *jus cogens.*

[110] See *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Rwanda)* (New Application: 2002) [2006] ICJ Rep 6 [64].

the term.[111] For example, in its opinion on the legality of nuclear weapons, the ICJ held that two norms of humanitarian law are amongst the 'intransgressible principles' of international law, but stopped short of referring to them as *jus cogens*—intentionally, we may presume.[112] By the same token, on another occasion, the Court classified self-determination as an '*erga omnes* principle', but did not refer to it as a *jus cogens* rule.[113]

Other international tribunals have sometimes found *jus cogens* norms to exist, most emphatically perhaps the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Furundžija* with its conclusion that the prohibition on torture so qualifies.[114] Then again, in one sense at least *Furundžija* was a relatively easy case: there was no need to pit the *jus cogens* prohibition of torture against any other rules of international law to establish its peremptory status. Where such a need has arisen, courts have been a bit less emphatic. Thus, the European Court of Human Rights has held that while the torture-prohibition forms part of the *jus cogens* corpus, this does not set aside the immunity of States from civil suit, although it may affect their immunity from criminal proceedings.[115] More generally, it will surely be the case that the mere label of *jus cogens* does not bring political debate to a halt. It is one

[111] In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* [1986] ICJ Rep 14 [190], the ICJ used the term but did so while citing the ILC and the parties to the dispute; it is doubtful whether this can be regarded as an unqualified endorsement.

[112] See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [79].

[113] See *East Timor (Portugal v Australia)* [1995] ICJ Rep 90 [29]. In the ICJ's 2019 advisory opinion on the Chagos Islands, several individual judges referred to the right to self-determination as a *jus cogens* rule. The majority opinion however did not do so. See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, advisory opinion, 25 February 2019, nyr.

[114] See *Prosecutor v Furundžija* (Case IT-95-17/1) (1998) 121 ILR 213.

[115] See *Al-Adsani v United Kingdom* (Decision of 21 November 2001) App No 35763/97 [61].

thing to agree that genocide or torture are *jus cogens*, but quite another to agree on what constitutes genocide or torture.

Domestic courts have been somewhat less hesitant than the ICJ in identifying the existence of *jus cogens*, and there is exists one case in which a domestic court has invalidated a headquarters agreement with a small international organization because the agreement affected due process considerations thought to be *jus cogens*.[116] It remains speculative, but perhaps in this case a unilateral finding of invalidity was facilitated by the circumstance that the treaty partner was an international organization, i.e. an entity without a legal order of its own, so to speak. Beyond this example, domestic courts may have identified *jus cogens*, but have been reluctant actually to apply it. They have sometimes held, for example, that perpetrators could benefit from sovereign immunity. Thus, in *Siderman de Blake*,[117] a US court held that torture qualified as a *jus cogens* norm, but that the government of Argentina was immune from suit. In *Princz*,[118] another US court reached a similar conclusion with respect to the genocide perpetrated by Nazi-Germany before and during the Second World War. These positions, however, seem conceptually awkward: if a norm is one from which no derogation is permitted, then surely sovereign immunity should not function as a shield.

Upholding immunity even for *jus cogens* violations can be—and has been—rationalized by making a rigid distinction between substantive law and procedural rules: on such a construction, the fact that the States concerned could not be sued does not detract from

[116] The case concerned is *Washington Cabrera J.E.* c *Comisión Técnica Mixta de Salto Grande*, a decision by Argentina's Supreme Court of Justice (1983), mentioned in T Weatherall, *Jus Cogens: International Law and Social Contract* (CUP, Cambridge 2015), at 460. The decision is available at https://www.dipublico.org/3850/cabrera-washington-j-e-c-comision-tecnica-mixta-de-salto-grande/ (accessed 24 April 2019).

[117] See *Siderman de Blake v Republic of Argentina*, 965 F.2d 699 (9th Cir).

[118] See *Hugo Princz v Federal Republic of Germany*, 26 F.3d 1166 (DC cir 1994). Moreover, the court found that engaging in an act prohibited by *jus cogens* does not constitute an implied waiver to immunity.

their possible guilt and from the fundamental nature of the rules breached. Yet somehow this seems too clever by half.[119] Perhaps a more plausible explanation may be that for many domestic courts, particularly those whose legal systems do not automatically incorporate international law, upholding an international *jus cogens* norm over considerations of sovereign immunity would typically imply an unwanted result: the prevalence of international law over domestic law, as immunity law is typically regulated in domestic legislation.[120] On the other hand, if *jus cogens* is regarded as domestic law, a different result may follow. Indeed, the decision of Italy's Court of Cassation in *Ferrini* goes some way towards this: the Court held that Germany could not invoke immunity in respect of allegations of forced labour during the Second World War, and specifically invoked the domestication of 'fundamental human rights': these 'automatically become an integral part of Italian law'.[121] On such a reading, any conflict between international law and domestic law dissipates, and *jus cogens* can come to be applied as a matter of domestic law.

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[119] Such a construction is hinted at by Zimmermann, noting that *jus cogens* rules and rules on immunity are best seen 'as involving two different sets of rules which do not interact with each other'. See A Zimmermann, 'Sovereign Immunity and Violations of International *Jus Cogens*—Some Critical Remarks' (1995) 16 Michigan J Intl L 433, 438. In a similar vein, see J Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2010) 21 EJIL 853, 869.

[120] Surely, the European Court of Human Rights too would be sensitive to such a concern; it is keen not to be seen as replacing the domestic law of its member States.

[121] See *Ferrini v Federal Republic of Germany* (Court of Cassation Italy, Judgment of 11 March 2004) 128 ILR 658, 666. Note, however, that the ICJ rejected this approach and held that the decision of Italy's Court of Cassation was not in conformity with international law, upholding a strict separation between substance and process. See *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, Judgment of 3 February 2012.

The reluctance of the ICJ, and the conceptual awkwardness of other courts, may well find its source in the general reluctance of States to accept the ultimate price to pay for acceptance of the *jus cogens* category. In the end, it would seem that the *jus cogens* notion is only workable within a hierarchical system of law (unlike the still predominantly horizontal international legal order), and with an acceptance of the possibility of legislation by majority.[122] Surely, the position, sometimes heard in the 1970s and 1980s, that the apartheid prohibition was accepted as a norm of *jus cogens*, but that this could not affect South Africa because of its non-acceptance thereof, bordered on the bizarre.[123] The one State that engages in an unwanted practice cannot escape from universal condemnation by acting as a persistent objector, at least not without diluting the very idea of *jus cogens*. *Jus cogens* should either be imperative enough to bind all, or it is not *jus cogens*.

As the above suggests, *jus cogens* has started to live a life outside the limited context of the conclusion of treaties,[124] and it is probably no coincidence that the topic was placed on the agenda of the International Law Commission in 2014, this time mostly to investigate its meaning and consequences in general international law, i.e. going beyond the context of the law of treaties. To date, Special rapporteur Dire Tladi has produced four reports.

One may perhaps stipulate that empirically, *jus cogens* seems to have been a reasonable success within the law of treaties. After all, few treaties are concluded in order to

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[122] In particular, France was troubled by the very category of *jus cogens*: troubled enough not to sign the Vienna Convention. See generally O Deleau, 'Les positions francaises à la Conférence de Vienne sur le droit des traités' (1969) 15 Annuaire Français de Droit International 7–23.

[123] Cassese came very close to such a position when allowing for application of the persistent objector doctrine to the creation of *jus cogens* norms. See A Cassese, *International Law in a Divided World* (Clarendon Press, Oxford 1986) 178.

[124] See generally also Weatherall, *Jus Cogens* (n 116).

facilitate genocide, slavery, or apartheid. While the relevance of facts is never self-evident, this may be taken as a sign that States do not conclude such treaties because they think such treaties will be invalid—although it may also mean that they refrain from concluding such treaties because they think them distasteful, impractical, or not in their best interest. That said, the recent popularity of treaties which facilitate torture through so-called extraordinary rendition casts some doubt on whether the torture prohibition still qualifies as a *jus cogens* norm: if too many States engage in torture, then either all those activities are invalid or, more likely perhaps, the conclusion must be reached that the norm is no longer recognized as one from which no derogation is permitted.

The more common usage of *jus cogens* would seem to be as a yardstick for the legality of official behaviour more generally. The scenarios in cases such as *Al-Adsani*, *Ferrini*, *Princz,* and *Siderman de Blake* did not involve treaty-making by the UK, Nazi-Germany, or Argentina, but concerned the way in which those States treated individuals. By the same token, *Furundžija* and the ICJ's *Armed Activities* case did not involve the validity of treaties. The ICJ has once been called upon (without answering the call) to assess the legality of a Security Council resolution in light of a proposed *jus cogens* norm: this arose when Bosnia complained that an arms embargo imposed on both Bosnia and Serbia during the Yugoslav conflict affected Bosnia's capacity for self-defense, and therewith contributed to ethnic cleansing or even genocide.[125] In short: the idea of *jus cogens* is no longer limited to being a validity test for treaties (if it ever was), but has come to assume the role of a general—and genuine—*ordre public* notion.

Conclusions

[125] See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia (Serbia and Montenegro))* (Order) [1993] ICJ Rep 325.

At the end of the day, the notion of validity (or invalidity) seems to have little practical effect in the law of treaties, and, if *jus cogens* be excepted, has not given rise to much theoretical reflection either. There is widespread agreement that some rules on validity are useful and required, and there is widespread agreement that the consent defects identified by Articles 46–52 are amongst the rules that should be present, and that the *jus cogens* idea is, well, a really good idea as such. The precise details, however, remain to be filled in.

It is therefore, naturally, no coincidence that also the procedure invented in the Vienna Convention to address issues of validity and invalidity (Articles 65–8 of the VCLT), has remained a dead letter. Such a procedure was considered necessary as soon as provisions on invalidity were introduced: it would not be a good idea to have States proclaim the invalidity of treaties left, right, and centre. Still, in the absence of instances of State practice, the procedures too have remained under-utilized.

And perhaps this relative neglect of validity is as it should be. A legal order in which the contractual activities of its main members are often invalidated would be a highly problematic legal order. Likewise, a legal order where invalidity is the norm, rather than a rare exception, has quite a problem. And even then, it is one thing to invalidate treaties, but quite another to scrutinize the acts of public authorities within any given legal order; it is surely no coincidence that the *jus cogens* notion has come to be seen as a test of the validity of the exercise of public authority rather than of treaties alone. Still, in the absence—or very limited existence—of global public authorities and the necessary presumption of validity of treaties, it stands to reason that the notion of invalidity does not do much work in the international legal order.

Recommended Reading

A Aust, *Modern Treaty Law and Practice* (2nd edn CUP, Cambridge 2007) 312–23

O Corten and P Klein (eds), *Les Conventions de Vienne sur le Droit des Traités: Commentaire Article par Article* (Bruylant, Brussels 2006)

M Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74 Nordic J Intl L 335–82

HG de Jong, 'Coercion in the Conclusion of Treaties' (1984) 15 Netherlands Ybk Intl L 209–47

GG Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in FM van Asbeck et al (eds), *Symbolae Verzijl* (Martinus Nijhoff, Leiden 1958) 153–76

D Greig, *Invalidity and the Law of Treaties* (BIICL, London 2006)

P Guggenheim, 'La validité et la nullité des actes juridiques internationaux' (1949/I) 74 RcD 191–268

L Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Finnish Lawyers' Publishing Company, Helsinki 1988)

H Kelsen, *Introduction to the Problems of Legal Theory* (Litschewski Paulson and Paulson trs) (Clarendon Press, Oxford 1992, first published in 1934)

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P Reuter, *Introduction au droit des traits* (Cahier (ed), 3rd edn Presses Universitaires de France, Geneva 1995)

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ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden 2009)

E Vitta, *La validité des traités internationaux* (Brill, Leiden 1940)

T Weatherall, *Jus Cogens: International Law and Social Contract* (CUP, Cambridge 2015)