Oliver Dörr
Kirsten Schmalenbach
Editors

Vienna Convention on the Law of Treaties

A Commentary

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Preface

The law of treaties forms the backbone of the international legal order. There would be no international law without the principle *pacta sunt servanda*, no legal security in international relations without the strict definition of grounds for the invalidity of treaties, no effective dispute settlement without universally accepted rules of treaty interpretation. As much as treaties contribute to the peaceful co-operation of States and other international actors, so does the international law of treaties to the fundamental role of treaties and, thus, provides an important element of international peace and security.

Given the importance of treaties and their law for the international legal order, it is hardly surprising that already in 1949, the International Law Commission awarded priority to the codification project. Over centuries, international practice has developed a set of rules that strives for a balance between the sovereign will of States, good faith, the importance of consensus and the needs of the international community. Those rules were finally codified in the Vienna Convention on the Law of Treaties in 1969 which, beside codifying recognized rules of customary international law, added quite a few progressive elements to the international law of treaties. After the adoption and the entry into force of the Convention on 27 January 1980, the law of treaties continued to evolve, so that the element of stability which the Convention, as a codificatory effort, brought into the international relations of States, was combined with the dynamics of international practice for which the Convention, as as set of mainly residual rules, leaves considerable room. Both elements of the international law of treaties, the traditional rules and the dynamic practice aiming at the progressive development of the law, are supposed to be reflected in the present Commentary.

Despite the long time and the great number of reports and debates that it took the ILC to prepare the text of the Convention, the latter is no self-explanatory piece of international legislation. Without detailed knowledge of international practice and jurisprudence or of the *travaux préparatoires* of the Convention, the language of many provisions may leave the reader confused or set him or her on the wrong track. It is the aim of the present Commentary, therefore, to explain language and

purpose of the Convention in the light of international practice and jurisprudence with regard to the law of treaties.

Due to the sheer length of the Convention and the amount of relevant material on the law of treaties, this book is the result of a joint effort of twelve scholars. Our sincere thanks go to the authors for their co-operation, their patience and their readiness to adapt to the editors' guidelines and deadlines.

Last but not least, we would like to acknowledge the help of several people in Salzburg and Osnabrück without whom this work would not have seen the light of day. Our sincere thanks go to the editorial assistant in Osnabrück, Sue Gerigk LL.M., and the editing team in Salzburg, especially Alexander Brenneis as the man in charge, as well as Lando Kirchmair and Thomas Rauter. Marco Athen and Anna-Katharina Kraemer were responsible for the final revision done in Osnabrück.

Padraic McCannon (Osnabrück) checked and edited the English language. Ludwig Wagner (Salzburg) was responsible for the time-consuming and painstaking task of producing the Table of Cases. The efficient team of student assistants – Peter Manhartsberger and Isabella Breit (Salzburg) – was heavily involved in the final editing process. Thanks to all of them for their tireless commitment, enthusiasm and patience.

Oliver Dörr
Kirsten Schmalenbach

Contents

Part III Observance, Application and Interpretation of Treaties

Section 1 Observance of Treaties

Section 2 Application of Treaties

Section 3 Interpretation of Treaties

Section 4 Treaties and Third States

Section 3 Termination and Suspension of the Operation of Treaties

Section 4 Procedure

Part VIII Final Provisions

Contributors

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Table of Cases

The table shows all occurrences of case law, with article numbers in **boldface**, followed by the margin numbers in standard typeface.

Arbitral Tribunals

Committee of Jurists, League of Nations

EFTA Court

European Commission of Human Rights (ECommHR)

European Court of Human Rights (ECtHR)

European Court of Justice (ECJ)

1. Court of Justice (CJ)

2. Court of First Instance (CFI)/General Court (GC)

3. Civil Service Tribunal

Inter-American Commission on Human Rights (IACommHR)

Inter-American Court of Human Rights (IACtHR)

International Centre for Settlement of Investment Disputes (ICSID)

International Court of Justice (ICJ)

International Criminal Tribunal for Rwanda (ICTR)

International Criminal Tribunal for the Former Yugoslavia (ICTY)

International Military Tribunal (Nuremberg)

International Tribunal for the Law of the Sea (ITLOS)

National Courts

1. Argentina

2. Australia

3. Bangladesh

4. Belgium

5. Canada

6. Chile

7. Denmark

8. France

9. Germany

10. Greece

11. Hong Kong

12. Hungary

13. India

14. Israel

15. Italy

16. New Zealand

17. Netherlands

18. Peru

19. Poland

20. Spain

21. Switzerland

22. United Kingdom

23. United States

Permanent Court of International Justice (PCIJ)

Special Court for Sierra Leone

Special Tribunal for Lebanon

UN Human Rights Committee (HRC)

WTO Appellate Body and Panel Decisions

1. Appellate Body

2. Panels

Abbreviations

ABM	(Treaty on the Limitation of) Anti-Ballistic Missile Systems[1]
ACHR	American Convention on Human Rights[2]
ACP	African, Caribbean and Pacific Group of States
AD	Annual Digest of Public International Law Cases
Add	Addendum
AFDI	Annuaire français de droit international
AG	Advocate General
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
ALR	American Law Reports
AmUILR	American University International Law Review
AnnIDI	Annuaire de l'Institut de droit international
App	Application
ARIEL	Austrian Review of International and European Law
Art(s)	Article(s)
ASIL	American Society of International Law
ASILP	American Society of International Law Proceedings
ATCA	Alien Tort Claims Act (United States)[3]
ATF	Arrêts du Tribunal federal (Switzerland)
ATS	Australian Treaty Series
AVR	Archiv des Völkerrechts (Germany)
AYIL	Australian Yearbook of International Law
BC	Before Christ
BDGVR	Berichte der Deutschen Gesellschaft für Völkerrecht (Germany)

[1](1972) 944 UNTS 13.

[2](1969) 1144 UNTS 123.

[3](1789) 28 USC § 1350.

BFSP	British and Foreign State Papers
BGBl	Bundesgesetzblatt für die Bundesrepublik Deutschland (Federal Law Gazette) (Germany)
BGE	Entscheidungssammlung des schweizerischen Bundesgerichts (Decisions of the Federal Court of Justice) (Switzerland)
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen (Decisions of the Federal Court of Justice in Criminal Matters) (Germany)
BIS	Bank for International Settlements
BIT	Bilateral investment treaty
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (Decisions of the Federal Constitutional Court) (Germany)
B-VG	Österreichisches Bundes-Verfassungsgesetz (Constitution of Austria)
BYIL	British Year Book of International Law
CalWILJ	Californian Western International Law Journal
CanYIL	Canadian Yearbook of International Law / Annuaire canadien de droit international
CARICOM	Caribbean Community
CCPR	Covenant on Civil and Political Rights[4]
CCW	[Convention on] Certain Conventional Weapons[5]
CDL	European Commission for Democracy Through Law ("Venice Commission")
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women[6]
CEDROMA	Centre d'études des droits du monde arabe
CEE	Communauté économique européenne, European Economic Community
CERD	Committee on the Elimination of Racial Discrimination / Convention on the Elimination of All Forms of Racial Discriminations[7]
CETS	Council of Europe Treaty Series
cf	*confer* (compare)
CFE	[Treaty on] Conventional Armed Forces in Europe[8]
CFI	

[4](1966) 999 UNTS 171.

[5]1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (with Protocols I, II and III) 1342 UNTS 137.

[6](1979) 1249 UNTS 13.

[7](1966) 660 UNTS 195.

[8](1990) 30 ILM 1.

	Court of First Instance of the European Communities / General Court of the European Union
ch	Chapter
CJ	Court of Justice of the European Union (as part of the ECJ)
cl	Clause
CLR	Commonwealth Law Reports (Australia)
CMLR	Common Market Law Review
Cmnd	Command Papers (United Kingdom)
COSPAS-SARSAT	International Satellite System for Search and Rescue
CoW	Committee of the Whole [of the Vienna Conference on the Law of Treaties]
CRC	Convention on the Rights of the Child[9]
CTBT	Comprehensive Nuclear Test Ban Treaty[10]
CTS	Consolidated Treaty Series, edited by *C Parry*
CWC	Chemical Weapons Convention[11]
DC	District of Columbia
DLR	Dominion Law Reports (Canada)
Doc	Document
DPRK	Democratic People's Republic of Korea
DSU	Dispute Settlement Understanding[12]
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECHR	[European] Convention for the Protection of Human Rights and Fundamental Freedoms[13]
ECJ	European Court of Justice
ECommHR	European Commission of Human Rights
ECOSOC	United Nations Economic and Social Council
ECR	European Court Reports
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
ed	Editor
edn	Edition
eds	Editors
EEC	European Economic Community
EEZ	Exclusive economic zone
EFTA	European Free Trade Association
eg	*exempli gratia* (for example)

[9](1989) 1577 UNTS 3.

[10](1996) 35 ILM 1439.

[11]1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction 1974 UNTS 45.

[12]1994 Understanding on Rules and Procedures Governing the Settlement of Disputes 1869 UNTS 401.

[13](1950) 213 UNTS 221, ETS 5.

EJIL	European Journal of International Law
ELR	European Law Review
EMEP	European Monitoring and Evaluation Programme
ENMOD	Environmental Modification Convention[14]
EPIL	Encyclopedia of Public International Law, edited by *R Bernhardt* (consolidated library edn), 5 vols (1992–2003)
et al	*et alii* (and others)
et seq	*et sequens* (and the following)
etc	*et cetera* (and so forth)
ETS	European Treaty Series
EU	European Union
EURATOM	European Atomic Energy Community
EuGRZ	Europäische Grundrechte-Zeitschrift (Germany)
EWHC	High Court of England and Wales (United Kingdom)
F2d	Federal Reporter, Second Series (United States)
F3d	Federal Reporter, Third Series (United States)
FacLR	University of Toronto Faculty Law Review
FAO	Food and Agriculture Organization
FAOP	Framework Agreement for Operational Partnership
FARC	Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia)
FCA	Federal Court of Australia
FCas	Federal Cases (United States)
FCN	[Treaty on] Friendship, Commerce and Navigation
FinnYIL	Finnish Yearbook of International Law
FRG	Federal Republic of Germany
FRY	Federal Republic of Yugoslavia
FSupp	Federal Supplement (United States)
FSupp2d	Federal Supplement, Second Series (United States)
GA	General Assembly (United Nations)
GAOR	General Assembly Official Records (United Nations)
GATT	General Agreement on Tariffs and Trade[15]
GC	Grand Chamber (ECtHR)
GDR	German Democratic Republic
GYIL	German Yearbook of International Law
HCA	High Court of Australia
HILJ	Harvard International Law Journal
HQ	Headquarters
HRLR	Human Rights Law Review
HRC	Human Rights Committee (United Nations)

[14] 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques 1108 UNTS 152.

[15] (1947) 55 UNTS 194; (1994) 1867 UNTS 187.

HRQ	Human Rights Quarterly
HuV	Humanitäres Völkerrecht (Germany)
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IAEA	International Atomic Energy Agency
ibid	*ibidem* (in the same place)
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICC	International Criminal Court, International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights[16]
ICESCR	International Covenant on Economic, Social and Cultural Rights[17]
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICLR	[. . .] International and Comparative Law Review / International Community Law Review
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
id	*idem* (the same)
IDI	Institut de droit international
ie	*id est* (that is to say)
IFAD	International Fund for Agricultural Development
IJHR	International Journal of Human Rights
IJIL	Indian Journal of International Law
IJMCL	International Journal of Marine and Coastal Law
ILA	International Law Association
ILC	International Law Commission (United Nations)
ILJ	[. . .] International Law Journal
ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
IMCO	International Maritime Consultative Committee
IMF	International Monetary Fund
IMO	International Maritime Organization
ITLOS	International Tribunal for the Law of the Sea
ITU	International Telecommunication Union
JapYIL	Japanese Yearbook of International Law

[16](1966) 999 UNTS 171.

[17](1966) 993 UNTS 3.

JDI	Journal du droit international ('Clunet')
JICJ	Journal of International Criminal Justice
JICL	[. . .] Journal of International and Comparative Law
JIL	[. . .] Journal of International Law
JILP	[. . .] Journal of International Law and Policy/Politics
JT	Journal des Tribunaux
JTL	[. . .] Journal of Transnational Law
KB	King's Bench Division (United Kingdom)
KFOR	Kosovo Force
lit	littera (letter, subparagraph)
liv	*livre* (book)
LJ	[. . .] Law Journal
LJIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
LoN	League of Nations
LR	[. . .] Law Review
Ltd	Limited
m	Metre
MARPOL	International Convention for the Prevention of Pollution from Ships[18]
Max Planck UNYB	Max Planck Yearbook of United Nations Law
MEA	Multilateral environmental agreements
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MFN	Most-favoured nation
MN	Margin number
MPEPIL	Max Planck Encyclopedia of Public International Law, edited by R. Wolfrum (2008) *et seq*
MS	Motor ship
n	Note
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
NILR	Netherlands International Law Review
NJW	Neue Juristische Wochenschrift (Germany)
NMFT	No more favourable treatment
No	Number
NPT	Non-Proliferation Treaty[19]
NYIL	Netherlands Yearbook of International Law
NZLR	New Zealand Law Reports
OAS	Organization of American States

[18](1973) 1340 UNTS 184.

[19]1968 Treaty on the Non-Proliferation of Nuclear Weapons 729 UNTS 161.

öBGBl	Bundesgesetzblatt für die Republik Österreich (Federal Law Gazette for the Republic of Austria)
OECD	Organization for Economic Co-operation and Development
OJ	Official Journal of the European Union
OPEC	Organization of the Petroleum Exporting Countries
OSCE	Organization for Security and Cooperation in Europe
ÖZöRV	Österreichische Zeitschrift für öffentliches Recht und Völkerrecht
P3d	Pacific Reporter, Third Series (United States)
para(s)	Paragraph(s)
PAULTS	Pan-American Union Law and Treaty Series
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PLO	Palestine Liberation Organization
POLISARIO	Popular Front for the Liberation of Saguia el-Hamra and Río de Oro (Western Sahara)
RBDI	Revue belge de droit international
RCDIP	Revue critique de droit international privé
RdC	Recueil des Cours de l'Académie de droit international
REIO	Regional economic integration organization
Rep	Report(s)
Res	Resolution
RGBl	Reichsgesetzblatt (Germany)
RGDIP	Revue générale de droit international public (France)
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen (Decisions of the Court of Justice of the Reich in Civil Matters) (Germany)
RIAA	Reports of International Arbitral Awards
RoP	Repertory of Practice of United Nations Organs
RTDH	Revue trimestrielle des droits de l'homme
RUF	Revolutionary United Front (Sierra Leone)
SC	Security Council (United Nations)
SCR	Supreme Court Reports (Canada)
SCSL	Special Court for Sierra Leone
Sec	Section
Ser	Series
SIPRI	Stockholm International Peace Research Institute
SOLAS	International Convention for the Safety of Life at Sea[20]
SR	Special Rapporteur

[20](1974) 1184 UNTS 2.

SS	Steam ship
SSR	[. . .] Soviet Socialist Republic
START II	Strategic Arms Reduction Treaty II[21]
StGBl	Staatsgesetzblatt (State Gazette) (Austria)
Supp	Supplement
SWAPO	South West African People's Organization (Namibia)
TAM	Tribunaux Arbitraux Mixtes
TEC	Treaty Establishing the European Community[22]
TEU	Treaty on European Union[23]
TFEU	Treaty on the Functioning of the European Union[24]
TGS	Transactions of the Grotius Society
TIAS	Treaties and Other International Acts Series (United States)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TRNC	Turkish Republic of Northern Cyprus
UCLR	University of Chicago Law Review
UDHR	Universal Declaration of Human Rights[25]
UK	United Kingdom [of Great Britain and Northern Ireland]
UKHL	United Kingdom House of Lords
UKTS	United Kingdom Treaty Series
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea[26]
UNCLOT	Official Records of the United Nations Conference on the Law of Treaties (3 volumes)
UNCLOTIO	Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (2 volumes)
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNIDO	United Nations Industrial Development Organization

[21] 1993 Treaty on Further Reduction and Limitation of Strategic Offensive Arms [1993] SIPRI Yearbook 576.

[22] [1992] OJ C 226, 6; [2006] OJ C 321 E, 37 (consolidated version Treaty of Nice).

[23] [1992] OJ C 191, 1; [2001] OJ C 80, 1 (consolidated version Treaty of Nice); [2010] OJ C 83, 13 (consolidated version Treaty of Lisbon).

[24] [2010] OJ C 83, 47 (consolidated version).

[25] UNGA Res 217 A (III), 10 December 1948, UN Doc A/810, 71.

[26] (1982) 1833 UNTS 3.

UNIDROIT	International Institute for the Unification of Private Law
UNITA	United Front for the Total Liberation of Angola
UNJYB	United Nations Juridical Yearbook
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNTS	United Nations Treaty Series
UNYB	[Max Planck] Yearbook of United Nations Law
US	United States [of America], United States Reports
USC	United States Code
USSR	Union of Soviet Socialist Republics
UST	United States Treaties and Other International Agreements
v	Versus
VaJIL	Virginia Journal of International Law
VCCR	Vienna Convention on Consular Relations[27]
VCDR	Vienna Convention on Diplomatic Relations[28]
VCLT	Vienna Convention on the Law of Treaties[29]
VCLT II	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations[30]
VN	Zeitschrift für die Vereinten Nationen (Germany)
Vol	Volume
WashCC	Washington's United States Circuit Court Reports
WEU	Western European Union
WFP	[United Nations] World Food Programme
WHO	World Health Organization
WTO	World Trade Organization
YbECHR	Yearbook of the European Commission on Human Rights
YbILC	Yearbook of the International Law Commission
YIL	[. . .] Yearbook of International Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Germany)
ZÖR	Zeitschrift für öffentliches Recht (Austria)

[27](1963) 596 UNTS 261.

[28](1961) 500 UNTS 95.

[29](1969) 1155 UNTS 331.

[30](1986) 25 ILM 543; reprinted in this volume.

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UNCLOT I Official Records of the United Nations Conference on the Law of Treaties, First Session (Vienna, 26 March–24 May 1968), Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, UN Doc A/CONF.39/11

UNCLOT II Official Records of the United Nations Conference on the Law of Treaties, Second Session (Vienna, 9 April–22 May 1969), Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, UN Doc A/CONF.39/11/Add.1

UNCLOT III Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions (Vienna, 26 March–24 May 1968 and 9 April–22 May 1969), Documents of the Conference, UN Doc A/CONF.39/11/Add.2

UNCLOTIO I Official Records of the United Nations Conference on the Law of Treaties Between States and International Organizations or Between International Organizations, Vienna, 18 February–21 March 1986, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, UN Doc A/CONF.129/16

UNCLOTIO II Official Records of the United Nations Conference on the Law of Treaties Between States and International Organizations or Between International Organizations, Vienna, 18 February–21 March 1986, Documents of the Conference, UN Doc A/CONF.129/16/Add.1

Introduction: On the Role of Treaties in the Development of International Law

Treaties form the basis of most parts of modern international law. They serve to satisfy a fundamental need of States to regulate by consent issues of common concern, and thus to bring stability into their mutual relations. As an instrument for ensuring stability, reliability and order in international relations, treaties are one of the most important elements of international peace and security. This is why, from the earliest days in the history of international law, treaties have always been **the primary source of legal relations** between entities today known as States.[1] The Preamble of the VCLT itself emphasizes the fundamental role of treaties in the history of international relations and especially the importance of treaties for developing peaceful co-operation among nations. This fundamental importance of treaties proved to be a *continuum*, while the rules and procedures of treaty-making, as well as the contents of international agreements, changed through the centuries. **1**

The history of international treaties is as long as the history of organized human co-existence. The **first treaties known** today are probably those concluded by the rulers of the Hittite empire with their neighbours and vassals in the fourteenth century BC,[2] followed by Hittite treaties with *Ramses II*, King of Egypt, around 1280–1270 BC.[3] The oldest international treaty preserved in full text is a friendship and commerce agreement between the Kings of Elba and Ashur concluded in the middle of the third century BC, which was found in the archive of the palace of Elba.[4] **2**

The medieval world had neither States nor a State system in the modern sense of these terms, but due to its numerous sovereigns, a remarkable number of international treaties were conducted. During the **early Middle Ages**, treaties of a legal nature were not only concluded between more or less independent princes and authorities, but also between all kinds of authorities of different ranks and legal positions.[5] Only the church was able to act as a supra-personal, institutional treaty party. A treaty engagement was usually considered to be a personal obligation between the contracting parties, which is why an international treaty was, as it had been the tradition in the late Roman era, in most cases concluded orally and confirmed in a ceremony by oath. **3**

[1] *C Tietje* The Changing Legal Structure of International Treaties as an Aspect of an Emerging Global Governance Architecture (1999) 42 GYIL 26, 30.

[2] See *WE Grewe* (ed) Fontes Historiae Iuris Gentium Vol I (1995) 2–17.

[3] *Grewe* (n 2) 18–23; Harvard Draft 666, citing a treaty of 1272 BC.

[4] *K-H Ziegler* Völkerrechtsgeschichte (2nd edn 2007) § 2 II 1.

[5] *WE Grewe* The Epochs of International Law (2000) 89.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
DOI 10.1007/978-3-642-19291-3_1,

4 In the later Middle Ages, the **procedure** of concluding treaties became more sophisticated, as negotiations were conducted by delegated envoys who themselves confirmed by oath that their sending sovereign would accredit the treaty.[6] In a way, that procedure constitutes the historical origin of the legal technique of ratification. In that period, it also became common to register a treaty in the form of a written document sealed by the contracting parties.[7] The Curia provided a treaty register and some notary functions, which were closely linked to the concept of the Church, and in particular the Pope, as the supreme guardian of all treaties. As to **contents**, treaties of alliance and peace were dominating, although trade and arbitration agreements can also be found. Treaties could be given the force of statutory law, for example in the imperial *Statum in favorum principum* of 1231.[8] More frequently, however, they were recorded in separate documents, which were formally independent of each other, as, for example, in the case of the Concordat of Worms.[9] The first synallagmatic treaty incorporated in one document is said to have been the Treaty of Constance, concluded between Emperor Frederick I and Pope Eugen III in 1153.[10]

5 During **the Spanish Age**, the first phase of the emerging modern State, international relations emancipated themselves from the Roman Curia, which was aptly illustrated by the fact that Catholic sovereigns began to conclude treaties in their own right.[11] Sovereigns still entered into international engagements in their personal capacity, for which the treaty between France and the Ottoman Empire (1535) is a good example, because here Sultan Süleyman and King Francis I agreed on a capitulation, which was supposed to remain in force for the lifetime of both rulers.[12] Similarly, the Treaty of Richmond, concluded between King Henry VII of England and King James IV of Scotland in 1501, was to remain in force for one year after both kings had died.[13] As in the Middle Ages, treaties were not just concluded between sovereigns, but occasionally also by regional public authorities: for instance, the city of La Rochelle entered into an alliance with the King of England, without dissolving its allegiance to the King of France.[14]

6 The agreements between Christian rulers and 'States' became more and more detailed, until the **Peace of Westphalia**, concluded in 1648 in the cities of Münster and Osnabrück, undertook the first attempt of building a common European order of peace. Additionally, the use of some typical clauses, such as clauses guaranteeing

[6] *Ziegler* (n 4) § 18 I 2.
[7] *Grewe* (n 5) 90.
[8] *Ibid.*
[9] *Ibid.*
[10] *H Mitteis* Die Rechtsidee in der Geschichte (1957) 579.
[11] *Ziegler* (n 4) § 30 I 1 b).
[12] *Ibid.*
[13] *Grewe* (n 5) 196.
[14] *Ibid.*

amnesty,[15] became common. *Hugo Grotius* elaborated the theoretical foundations of treaty law in 1625 in his seminal work *De iure belli ac pacis libri tres* by presenting a general theory of treaties based on the concept of natural justice.[16] He focused in particular on the scope of the *clausula rebus sic stantibus* and the general applicability of the principles of equity and good faith.

In the **French Age**, the development of intergovernmental relations reached a relevance and perfection, which was unknown before.[17] However, treaties between States were still mostly legal transactions pertaining to the settlement of a specific dispute or to a specific bargain in an individual case: at the conclusion of a peace, the establishment of a boundary, the cession of territory, *etc*. Treaties of a law-making character were almost unknown.[18] Although monarchs still appeared as the contracting parties, they were just listed by their most important title, which demonstrated that the parties did not only engage themselves personally anymore, but also the territorial entity they represented.[19] **7**

The situation changed in the **nineteenth century**, due to the 40 years of peace following the Congress of Vienna in 1814/15. That period of stability, until then unknown in European history, made it possible to concentrate international treaty relations on technical and administrative issues.[20] Instead of just concluding treaties on specific legal transactions, States started using treaties as a means to regulate fundamental aspects of international relations. Codification as technique to be employed in the form of collective treaties was promoted through a significant number of international conferences. For instance, the rules on maritime neutrality were partly codified by the Paris Peace Conference of 1856,[21] and considerable progress was made in respect of humanitarian guarantees to be applied in warfare as a result of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded of Armies in the Field. Referring to the use of treaties as instruments of international legislation, the legal doctrine began to distinguish between treaties on specific legal transactions (contracting treaties) and law-making treaties.[22] The instrument of collective treaties was accompanied by technical innovations, such as 'open treaties', reservations and general participation clauses.[23] Beside these structural developments, the number of bilateral agreements increased significantly due to the growing interdependence of States, which resulted from the technical **8**

[15]For example "perpetua oblivio et amnestia", agreed to in Art II of the Peace of Westphalia (Treaty of Osnabrück between the Emperor and Sweden), reprinted in *Grewe* Fontes Historiae Iuris Gentium Vol II (1988) 188, 190.

[16]*Ziegler* (n 4) § 30 I 3.

[17]*Ziegler* (n 4) § 36 I 1.

[18]*Grewe* (n 5) 360.

[19]*Grewe* (n 5) 361.

[20]*Tietje* (n 1) 31.

[21]1859 Paris Declaration Respecting Maritime Law, reprinted in *N Ronzitti* (ed) The Law of Naval Warfare (1998) 61 *et seq*.

[22]See *eg H Triepel* Völkerrecht und Landesrecht (1899) 27 *et seq*.

[23]*Grewe* (n 5) 514.

and economic developments in the time of industrial revolution.[24] Approximately ten thousand treaties were in force in 1917, which is why the nineteenth century is described from the international legal point of view as an era of impressive growth of written law.[25]

9 A further structural development of treaty law during the nineteenth century, which had a significant impact on the international legal system as a whole, was the **creation of international organizations** through multilateral treaties of a collective character. The first administrative union, as they were then called, was established in 1831 on the basis of the final document of the Congress of Vienna with the constitution of the "Central Commission for the Rhine Shipment".[26] It was followed by similar river commissions. The positive experience with those river regimes and the growing awareness that some administrative tasks, in view of their cross-border relevance, could not be dealt with by one State alone, let a number of international organizations come into existence, such as the International Telegraph-Union (1865) and the Universal Postal Union (1874). The mostly administrative character of those treaties and treaty-based organizations differed from the traditional perspective of international law, which had until then been exclusively directed towards the coordination of national politics and illustrated a dramatic change in the structure of international treaties.[27]

10 In no other phase in the history of international relations have so many attempts of law-making been undertaken in such a short period of time than in the inter-war period **from 1919 to 1939**. Not least because the League of Nations, and in particular Article 18 of its Covenant, which prescribed the registration of treaties and made their publication a precondition for their binding force, created an adequate environment, the technique of treaty-making improved considerably.[28] Almost 3,600 "treaties or international engagements" were registered with the Secretariat of the League of Nations between May 19, 1920, and January 1, 1935.[29]

11 The short era of the League of Nations was characterized by a remarkable discrepancy between the official appraisal of treaties as a form of political action, on the one hand, and the unsatisfactory state of the law on which those actions were based, on the other. The '**sanctity of treaties**', or treaty obligations, was never proclaimed more intensively and with more pathos than during that period,[30] and the treaties and official statements, which emphasized the sanctity of contractual agreements between States were extraordinarily numerous.[31] For instance, the

[24] *Ziegler* (n 4) § 42 I 2.

[25] *A Nussbaum* A Concise History of the Law of Nations (2nd edn 1954) 196–197.

[26] *Tietje* (n 1) 32.

[27] *Tietje* (n 1) 34.

[28] *Ziegler* (n 4) § 46 VI 1.

[29] Harvard Draft, 666 (Introductory Comment).

[30] *Grewe* (n 5) 608, who refers to the famous resolution of the League of Nations Council after the conference of Stresa (17 April 1935), (1935) 16 League of Nations Official Journal 551.

[31] Examples given, *eg*, by *H Wehberg* Pacta Sunt Servanda (1959) 53 AJIL 775, 782–784.

preamble of the Covenant of the League of Nations accentuated the "scrupulous respect for all treaty obligations in the dealings of organized peoples with one another". The former German Emperor William II was arraigned by the Allied Powers for "a supreme offence against international morality and the sanctity of treaties" (Article 227 Treaty of Versailles of 1919). And speaking in 1937, the US Secretary of State, *Cordell Hull*, said of US foreign policy:

> "We advocate faithful observance of international agreements. Upholding the principle of the sanctity of treaties, we believe in modification of provisions of treaties, when need therefore arises, by orderly processes carried out in the spirit of mutual helpfulness and accommodation. We believe in respect by all nations for the rights of others and performance by all nations of established obligations."[32]

Although, thus, the number and the importance of international treaties increased, and their provisions constituted a large part of the contemporary positive international law, there was **no structured and well-defined law of treaties**. Already the term 'treaty' itself was considered to be of vague and uncertain content, and the state of the law of treaties unsatisfactory, due, among others, to the lack of common formal and procedural standards accepted as such by the various governments.[33]

In an attempt to change that, the League of Nations Committee of Experts on Codification of International Law included in 1926 on its list of possible **subjects for codification** the question "whether it is possible to formulate rules to be recommended for the procedure of international conferences and the conclusion and drafting of treaties, and what such rules should be".[34] However, when the Committee's report on the subject came before the Council of the League of Nations, the matter was thought to be "in no sense urgent" and not pursued any further.[35] In 1925, the American Institute of International Law, having been requested by the Governing Board of the Pan American Union to draw up projects for the codification of international law, prepared a *projet* on 'Treaties', which led, after some modifications, to the adoption by the Sixth International Conference of American States, on 20 February 1928, of the **Havana Convention on Treaties.**[36] However, the drafting of that instrument was defective in some respects, for example in that no definition or explanation was given of the term "treaty"; moreover, the principles embodied therein were rather fragmentary and did not, therefore, significantly contribute to the clarification of the law of treaties. The Convention on the Law of Treaties drafted by the **Harvard Research** in International Law in 1935 (Harvard Draft) went much further along that road and helped to clarify many aspect of the treaty law of its time. Its definition and rules were

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[32]Quoted by *Wehberg* (n 31) 783.

[33]Harvard Draft 667 (Introductory Comment).

[34]League of Nations Document C.196.M.70.1927.V, 105, quoted Harvard Draft, in 669.

[35]Harvard Draft 670 (Introductory Comment).

[36]Harvard Draft 670 (Introductory Comment); Text of the Convention in (1928) 22 AJIL Supp. 138.

important points of reference for later discussions on the law of treaties, including those of the International Law Commission.

13 Despite the acknowledged importance of treaties for international peace and security, it was not until 1969 that the first comprehensive codification of international treaty law was adopted at the Vienna Conference on the Law of Treaties. The Conference marked the culmination of many years of tireless **work of the ILC**, which had emphasized the necessity of a codified law on treaties by listing the subject as suitable for codification already in its first session in 1949, and moreover by including the law of treaties among the three priority topics selected for study.[37] The Commission devoted 18 years (1949–1966) and 292 meetings to the topic, four Special Rapporteurs prepared 17 reports,[38] before the ILC could complete its task with the submission of its final set of draft articles in 1966. This may seem a long time for drafting a legal text, but already the ambitious aim pursued with it, to adopt the "treaty on treaties" with a universal scope of application, *ie* for the international community as a whole, lets the time spent on it appear worthwhile. Moreover, compared to the long history of treaties in international relations, the time it took to actually prepare a codification of the international law on treaties is just a blink of an eye. After all, it took more than 3,000 years of treaty-making before the law of treaties was finally codified.

[37] [1949-II] YbILC 281.

[38] *Villiger* History of the Convention MN 13.

Preamble

Preamble

Vienna Convention on the Law of Treaties Done at Vienna on 23 May 1969

***The States Parties to the present Convention*,**
***Considering* the fundamental role of treaties in the history of international relations,**
***Recognizing* the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems,**
***Noting* that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,**
***Affirming* that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,**
***Recalling* the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,**
***Having in mind* the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,**
***Believing* that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations,**
***Affirming* that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,**
***Have agreed* as follows:**

Contents

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A. Purpose and Function

1 The Preamble of the VCLT introduces the Convention's core elements (3rd and 8th recital) and builds a bridge between the law of treaties and the principles of the **UN Charter** (4th, 5th, 6th and 7th recital). With a typical solemn intonation (1st, 2nd, 7th recital), the Preamble spotlights the Convention's general objects and purposes as well as the UN Charter's objectives and principles in order to support the **interpretation** of single treaty provisions (→ Art 31 MN 45, 50). By referring to core objectives and principles of the UN Charter (4th, 5th, 6th and 7th recital), the Preamble **incorporates** them into the Convention's own framework in order to avoid conflicts between the treaty regime and the obligations flowing for the UN Charter (*cf* Art 103 UN Charter).[1]

2 Even though the Preamble does not create substantive rights and obligations for the parties to the Convention, its **legally binding character** entails its **normative influence** on the understanding of each provision of the Convention in its specific context.[2]

B. Negotiating History

3 The Drafting Committee, which was entrusted with the task to prepare a draft preamble, was fully aware of the importance of the Preamble as an integral part of the Convention.[3] Their draft was based on two proposals, one submitted by Mongolia and Romania[4] and the other by Switzerland.[5] Only few changes were

[1] *Cf MM Mbengue* Preamble in MPEPIL (2008) MN 9.

[2] ICJ *Rights of Nationals of the United States of America in Morocco (France v United States)* [1952] ICJ Rep 176, 184.

[3] UNCLOT I 7 para 7; see also the statements by the representatives of Ecuador, Romania and Uruguay UNCLOT II 170 para 22, 171 para 29, 171 para 33.

[4] UN Doc A/CONF.39/L.4, UNCLOT III 263.

[5] UN Doc A/CONF.39/L.5, UNCLOT III 263.

introduced at the 31st plenary meeting.[6] The Preamble, as amended, was finally adopted by 86 votes to none, with 11 abstentions.[7]

C. Elements of the Preamble

I. 1st Recital: Fundamental Role of Treaties in History

As far as the memory of mankind goes back, the binding power of treaties has been used in order to facilitate coexistence and cooperation (→ Introduction MN 2).[8] By highlighting the importance of the law of treaties in the history of international relations, the Preamble emphasizes the Convention's weight and its uncontested status in contemporary history.[9] **4**

II. 2nd Recital: Treaties as a Source of International Law and a Means of Peaceful Cooperation

In the past decades, treaties have superseded customary law as the most important source of international law (Art 38 ICJ Statute) due to the increasing ambition of international organizations, international organs and States to **codify unwritten rules**. At the same time, treaties contribute to the **development of international law** (*cf* Art 13 para 1 lit a UN Charter).[10] The reasons for codification projects are manifold; the most sweeping one is, of course, the **legal certainty** that comes along with converting customary rules into concise written provisions. Nonetheless, many States are reluctant to ratify codification conventions for the simple reason that **5**

[6]The amendment submitted by Ecuador (UN Doc A/CONF.39/L.44, UNCLOT III 271) introduced the phrase "principles of free consent and" to the 3rd recital; the amendment submitted by Sweden (UN Doc. A/CONF.39/L.43, UNCLOT III 271) added the phrase "and in conformity with the principles of justice and international law" to the 4th recital; the amendment submitted by Costa Rica and the Netherlands (UN Doc A/CONF.39/L.42 and Add.1, UNCLOT III 271) added the phrase "and of universal respect for, and observance of, human rights and fundamental freedoms for all" to the 6th recital; finally the amendment submitted by Switzerland (8th recital UN Doc A/CONF.39/L.45, UNCLOT III 271) was accepted with a slight but significant modification: the Swiss proposal originally included the words "which have not been *expressly* regulated by the provisions of the present Convention" (emphasis added).

[7]UNCLOT II 178 para 31.

[8]See the statement by the representative of Romania UNCLOT II 171 para 29.

[9]On the history of international treaties, see *A Truyol y Serra* Geschichte der Staatsverträge und Völkerrecht in *R Marcic et al* (eds) Festschrift Verdross (1971) 512; *A Altman* The Role of 'Historical Prologue' in the Hittite Vassal Treaties: An Early Experiment in Securing Treaty Compliance (2004) 6 Journal of the History of International Law 43.

[10]*HWA Thirlway* International Customary Law and Codification (1972).

legal uncertainty is more convenient or because they disagree with the progressive character of the codification.[11] The ILC Articles on the Law of State Responsibility of 2001 exemplify a way out of the dilemma:[12] the 'codification convention' remains a mere 'proposal for a convention' but contributes non-etheless to legal certainty since, as time passes, the 'proposal' grows into a faithful reflection of customary rules (*cf* 8th recital).

6 The substantial contribution of international treaties to promote **peaceful co-operation** among States follows from the very foundation of international treaties, the **free consent** of their parties (3rd recital). On the international plane, consensus eclipses the specifics of the constitutional and social systems of States, meaning that they cannot serve as a justification for non-performance (Arts 27, 46). In 1969, when States adopted the VCLT at the Vienna Conference by majority (79 votes to one with 19 abstentions), the 2nd recital implicitly pointed at the **East-West divide** to be bridged by international treaties concluded between the opponents.

III. 3rd Recital: Free Consent, Good Faith and *Pacta Sunt Servanda*

7 The 3rd recital refers to the major pillars of treaty law:[13] while Art 26 seizes on both, the principles of **good faith** and ***pacta sunt servanda*** (→ Art 26 MN 15, 46), the principle of **free consent** underlies the Convention as a whole even though special emphasis is placed in Arts 34, 48, 49, 51 and 52.[14] In addition, the Preamble's reference to the principle of free consent impacts on the interpretation of Art 53, especially on the question whether ***ius cogens*** has the authority to bind States against their expressed will (→ Art 53 MN 51–53).

IV. 4th Recital: Peaceful Settlement of Disputes

8 It is a commonplace that disputes over the **application and interpretation of treaties** should, like all other international disputes, be settled by peaceful means (4th recital). For the specific purposes of the Convention, this duty is given a definite form in Arts 65–68 in cases of disputes concerning the invalidity or termination, withdrawal from or suspension of a treaty. By emphasizing that international disputes shall be

[11] See on the pros and cons of putting the draft through the process of a diplomatic conference *SR Crawford* Fourth Report on State Responsibility, UN Doc A/CN.4/517, paras 22–23.

[12] *DD Caron* The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority (2002) 96 AJIL 857.

[13] SR *Waldock* proposed to include the principles in the Preamble so as to demonstrate their importance [1966-I/2] YbILC 32, 37 para 71.

[14] The Ecuadorian amendment (UN Doc A/CONF.39/L.44, UNCLOT III 271) added the phrase "principles of free consent and"; The representative of Iraq interpreted the principle as a component of the notion of good faith, UNCLOT II 174 para 67.

settled "in conformity with the principles of justice and international law", introduced by the Swedish amendment,[15] the 4th recital mirrors the wording of Art 1 para 1 UN Charter in order to make it plain that, on this point too, the Convention dovetails with the UN Charter.

As a result of the principle of free choice of means, as stipulated in Art 33 UN Charter (→ Art 65 para 3), the modes of settling a **dispute concerning a treaty** are manifold. In the course of an **internal dispute settlement**, *eg* bilateral negotiations, the disputing parties to the treaty sort things out among themselves; in contrast, **external dispute settlement** is understood as a settlement reached through the efforts of an impartial third party (*eg* the ICJ on the basis of a compromissory clause, → MN 11).[16] With regard to the methods of settling a dispute over the interpretation or application of a treaty, there is a narrow line between **diplomatic**, **judicial** and **quasi-judicial dispute settlements**. **9**

There are several examples of external dispute settlements provided by an organ of an international organization, applying **diplomatic methods** that result in a non-binding recommendation. **10**

> Belonging to that category is the 'good offices' function of *eg* the UN Secretary-General under Arts 98 and 99 UN Charter,[17] and of the Director-General of the WTO under Art 5 para 6 Dispute Settlement Understanding (DSU).[18]

It is the very specific combination of institutional setting, method and power that makes up the modern notion of **judicial dispute settlement**: it involves a legal dispute over the interpretation or application of a treaty, referred to a standing judicial body composed of independent judges, for a legally binding decision based on the interpretation and application of the disputed provision of the treaty and other rules of international law. The **International Tribunal for the Law of the Sea** and the **International Court of Justice** are the epitome of an international judicial body (apart from their advisory functions). **11**

> Approximately 80% of the worldwide 193 States have accepted the contentious jurisdiction of the ICJ via compromissory treaty clauses.[19] If an international organization is party to

[15] UN Doc A/CONF.39/L.43, UNCLOT III 271; see also the statement by the representative of Sweden UNCLOT II 170 para 19.

[16] *RB Bilder* International Third Party Dispute Settlement (1989) 17 Denver Journal of International Law and Politics 471, 474.

[17] *A Brehio* Good Offices of the Secretary-General as Preventive Measures (1998) 30 New York University JILP 589, 612.

[18] *M Matsushita/TJ Schoenbaum/PC Mavroidis* The World Trade Organization: Law, Practice, and Policy (2006) 115.

[19] *Cf EJ Powell/SM Mitchell* The International Court of Justice and the World's Three Legal Systems (2007) 69 Journal of Politics 397. Very few universal agreements commit States Parties to obligatory judicial dispute settlement. Examples include the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (Art 22) 660 UNTS 195, with 173 parties but altogether 25 reservations to Art 22; for the VCLT, see Art 66.

the dispute, the dispute can be referred to the advisory jurisdiction of the ICJ under Art 65 ICJ Statute (with the assistance of UN organs, if necessary), accepted as compulsory by the disputants (the so-called 'decisive advisory opinion clause').[20] Art 32 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances is an example of this kind of dispute settlement.

12 The WTO Dispute Settlement Procedure is an example for a **quasi-judicial dispute settlement mechanism**. Considered as a whole – the adjudicating powers of the Dispute Settlement Body and the reports of the Panels or Appellate Bodies, jointly reaching a legal adjudication in a court-like procedure – the WTO dispute settlement mechanism represents a "judicialization of politics".[21]

13 **Arbitral tribunals** are established as treaty bodies with specialized jurisdiction because their *raison d'être* is rooted in a dispute-related agreement between the disputants (*compromis*). International arbitration still has its standing in the settlement of disputes concerning treaties, and it is even enjoying a heyday within the realm of commercial disputes.[22]

V. 5th Recital: Condition under Which the Respect for Obligations Arising from Treaties Can Be Maintained

14 The 5th recital of the Preamble refers to the 3rd recital of the UN Charter's Preamble: the peoples of the United Nations are determined "to establish conditions under which justice and respect for the obligations arising from treaties [. . .] can be maintained". After deciding in its first session in 1947 that the law of treaties is suitable for codification, following 17 years of debate in altogether 292 sessions,[23] the ILC set the milestone envisaged in the 3rd recital of the Preamble of the UN Charter. With this in mind, the 5th recital of the VCLT's Preamble points to the ***raison d'être*** of the Convention.

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[20]Or 'compulsory opinion clauses'; see the comprehensive study on 'decisive advisory opinion clauses' of *C Dominicé* Request of Advisory Opinions in Contentious Cases? in *L Boisson de Chazournes et al* (eds) International Organizations and International Dispute Settlement: Trends and Prospects (2002) 91–103; the ICJ has stressed that the decisive advisory opinion clause does not change the nature of the advisory opinion, *ie* it will not assume the nature of a judgment: ICJ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, para 25. If, however, the legal question is specific to the dispute, the opinion rendered by the court *de facto* has the legal effects of a judgment for the parties to the dispute, including the *res iudicata* authority flowing exclusively from the contractual clause: *cf G Bacot* Réflexion sur les clauses qui rendent obligatoires les avis consultatifs de la CPJI et de la CIJ (1980) 84 RGDIP 1027, 1060 *et seq*.

[21]*SA Ghias* International Judicial Lawmaking: A Theoretical and Political Analysis of the WTO Appellate Body (2006) 24 Berkeley JIL 534.

[22]For a definition of 'international arbitration', see the 1899 and 1907 Hague Conventions for Pacific Settlement of International Disputes, Arts 15 and 37 respectively.

[23]*S Verosta* Die Vertragsrechtskonferenz der Vereinten Nationen 1968/1969 und die Wiener Konvention über das Recht der Verträge (1969) 29 ZaöRV 654, 655.

VI. 6th Recital: Principles of UN Charter

The 6th recital establishes the main connection to the UN Charter. The principles of **equal rights** and **self-determination of peoples** (Art 1 para 2 UN Charter), the **sovereign equality** and **independence of all States** (Art 2 para 1 UN Charter) and the **non-interference in the domestic affairs of States** (Art 2 para 7 UN Charter) are exclusively referred to in the Preamble. In contrast, Art 52 builds on the **prohibition of the threat or use of force** (Art 2 para 4 UN Charter) and Art 60 para 5 protects the universal respect for and observance of **human rights and fundamental freedoms** (Art 1 UN Charter).[24] All UN principles cited have a more or less strong connection to the law of treaties. Whereas, *eg*, the sovereign equality of States is the very foundation of the principle of free consent (→ MN 7), the non-interference in domestic affairs has a more ambivalent tie to the law of treaties: it is the essence of many treaties to 'internationalize' certain subject matters, such as the treatment of citizens, which therefore no longer belong to the *domaine réservé* of the parties. **15**

VII. 7th Recital: Codification and Progressive Development

The 7th recital, too, links the VCLT and the United Nations, namely the Organization's function to maintain international peace and security, to develop friendly relations and to achieve the cooperation among nations (Art 1 UN Charter). According to the 7th recital, the Convention is believed to serve these proposes by **codifying** and **progressively developing** the law of treaties. This statement can serve as an indication that at least some of the provisions of the VCLT establish new rules whereas most provisions codify customary treaty law (→ Art 4 MN 4–10). Consequently, there is a need to clarify the role of customary law within the framework of the Convention (8th recital). **16**

VIII. 8th Recital: Role of Customary International Law

The 8th recital can be traced back to the slightly modified amendment proposed by Switzerland.[25] Like many other preambles of international conventions,[26] the 8th recital emphasizes the continuing validity of customary treaty law. In addition, **17**

[24]This phrase was introduced by Costa Rica and the Netherlands, UN Doc A/CONF.39/L.42 and Add.1, UNCLOT III 271.

[25]UN Doc A/CONF.39/L.45, UNCLOT III 271; the Swiss proposal originally included the words "which have not been *expressly* regulated by the provisions of the present Convention" (emphasis added), which was criticized as too far-reaching and as a limitation of the Convention's scope, see the statement by the representative of Iraq UNCLOT II 174 para 68.

[26]See *eg* the preambles of the 1899 Hague Convention with Respect to the Laws and Customs of War on Land, the 1907 Hague Convention Respecting the Laws and Customs of War on Land and the 1982 UN Convention on the Law of the Sea.

customary treaty law remains applicable if the VCLT does not explicitly or implicitly provide for a special rule (*eg lex specialis derogat legi generali*). The 8th recital cannot be taken as evidence for a **hierarchical structure** between the different sources of treaty law, *eg* by giving the Convention superiority over customary treaty law.[27] Nor should general principles of law be excluded as a source of international treaty law, as demonstrated by the Preamble's reference to the good faith principle.[28]

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[27]For a different understanding, see the statement by the representative of Poland UNCLOT II 176 para 13; see also the Swiss amendment UN Doc A/CONF.39/L.45, UNCLOT III 271.

[28]See the statements by the representatives of Uruguay and Spain UNCLOT II 172, 173.

Part I
Introduction

Article 1
Scope of the present Convention

The present Convention applies to treaties between States.

Contents

A. Purpose and Function

Due to their far-reaching international and national legal capacities, States are capable of concluding agreements with all types of legal entities, *ie* with other States and with Non-States actors (*eg* international organizations, corporations, NGOs, individuals; → Art 3 MN 19–72). Therefore, the sole purpose of Art 1 is to limit the scope of the VCLT *ratione materiae* to **interstate treaties** and – in view of the potential diversity of signatories – *ratione personae* to **States** alone.[1] **1**

To fully appreciate the limited scope of the VCLT as a whole, other provisions of the Convention have to be taken into account as well, namely, Art 1 must be read in conjunction with Art 2 para 1 lit a, which restricts the scope of the Convention *ratione materiae* to **treaties in written form** which are **governed by international law**. Constituent instruments of international organizations fulfill these prerequisites and therefore fall comfortably within the scope of the VCLT (→ Art 5 MN 5–7). However, even if the Convention applies to all international interstate treaties, it does not cover every situation. According to Art 73, the VCLT does not address the fate of treaties in the event of State succession, State responsibility and interstate hostilities. The limitation of the Convention *ratione temporis* is laid down in Art 4, which answers the question of the Convention having retroactive application in the negative. Assuming that the Convention is applicable to a particular treaty, the autonomy of its parties may non etheless prevail in certain areas: many rules of the Convention are **residual in character**, *ie* they come into play under the condition that the particular treaty does not "otherwise provide" (*eg* Arts 22, 77), or it is not "otherwise agreed" by the parties (*eg* Arts 22, 37), or a different intention is not "otherwise established" (*eg* Arts 12, 14, 15, 16).[2] As a rule, the Convention explicitly labels provisions as residual. If not, the provision is mandatory **2**

[1] But see *S Rosenne* Developments in the Law of Treaties 1945–1986 (1989) 22.

[2] *Sinclair* 6; for detail see also → Art 5 MN 15–20.

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(*eg* Art 53) provided that the residual character cannot be otherwise established (contextual interpretation or travaux préparatoires, *eg* Art 30 paras 3–5).

3 Art 3 lit c clarifies that the Convention's application to a multilateral treaty is not to be questioned for the mere fact that – alongside at least two States Parties to the VCLT – **other subjects of international law** are also party to said treaty. Unspoken but congruously, the same is true when States not party to the VCLT participate in a multilateral treaty. From all this, it follows that one treaty concluded between different subjects of international law can be ruled by up to **three different legal regimes**: (1) the treaty relation between parties to the VCLT is governed by that Convention; (2) the treaty relation with and among participating international organizations is governed by the VCLT II, provided that the parties involved are parties to that Convention; (3) treaty relations other than those mentioned, *eg* treaty relations with the Sovereign Order of Malta,[3] the ICRC[4] or with States not parties to the VCLT[5] are governed by customary international law (→ Art 4 MN 4–6). *Prima facie*, this potential multitude of applicable treaty law, all of which could be applied to one and the same treaty, seems to contradict any concept of uniform application. However, the **fragmentation of treaty relations** is somewhat alleviated by the congruency of most substantive rules of the aforementioned regimes.[6]

B. Historical Background and Negotiating History

4 During most stages of the negotiating process, the scope of the Convention had not been laid down in a separate article, but rather had been derived from the **definition** of 'treaty' (→ Art 2 para 1 lit a). When the ILC discussed the very first SR report on the law of treaties, prepared by SR *Brierly* in 1950,[7] it was agreed that treaties to which **international organizations** were parties would be included in its studies.[8]

[3] See *eg* the 1989 Postal Convention with Austria öBGBl No 447/1989 and the 1979 Postal Agreement between the Philippines and the Sovereign Order of Malta 1195 UNTS 411; the latter appears to have been mistaken by the Treaty Section of the UN Office of Legal Affairs to be a treaty between the Philippines and the *Republic* of Malta which explains why it was – contrary to the Secretary-General's practice – registered and included in the UNTS (*cf* also → Art 3 MN 45).

[4] See *eg* the 2006 Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons Deprived of Liberty Pursuant to the Jurisdiction of the ICC, ICC Official Journal ICC-PRES/02-01-06.

[5] *Villiger* Art 3 MN 7; see generally *EW Vierdag* The Law Governing Treaty Relations between Parties to the VCLT and States Not Party to the Convention (1982) 76 AJIL 779; *EW Vierdag* Some Remarks on the Relationship between the 1969 and the 1986 Vienna Convention on the Law of Treaties (1987) 25 AVR 82, 91.

[6] For a detailed analysis, see *ibid* 786–801.

[7] *Brierly* I 223–248.

[8] ILC Report 11th Session [1959-II] YbILC 87, 96 para 6.

However, by definition, treaties to which entities other than States and international organizations are parties should be excluded.[9] When proposing this demarcation, SR *Brierly* not only had clear Non-States entities such as **churches**, **companies** or **cities** in mind, but also **component units of federal States**, assuming that these components do not possess the attributes of a State.[10] *Brierly*'s understanding of the term 'State', though, remained vague (Draft Art 2: "A State is a member of the community of nations").[11]

Enhancing *Brierly*'s developing findings, his successor SR *Lauterpacht* removed the term "international organization" and replaced it with "organization of States"[12] in order to point out that "States only – acting either individually or in association – are the normal subjects of [. . .] international law".[13] With regard to **component units of federal States** or **protectorates**, SR *Lauterpacht* advocated an all-embracing understanding of the term "State" for the purpose of his definition clause (Draft Art 1), leaving it to the subsequent capacity provision[14] (Draft Art 10[15]) to pragmatically resolve "**borderline cases**".[16] It was SR *Waldock* who finally proposed in 1965 to limit the scope of the Convention to treaties concluded between States[17] It was the understanding of the ILC that the term 'State' means a 'State for the purposes of international law',[18] *ie* a **formally independent and thus sovereign State**.[19] **5**

Some States, and most of all the United States, felt that the limitation "took into account neither the development of international law during the twentieth century nor the growth of the activities of **international organizations**".[20] India and the USSR, on the other hand, pointed out that including treaties between international organizations under the scope of the Convention would complicate **6**

[9] *Brierly* I 223, Draft Art 1 lit c: "The term 'treaty' does not include an agreement to which any entity other than States or international organizations is or may be a party." The wording closely follows Art 1 lit c of the 1935 Harvard Draft Convention on the Law of Treaties.

[10] *Brierly* I 229.

[11] With regard to component units of federal States, the proposed litmus test was the existence of an "international personality" (*Brierly* I 229).

[12] *Lauterpacht* I 90.

[13] *Ibid* 94.

[14] See also *Brierly* III 50.

[15] *Lauterpacht* I 92, Draft Art 10: "An instrument is void as a treaty if concluded in disregard of the international limitations upon the capacity of the parties to conclude treaties."

[16] *Lauterpacht* I 95.

[17] *Waldock* IV 10; see the discussion and decision of the ILC [1965-I] YbILC 9–16; critical: *PK Menon* The Law of Treaties between States and International Organizations (1992) 17, 18.

[18] Final Draft, Commentary to Art 1, 187 para 4.

[19] China (Taiwan) proposed at the UN Conference to add a definition of State to mean "a sovereign State". The proposal was rejected by the Drafting Committee on the basis of the lack of necessity for such a definition (UNCLOT III 112); the proposed definition relies on Art 4 Harvard Draft.

[20] UNCLOT I 11 para 3.

and delay the drafting process.[21] By and large, it was finally agreed that treaties between international organizations had special characteristics and therefore should be considered separately by the ILC.[22] The compromise was flanked by the understanding that the thematic limitation of the Convention does not prejudice treaty law governing treaties concluded between other subjects of international law (→ Art 3).[23] Art 1 was eventually adopted by the Vienna Conference with 98 votes to none.[24]

C. Elements of Article 1

I. Treaties

7 → Art 2 MN 3–36

II. States

8 By not defining it in Art 2, the VCLT takes the most fundamental term 'State' for granted.[25] This approach is quite common when drafting multinational treaties,[26]

[21] UNCLOT I 12 para 7, 13 para 26.

[22] See the VCLT II.

[23] See the Resolution of the Vienna Conference relating to Art 1, UNCLOT II 178, annexed to the Final Act of the Conference, UNCLOT III 285:

> "*The United Nations Conference on the Law of Treaties,*
> *Recalling* that the General Assembly of the United Nations, by its resolution 2166 (XXI) of 5 December 1966, referred to the Conference the draft articles contained in chapter II of the report of the International Law Commission on the work of its eighteenth session,
> *Taking note* that the Commission's draft articles deal only with treaties concluded between States,
> *Recognizing* the importance of the question of treaties concluded between States and international organizations or between two or more international organizations,
> *Cognizant* of the varied practices of international organizations in this respect, and
> *Desirous* of ensuring that the extensive experience of international organizations in this field be utilized to the best advantage,
> *Recommends* to the General Assembly of the United Nations that it refers to the International Law Commission the study, in consultation with the principal international organizations, of the question of treaties concluded between States and international organizations or between two or more international organizations." (footnote omitted)

[24] UNCLOT II 3 para 14.

[25] For a broad definition, see *Brierly* I 229 (Draft Art 2 lit a); *cf* also *Fitzmaurice* I 107 (Draft Art 3).

[26] See *eg* Arts 3 and 4 UN Charter, Art 36 para 1 ICJ Statute, Arts 1–3 Articles on State Responsibility UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83.

since the legal problems linked to the diffuse concept of **sovereignty**[27] and the recognition of **statehood**[28] would, without doubt, needlessly burden the codification process.[29] Upon closer examination, however, the determination of sovereignty and statehood can be neglected in the context of Art 1 since the issue is actually resolved by Art 81. Accession to the VCLT is dependent upon the outcome of the **UN's admission process** (Art 4 UN Charter) or the decision on membership taken by the specialized agencies and international organizations mentioned in Art 81 (so-called '**Vienna formula**'[30]).[31] As an example in this regard, the **Holy See** – a member of various UN specialized agencies[32] – has been party to the VCLT since 1969. The Holy See is a subject of international law but does not fit comfortably within the criteria for statehood.[33] The **Byelorussian and Ukrainian Soviet Socialist Republics**, founding members of the United Nations[34] and parties to the VCLT since 1986, exemplify that even component units of federal States (→ Art 3 MN 20) may fall within the scope of Art 1 by virtue of Art 81. In the context of the VCLT II, it is remarkable that the then dependent territory of **Namibia** was expressly allowed access despite its lack of sovereignty (Art 84 VCLT II).[35]

[27] *M Koskenniemi* From Apology to Utopia (2005) 240–245; *J Bartelson* The Concept of Sovereignty Revisited (2006) 17 EJIL 463; *SD Krasner* The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law (2004) 25 Michigan JIL 1075.

[28] On the difficulties of defining the term "State", see Harvard Draft 706. For an overview on statehood *J Crawford* The Creation of States in International Law (2006); *G Acquaviva* Subjects of International Law (2005) 38 Vanderbilt JTL 345, 346–375; *TD Grant* Defining Statehood: The Montevideo Convention and its Discontents (1999) 37 Columbia JTL 403.

[29] See the controversial debate of the ILC within the framework of the Draft Declaration on the Rights and Duties of States [1949] YbILC 61–68.

[30] In contrast to the 'all States formula', applied *eg* by the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid 1015 UNTS 243; see 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, para 79.

[31] The statement of the Final Draft, Commentary to Art 5, 192 para 4 that the term "State" is used with the same meaning as in the UN Charter, the ICJ Statute, the Geneva Convention on the Law of the Sea and the Vienna Convention on Diplomatic Relations – treaties which do not define the term – must be seen in the light of Art 81 VCLT.

[32] For example the World Intellectual Property Organization; see UNGA Res 58/314, 1 July 2004, UN Doc A/RES/58/314 for an overview of the international engagements of the Holy See.

[33] For considerations of the ILC, see ILC Report 11th Session [1959-II] YbILC 87, 96; *RJ Araujo* The International Personality and Sovereignty of the Holy See (2001) 50 Catholic University LR 291, 293, 323 *et seq*; *Y Abdullah* The Holy See at United Nations Conferences: State or Church? (1996) 96 Columbia LR 1835.

[34] As the Ukrainian SSR lacked the characteristics of statehood in an international legal sense, it was agreed on by the UN Founding Conference that statehood (Art 4 UN Charter) was not a constitutive feature for founding members, irrespective of the wording of Art 3 UN Charter, *U Fastenrath* in *Simma* Art 3 MN 6.

[35] Namibia was internationally represented by the UN Council for Namibia until its independence in 1990.

9 The cases mentioned illustrate that the VCLT consciously avoids a dogmatic view regarding the question of statehood and sovereignty. On the contrary: if the requirements of Art 81 are met, access to the Convention stipulates that all parties are *ipso iure* considered 'States' exclusively within the framework and for the purpose of the Convention. Consequently, all provisions of the Convention are applicable to all parties, regardless of any doubts concerning the latter's independence, sovereignty or statehood.[36]

10 Some treaties appear in form to be concluded between natural persons, *eg* the **heads of State**. The practice of concluding treaties between heads of State is principally a historical phenomenon, with roots in monarchic traditions. To this extent, the appearance of 'His/Her Majesty' as the party to the treaty is a relic of the ancient practice of identifying the person who was the head of State as the State itself.[37] Such practice does not contradict the modern concept of a State as a judicial person acting through its organs.[38]

11 Though the concept of 'State' has no constitutive function within the framework of the Convention, it can be of certain importance within the realm of **customary treaty law**. Whereas Non-States Parties to the VCLT may have recourse to all provisions of the Convention in order to make visible respective rules of customary treaty law, other entities short of statehood must exercise restraint in this regard, *eg* in the context of Art 6 ("capacity to conclude treaties") or Art 7 para 2 ("representation").

12 An indication for the statehood of entities with ambiguous international status is provided by the practice of registration by the UN Secretary-General with regard to those multilateral treaties which limit the participation to "any State" (so-called '**all States formula**'[39]). Self-governing territories (or States *in statu nascendi*) such as **Palestine**,[40] **Somaliland** (Awdal Republic)[41] or the **Turkish Republic of Northern Cyprus**[42] cannot invoke this formula to achieve participation in multilateral treaties

[36]But see Argentina's declaration upon ratification of the VCLT 1155 UNTS 502: "The application of this Convention to territories whose sovereignty is a subject of dispute between two and more States, whether or not they are parties to it, cannot be deemed to imply a modification, renunciation or abandonment of the position heretofore maintained by each of them."

[37]*WG Grewe* The Epochs of International Law (2000) 90.

[38]See *eg* the 1952 Exchange of Notes Constituting an Agreement Giving Effect to the Convention of 31 March 1931 between His Majesty, in Respect of the United Kingdom, and the Federal President of the Republic of Austria, Regarding Legal Proceedings in Civil and Commercial Matters 236 UNTS 245.

[39]For reference, see note 30.

[40]For a different point of view see *J Quigley* The Israel-PLO Interim Agreement: Are They Treaties? (1997) 30 Cornell ILJ 717, 722–726.

[41]In 1960 Somaliland, a former British colony, joined the former Italian Somalia to form the Somali Republic. Somaliland declared its independence in 1991 and requested recognition by the African Union in December 2005. The subject of State secession is still a matter of ongoing conflict and hampers the international recognition as an independent State.

[42]See the Declaration of Independence of Turkish Cypriot Authorities, 15 November 1983, UN Doc A/38/586-S/16148. UNSC Res 541, 18 November 1983, UN Doc S/RES/541 (1983)

due to the ongoing political ambivalence within the international community as to whether these entities should be recognized as 'States'. The practice of admission of international organizations, however, can produce a domino effect with regard to treaty access on the basis of the 'all State formula' which perfectly matches the effects of the 'Vienna formula' (→ MN 8). The Secretary-General, for example, had refused the Cook Islands' application for access to certain multilateral treaties containing 'all States clauses' by referring to the non-sovereign status of the islands.[43] However, after the WHO approved the Islands' membership in 1984 following Art 6 of its Constitution ("States"), the Secretary-General considered that the Cook Islands could henceforth be included in the 'all State formula' of other multilateral treaties.[44]

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Id The Law Governing Treaty Relations between Parties to the VCLT and States Not Party to the Convention (1982) 76 AJIL 779–801.

considered the attempt to create and present the TRNC as being "legally invalid": it called for the withdrawal of the declaration of independence and asked all countries not to recognize the new republic.

[43] *Cf* UNGA Res 2064 (XX), 16 December 1965, UN Doc A/RES/2064 (XX) on the not-yet-sovereign status of the Cook Islands; see also [1979] UNJYB 172.

[44] For reference see note 30.

Article 2
Use of terms

1. For the purpose of the present Convention:

(a) "treaty" means an international agreement in written form concluded between States and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(c) "full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing of consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

(d) "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions to the treaty in their application to that State;

(e) "negotiating State" means a State which took part in the drawing up and adopting of the text of the treaty;

(f) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has been entered into force;

(g) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(h) "third State" means a State not a party to the treaty;

(i) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meaning which may be given to them in the internal law of any State.

Contents

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A. Purpose and Function

1 A definition clause, as provided in Art 2, is a classic instrument of international codification, which serves technical as well as substantive purposes.[1] Primarily, it uniformly determines the meaning of and the relationship between **central technical terms** for all parts of the VCLT. Additionally, the definition clause provided in Art 2 is of central importance for the determination of the Convention's **scope** *ratione materiae* – particularly lit a (treaties); → Art 1 MN 2.

2 As the introductory words indicate ("For the purpose of the present Convention. . ."), the definition clause is intended only to state the meaning with which the terms are used **in the VCLT**[2]; it does not provide for generalities. When other international instruments refer to the terms outlined in Art 2, *eg* Art 36 ICJ Statute ("treaties") or Art 220 TFEU ("international organizations"), the meaning of those terms has to be independently assessed with a view to the objects and purposes of the relevant instruments alone. This general rule does not bar parties to those instruments or dispute settlement bodies from invoking Art 2 VCLT in order to document a customary understanding of certain terms.[3]

B. Elements of Article 2

I. Treaty (para 1 lit a)

1. Historical Background and Negotiating History

3 The first attempts to determine the common understanding of the term 'international treaty' were comparatively recent. In 1753, *Emer de Vattel* put down quite a modern perception: "A treaty (*traité*), in Latin, *fœdus*, is a compact (*pacte*) entered into by sovereigns for the welfare of the State, either in perpetuity or for a considerable

[1] While SR *Brierly* and SR *Lauterpacht* defined specific terms in the relevant articles (*Brierly* I 223; *Lauterpacht* I 91), the necessity to design one prefixed definition clause for terms crucial for the entire Convention was recognized for the first time by SR *Fitzmaurice* (*Fitzmaurice* I 107).

[2] Final Draft, Commentary to Art 2, 188 para 1.

[3] ICJ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 133, para 23.

length of time. [. . .] Treaties can only be entered into by the highest State authorities, by sovereigns, who contract in the name of the State."[4] Despite early attempts to capture the term, international practice and usage – combined with the language of constitutional provisions – gave the term a somewhat **vague and uncertain content**.[5] In the late nineteenth century and early twentieth century, the academic efforts increased,[6] culminating in the definition of the 1935 Harvard Draft Convention on the Law of Treaties.[7] In addition, the registration practices of the League of Nations under Art 18 of its Covenant provided direction as to the international usage of the term 'treaty'.

The registration practices of both the League of Nations and the United Nations as well as the Harvard Draft sowed the seed of the first definition in the early ILC proceedings.[8] The ILC's second SR *Lauterpacht* focused on a treaty's "essential requirements" rather than its definition as a concept.[9] In contrast, SR *Waldock* decided to refer to both **'international agreements'** and '**treaties'** in his Draft Art 1,[10] using "international agreement" as the starting point for the conceptual understanding of the subject matter (definition), and "treaty" as a generic term which covers all forms and designations of an international agreement. This approach was immediately defeated by the ILC[11] mainly because it was considered 'inelegant'.[12] **4**

2. Designation in International Practice

Within the realm of international relations, the **variety of nomenclature** for an agreement is manifold and thus confusing.[13] Apart from 'treaty', one finds titles such as 'accord', 'act', 'convention',[14] 'covenant',[15] 'charter', 'declaration', 'pact', 'protocol', 'statute', '*modus vivendi*', 'memorandum of understanding', 'exchange **5**

[4] *E de Vattel* Le droit des gens (1758) book II ch XII Sects. 152, 154 (*CG Fenwick* translation (1916) 160).

[5] Harvard Draft 667.

[6] See *eg JC Bluntschli* Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt (1878) Arts 417–424; *L Renault* Introduction à l'étude du droit international (1869) 33–34.

[7] Harvard Draft 657, Art 1 lit a: "A 'treaty' is a formal instrument of agreement by which two or more States establish or seek to establish a relation under international law between themselves."

[8] *Brierly* I 226–227.

[9] *Lauterpacht* I 93.

[10] *Waldock* I 31, 53.

[11] *Amado* [1962-I] YbILC 49 paras 52 *et seq*; *Waldock* [1962-I] YbILC 51 paras 2 *et seq*.

[12] *De Luna* [1962-I] YbILC 49 para 61.

[13] At first, SR *Waldock* suggested a bracketed reference to common designations (*Waldock* I 31). Japan's doubts about the utility of such a necessarily incomplete enumeration prevailed (*Waldock* IV 10).

[14] See Art 38 para 1 lit a ICJ Statute.

[15] See the 1966 International Covenant on Civil and Political Rights 999 UNTS 171.

of notes/letters', 'joint communiqué' and 'agreed minute'.[16] The specific designation is seldom randomly selected by the participating parties[17]: terms such as 'exchange of letters' indicate – contrary to 'covenant' – the less formal character of the agreement; the title 'declaration' may suggest that no legally binding effect is intended.[18] Nonetheless, one must be extremely careful when assessing the status of an instrument solely based on its title.[19] The **provisions** of the agreement, the **particular circumstances** in which it was drawn up, as well as the **intention of the parties** may disprove the *prima facie* suggestion communicated by a designation.[20]

3. Designation Within the Convention

6 Art 2 para 1 lit a utilizes the term 'international agreements' as an unspecified generic term absorbing 'treaties' as well as all other international instruments which do not meet the requirements listed in lit a (→ Art 3 MN 3). The ILC selected the term 'treaty' among all designations for international agreements (→ MN 5) for the simple reason that the codified branch of international law was universally referred to as 'the law of treaties'.[21]

7 The decision to limit the **scope** of the VCLT *ratione personae* to **States** (→ Art 1 MN 8) necessarily delimits the usage of the term 'treaty' simply because the definition clause shapes the terminological usage of the Convention (→ MN 2). Art 2 para 1 lit a of the VCLT II, however, runs counter to the notion that, for the general purpose of international law, the term 'treaty' is legally reserved for agreements concluded between States. For the purpose of both Conventions, the term 'treaty' is used to visualize the line between agreements subject to codified treaty law and agreements not subject to codified treaty law (→ Art 3).

4. Classification of Treaties

8 Since the undertaking to classify treaties is primarily of academic interest, the ILC consciously avoided compiling different types of treaties.[22] From a general perspective, treaties can be classified according to laterality (**bi-, tri-, pluri-** and

[16] *Cf* PCIJ *Customs Régime between Austria and Germany (Protocol of March 19th, 1931)* (Advisory Opinion) PCIJ Ser A/B No 41, 47 (1931); see the statistical evaluation of the international use of terms in *DP Myers* The Names and Scope of Treaties (1957) 51 AJIL 574, 576.

[17] *JK Gamble* Multilateral Treaties: The Significance of the Name of the Instrument (1980) 10 California Western ILJ 1; *Klabbers* 43; *Myers* (n 16) 578 *et seq*.

[18] But see High Court (Hong Kong) *Tang Ping-hoi v Attorney-General* 92 ILR 638, 640 (1985), stating that the Sino-British Joint Declaration constitutes a 'treaty'.

[19] ICJ *South West Africa Cases (Ethiopia v South Africa, Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 331.

[20] ICJ *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 3, para 96.

[21] ILC Report 14th Session [1962-II] YbILC 162 para 4.

[22] For a different approach, see *Waldock* I 31, 41 (Draft Art 1 lit d, Draft Art 6); *Fitzmaurice* I 108 (Draft Art 6).

multilateral treaties) and – closely linked to this – according to geography (**universal** and **regional treaties**). With regard to the subject matter, one can distinguish between **general** and **particular treaties** (→ MN 13). Finally, the scholarly label as a **law-making treaty** in contrast to a mere **contractual treaty** differentiates with respect to the quality of obligations (→ MN 14).

At first glance, the terms 'bilateral' and 'multilateral' treaty are self-explanatory with regard to the two (*bi*) or several (*multi*) parties involved.[23] However, a treaty with a multitude of signatories may be **bilaterally structured** if it is concluded between one or more States on one side and two or more States on the other side, creating rights and obligations only between the mutually facing sides (formal reciprocity; → MN 33).[24] In principle, it adds up to the same legal effect as when one State concludes a number of textually identical treaties separately with two or more States except that these treaties may evolve in different ways.[25] **9**

Plurilateral treaties are commonly understood as treaties open to a restricted number of parties due to their specific subject matter[26] or geography.[27] **Multilateral treaties** (or collective treaties) which do not know such restrictions on participation may turn into *de facto* plurilateral treaties if only a few States have subject-matter-related interest in participation.[28] Within the **WTO context**, both terms become important since plurilateral agreements are those binding only WTO members that have chosen to sign[29] (voluntary participatory system) whereas the multilateral instruments are automatically binding for all WTO members (obligatory participatory system).[30] **10**

[23] *McNair* 29 prefers the terms "bipartite" and "multipartite".

[24] *Cf* the 2000 Cotonou Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the One Part, and the European Community and its Member States, of the Other Part [2000] OJ L 317, 3.

[25] *Cf* the two treaties, identical in content, concluded in 1993 between Germany and Georgia 2071 UNTS 193, and Germany and Latvia 2033 UNTS 409, for the promotion and reciprocal protection of investments.

[26] *BR Bot* Non-Recognition and Treaty Relations (1968) 105; *JF Hogg* The International Law Commission and the Law of Treaties (1965) 59 ASILP 8, 10; see *eg* the constituent instrument of the Organization of the Petroleum Exporting Countries (OPEC) 443 UNTS 247.

[27] *JK Gamble Jr*/*JB Kolb* Multilateral Treaties: An Assessment of the Concept of Laterality, (1980) 3 Loyola of Los Angeles International and Comparative Law Review 19, 25; see *eg* the 1983 Agreement for Cooperation in Dealing with the Pollution of the North Sea 1605 UNTS 39 and the 1964 Agreement Concerning the Niger River Commission 587 UNTS 19; the same is valid for the constituent documents of regional organizations such as the Council of Europe and the OAS, *Waldock* [1962-I) YbILC 77 paras 2 *et seq*.

[28] *Gamble*/*Kolb* (n 27) 30; for a bilateral treaty turned into a plurilateral treaty due to State succession, see the 1987 Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles 1657 UNTS 485.

[29] Art II para 3 WTO Agreement 1867 UNTS 154: *eg* Agreement on Trade in Civil Aircraft and Agreement on Government Procurement, Annex 4 to the WTO Agreement.

[30] Art II para 2 WTO Agreement: *eg* GATT 1994, Annex 1A to the WTO Agreement.

11 The characteristic of a '**trilateral treaty**' may be simply that three parties are involved.[31] However, the term conveys a specific meaning if a treaty establishes a legal relationship between two parties whereas the third party – typically an international organization – supervises the former's compliance with the treaty.[32] This constellation is trilateral because in relation to the treaty, the legal position of two sides is not the same as the legal position of the third side.[33]

12 If the participation in a treaty is restricted due to **geographic requirements**, international parlance prefers the expression '**regional treaty**' to 'plurilateral treaty'. In contrast, **universal treaties** are open to worldwide participation even if only entered into by a small group of States.

13 To juxtapose **general** and **particular treaties** is quite uncommon even if introduced as in Art 38 para 1 lit a, ICJ Statute. The ICJ tends to equate the term 'general treaties' with 'multilateral treaties', if at all.[34] SR *Waldock*'s understanding is beyond this scope: he entertained the idea that '**general multilateral treaties**' are treaties which deal with matters of general interest to States as a whole[35] – a perception well received at the Vienna Conference[36] but non-etheless dropped.[37] In international parlance, the term 'general treaty' helps to identify the substantive scope of a treaty; *eg* within the human rights context, **general human rights treaties** – whether universal or regional – indicate the broad spectrum of established human rights whereas **special human rights treaties** concentrate on a specific peril or subject area.

14 For a considerable time legal doctrine was prone to divide treaties into **law-making treaties** (or normative treaties) and **contractual treaties** (or synallagmatic treaties).[38] Today, this classification faces certain criticism as it has lost its clear-cut character.[39] Ideally, law-making treaties stipulate abstract principles and rules of general application,[40] in a metaphorical sense international legislation, whereas contractual treaties involve merely legal transactions such as the transfer of

[31] See *eg* the trilateral treaties between the three Baltic States Estonia, Latvia and Lithuania on higher education 2268 UNTS 224 and on tourism 2196 UNTS 232.

[32] See the agreements on the transfer of fissionable material between the IAEA and two States (a supplying and a receiving party), *eg* the 1965 Agreement between the Agency, the United States and Uruguay 556 UNTS 141.

[33] *Reuter* I 190.

[34] ICJ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)* [1984] ICJ Rep 246, para 83; *Gamble/Kolb* (n 27) 25.

[35] *Waldock* IV 10, Draft Art 1 para 1 lit c: "'General multilateral treaty' means a multilateral treaty which concerns general norms of international law or deals with matters of general interest to States as a whole."

[36] See the statement by the representative of the United Arab Republic UNCLOT I 26 para 37; see also the amendment proposed by the Democratic Republic of Congo *et al* UN Doc A/CONF.39/C.1/L.19/Rev.1, UNCLOT III 112.

[37] UNCLOT III 235; for the reserved comments of States, see *Waldock* IV 13.

[38] See above *Vattel* (n 4) book II ch XII Sect. 153 (*Fenwick* translation 160).

[39] *A Pellet* in *A Zimmermann/C Tomuschat/K Oellers-Frahm* (eds) The Statute of the International Court of Justice (2006) Art 38 MN 201; *Reuter* 27.

[40] See *eg* the 1982 UN Convention on the Law of the Sea 1833 UNTS 3.

sovereignty over a defined territory. Many international treaties, however, resist such strict categories by merging them (*eg* peace treaties).

5. Number of Parties

By using the plural of 'State', Art 2 para 1 lit a indicates that at least **two** States must be parties to the 'treaty' as defined. The plurality of participants seems to be a matter of course since the major characteristic of a 'treaty' is its consensual nature (→ MN 34). So far, the definition embraces **bilateral agreements** as well as **multilateral treaties** while excluding **unilateral declarations.** **15**

The fundamental characteristic of a **unilateral declaration (or act)** is its emanation from a single side. No previous participation and/or subsequent acceptance of a third party is required in order to create a legal obligation for the author.[41] In short, a unilateral declaration is an act of **auto-limitation** within the sphere of international law.[42] Its unilateral nature, as well as its legally binding character, has to be judged primarily by the intention of the author and unveiled by examining the structure, the object and the content of that announcement, the circumstances in which it was declared, as well as any reactions it may have prompted.[43] If a plurality of States act **collectively or jointly** (like-minded States) inasmuch as they do not intend to regulate their mutual relations, these acts are unilateral in nature. **16**

The thin line between a unilateral declaration and an (oral) agreement between the author of the declaration and its addressee is somewhat diffuse, in particular when the declaration is made on the specific request of the addressee.[44] This being said, tacit acceptance by the addressee would not deprive the preceding declaration of its unilateral character, if the declaration – judged on its own – creates legally binding obligations for the author based on **good faith**.[45] **17**

[41]ICJ *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, para 43.

[42]SR *Rodríguez-Cedeño*, First Report on Unilateral Acts of States (1998) UN Doc A/CN.4/486, para 59.

[43]ICJ *Nuclear Tests* (n 41) paras 43, 51; *Frontier Dispute (Burkina Faso v Mali)* [1986] ICJ Rep 554, para 40; *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, para 49; see also ILC, Report of the Working Group, Conclusions of the ILC Relating to Unilateral Acts of States, Guiding Principles (2006) UN Doc A/CN.4/L.703, para 3.

[44]*Cf Lauterpacht* I 90, Draft Art 2 (alternative version); the assessment of the so-called 'Ihlen declaration' as a bilateral engagement – left open by the PCIJ in *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53, 70 (1933) – is disputed in doctrine: affirmative Judge *Anzilotti* in his dissenting opinion *ibid* 91; *P Guggenheim* Traité de droit international public Vol 1 (1967) 138; negative jurisprudence: declaration of Judge *Rezek* in ICJ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening)* [2002] ICJ Rep 489, 490–491.

[45]ILC, Unilateral Acts of States, Guiding Principles (n 43) para 1.

6. Form

18 Unlike the Harvard Draft Convention on the Law of Treaties,[46] the VCLT leaves it to the contracting parties to decide on the – formal or informal – appearance of their understanding.[47] Hence, exchanges of letters, communiqués, notes or telegrams, *procès-verbaux*, as well as minutes and memoranda are proper instruments to record an agreement.[48] Also, with regard to the agreement's medium (instrument), no limits are set: the traditional **paper form** is replaceable by an **electronic data carrier** as it fulfills the requirement of a permanent (even if not everlasting) readable form.[49]

19 To meet the VCLT treaty definition, international agreements must be presented "in written form", *ie* **recorded in writing**,[50] whether handwritten, hand-typed or printed. The ILC's decision to exclude purely **oral agreements** from the scope of the Convention was, a matter of simplicity and clarity,[51] with no impact on the legally binding character of oral agreements (→ Art 3 MN 4–7).[52]

20 As the VCLT (and the ILC Commentary) does not give a strict definition of "written form", the determination must be based on the purpose of the 'written' criterion. With a view to the desired clarity, the requirement of written form seeks to evidence the existence of consent between at least two parties. That aim does not require the existence of signatures or initials if the circumstances or the content of the act (*eg* a communiqué or a *procès-verbal* of a meeting) indicate an accord.[53] If an oral agreement is evidenced in writing, *eg* documented by a third party with the authority of the parties, the formal requirement of "written form" is fulfilled.[54] In contrast, (video)taped understandings (reached *eg* in media conferences) do not

[46] Harvard Draft 657, Art 1 lit a: "A 'treaty' is a formal instrument of agreement [. . .]".

[47] Final Draft, Commentary to Art 2, 188 para 2; *cf* already PCIJ *Customs Régime between Austria and Germany* (n 16) 47.

[48] ILC Report 14th Session [1962-II] YbILC 163–164; Final Draft, Commentary to Art 2, 188 paras 2–3; for the international practice, see *J Basdevant* La conclusion et la rédaction des traités (1926) 15 RdC 539, 542 *et seq*.

[49] *Aust* 19 demands that the electronic text can be reduced to a permanent, readable form, *eg* by printing it out.

[50] *Brierly* I 223, Draft Art 1.

[51] [1962-II] YbILC 163 para 10.

[52] *Ibid*; but see *Lauterpacht* I 159 Draft Art 17 "An agreement is void as a treaty unless reduced to writting.". The binding character of oral agreements has been emphasized by the PCIJ in *The Mavrommatis Jerusalem Concessions* PCIJ Ser A No 5, 37 (1925); relating to unilateral declarations, see ICJ *Nuclear Tests* (n 41) para 45.

[53] *Argumentum*: Art 11 VCLT; see also ICJ *Aegean Sea* (n 20) para 96; Arbitration Act of 1996 (United Kingdom) Part 1 Sect. 5 para 2 lit a (1997) 36 ILM 165, 168.

[54] *Cf* UK Arbitration Act (n 53) Part 1 Sect. 5 para 2 lit c, para 4; for the VCLT, see the statement by the representative of the USSR UNCLOT I 41 para 69; for the VCLT II see *Reuter* II 81.

constitute a treaty "in written form" under the terms of the Convention if no authorized transcription was made.[55] The same holds true for an undocumented **oral answer** to a written proposal and *vice versa*.

21 The second major aim of the written form requirement is to facilitate the retracing of the agreement's content.[56] In this respect, **encrypted agreements** fall within the scope of the VCLT only if decipherable. Taking into account the spirit and purpose of the 'written' criterion, **drawings** (*eg* maps) should be subsumed under the definition, even if not accompanied by written words.[57]

22 The **number of instruments** which form a treaty is irrelevant for the purpose of the Convention.[58] The question of whether two or more documents, *eg* protocols or annexes, constitute one or more treaties has to be determined on the basis of the parties' will. If the parties agree to express their consent to be bound to each document separately, the *modus operandi* provides strong evidence in a multitude of treaties.

7. Governing Law

23 Treaties must be **governed by international law** in order to fall within the scope of the Convention. The phrase denotes the body of law applicable – *ie* all sources enumerated in Art 38 ICJ Statute[59] – when executing and interpreting the treaty (*eg* all questions relating to validity, binding force,[60] effect, application and termination)[61] and the body of law to be used when resolving any treaty-related dispute (*eg* the law of State responsibility).[62] The requirement serves to distinguish between international agreements regulated by public international law and those which, although concluded between States, are regulated by the national law of one of the parties or by some other national law system chosen by the parties by virtue of a choice-of-law clause (**proper law**).[63]

[55] *Cf Reuter* II 81.

[56] *Brierly* I 227 (Draft Art 1).

[57] Usually, maps are integrated or annexed to the text of the agreement, *DE Khan* Die Vertragskarte (1996) 63–75.

[58] Final Draft, Commentary to Art 2, 188 para 2.

[59] *Cf* Art 8.04 lit b no v of the September 1994 Standard Terms and Conditions issued by the European Bank for Reconstruction and Development; *cf Lauterpacht* I 90; *JW Head* Evolution of the Governing Law for Loan Agreements (1996) 90 AJIL 214, 227.

[60] *M Fitzmaurice/O Elias* Contemporary Issues of the Law of Treaties (2005) 20.

[61] *Cf Fitzmaurice* I 108 (Draft Art 7).

[62] *Cf Lauterpacht* I 90 (Draft Art 3).

[63] *Brierly* I 228; UNCLOT III 9 para 6.

See *eg* the loan agreements concluded by Denmark with Jordan,[64] Brazil,[65] Iran[66] and Malaysia[67] which contain an identical Art XII: "Unless otherwise provided for in the Agreement, the Agreement and all the rights and obligations deriving from it shall be governed by Danish law."[68]

24 As a rule, the legal system which provides the agreement with **binding force** is not necessarily identical to the legal system chosen to govern the provisions of the agreement (but see →Art 26 MN 27).[69] To come within the definition of 'treaty' and accordingly within the scope of the VCLT, however, interstate treaties must be both binding under international law and (at least partly) subjected to international law (→ MN 28–29).[70]

25 When drafting Art 2 para 1 lit a, the ILC discussed whether the phrase '**intended to be** governed by international law' would be preferable, in order to indicate that the proper law of an agreement depends on the will of the parties alone.[71] The ILC's final decision to abandon the words 'intended to be' was based on the presumption that the phrase "governed by international law" embraces the intent relating thereto.[72] There was, however, the strong opinion that, depending on the subject matter of the respective agreement, the freedom of States Parties to choose the proper law is limited by international law.[73] In view of international treaty practices, it was, and still is,

[64] 574 UNTS 3; a departure from Danish law is Art XIII (dispute settlement).

[65] 581 UNTS 95.

[66] 638 UNTS 217.

[67] 640 UNTS 30.

[68] When dealing with the UNGA Regulation referring to Art 102 UN Charter, the Sixth Committee suggested that an agreement between two governments was not an international agreement if it concerned a transaction of the same character as that which could be concluded by private persons or companies, and was governed by private international law and municipal law rather than by public international law, see (1945–1954) 5 RoP Art 102 para 22. The Secretariat, however, refused to determine the international nature of a registered treaty, leaving it to gradual development through practice (*ibid* para 20). In the pre-VCLT era, it was the understanding of the Secretariat that, since the terms "treaty" and "international agreement" have not been defined by Art 102 UN Charter and the related UNGA Regulation, the registration does not confer on the instrument the status of a treaty if it does not already have that status, *cf* (1954–1955) 2 RoP Supp No 1 Art 102 para 12. This self-conception is still valid even if the Secretariat is more or less guided by Art 2 para 1 lit a VCLT, at least since 1985, see (1985–1988) 6 RoP Supp No 7 Art 102 para 7.

[69] *I Seidl-Hohenveldern* The Theory of Quasi-International and Partly International Agreements (1975) 11 RBDI 567, 568.

[70] *Fitzmaurice/Elias* (n 60) 20.

[71] *Cf de Luna* [1962-I] YbILC 53 para 34; *Ago* [1962-I] YbILC 52 para 19; for a different perspective, see *Yasseen* (Chairman of the Drafting Committee) [1962-I] YbILC 52 para 24 (the character of the agreement as another the decisive elements); for the question of whether this applies also for the legal regime commanding the treaty's binding force → Art 26 MN 27.

[72] Final Draft, Commentary to Art 2, 189 para 6.

[73] *Yasseen* (Chairman of the Drafting Committee) UNCLOT II 346 para 22; see also *E Jiménez de Aréchaga* International Law in the Past Third of a Century (1978) 159 RdC 1, 37.

undisputed that States are at liberty to choose domestic law – or international law[74] – as the proper law if the subject matter of the agreement is of a **commercial nature**, *ie* relating to loans, trade of goods, guarantee of interest, the lease of buildings or the exchange of patents (*pacta iure gestionis*).[75] Contrary to the ILC's suggestion, however, it is questionable whether States are **legally obliged** to subject their agreements to international law if the latter affect the **sovereign sphere** of the parties or contain transactions of a sovereign character (*pacta iure imperii*).[76] Whereas national legal systems know limits of the choice-of-law principle 'l'autonomie de la volonté' due to public policy,[77] comparable international rules are difficult to detect.[78] Therefore, the issue should be solved in a practical rather than a dogmatic manner. If the selected municipal law appears to be – partially – inappropriate and ineligible with regard to the subject matter (*eg* the transfer of territorial sovereignty[79] contrary to real estate[80]), international law as the 'proper law' would fill the gaps.

26 If States exercise their '**autonomie de la volonté**' in an abusive way, *eg* in order to escape *ius cogens* obligations (→ Art 53) or obligations under the UN Charter (Art 103 UN Charter; → Art 30),[81] the conflicting international obligations of the contracting parties remain unaffected on the international plane, just as they remain unaffected in the case of inconsistent national legislation (→ Art 27).[82] An institution entitled to settle a contract-related dispute, however, may refuse to apply the national law governing the interstate contract if the consequences of that application would be contrary to international *ius cogens* obligations (*cf* → Art 53 MN 73–74).

27 The consent to subject an agreement to a domestic legal system can be **implicitly** expressed, elucidated by the subject of the agreement, the process of conclusion, the

[74] *Gros* [1962-I] YbILC 51 para 13.

[75] Harvard Draft 694; *Waldock* [1962-I] YbILC 53 para 32; *FA Mann* The Proper Law of Contracts Concluded by International Persons (1959) 35 BYIL 34, 35–41. *McNair* 4–5; *Reuter* 35.

[76] But see *Ago* [1962-I] YbILC 52 para 19; *Reuter* 35.

[77] *CW Jenks* The Proper Law of International Organizations (1962) 148.

[78] *J Verhoeven* Traités ou contrats entre États? Sur les conflits de lois en droit des gens (1984) 111 JDI 5.22–23; a different issue concerns the question of whether constitutional law permits State organs to conclude 'private law contracts' with a foreign State, *eg* with regard to parliamentary competences; but see the Danish–Iranian loan agreement (n 66), governed by Danish law, which states in Art XIV Sect. 1: "This Agreement shall come into force on the date upon which the constitutional requirements of both the Danish and the Iranian Government concerning foreign agreements have been fulfilled."

[79] For example the Alaska Purchase of 1867 (United States/Russia), see *DJC Bancroft* (ed) Treaties and Conventions Concluded between the United States of America and Other Powers since July 4, 1776 (1873) 741.

[80] For example the purchase of real estate for the construction of an embassy, *cf McNair* 5.

[81] According to *R Bernhard* in *Simma* Art 103 para 21, Art 103 UN Charter is applicable to private law contracts.

[82] *S Michalowski*/*JP Bohoslavsky* Ius cogens, Transnational Justice and Other Trends of the Debate on Odious Debts: A Response to the World Bank Discussion Paper on Odious Debts (2009) 48 Columbia JTL 59, 68.

State organs involved and the place of performance.[83] In a case where the States Parties do not explicitly or implicitly choose domestic law as the proper law of their agreement, it is **assumed** that the agreement is governed by international law regardless of its content.[84]

28 In some cases, agreements between States and/or international organizations are governed in some respects by international law, in other respects by the law of a particular State.

> *Cf* the 2009 Framework Agreement on Integrated Cross-Border Maritime Law Enforcement Operations between the Government of the United States of America and the Government of Canada ('Shiprider Agreement'),[85] Art 11 para 2: "Any claim submitted for damage, harm, injury, death and loss resulting from an integrated cross-border maritime law enforcement operation carried out by a Party under this agreement shall be resolved in accordance with the domestic law of the party to which the claim is brought and with international law."
>
> See also the 1950 Loan Agreement between Iraq and the IBRD,[86] where it is stated in Art X § 1 that "the respective rights and obligations of the parties hereto under this Agreement [...] shall be valid and enforceable in accordance with their terms anything in any statute, law or regulation of any nation or state [...] to the contrary notwithstanding". Even so, Art X § 2 determines that "the provisions of this Agreement [...] shall be interpreted in accordance with the law of the State of New York, United States, as at the time in effect".[87]

29 Such **hybrid agreements** can be considered treaties "governed by international law" because they are, in principle, subjected to international law as the fundamental legal regime common to both parties.[88] Isolated treaty provisions deviant thereto, while referring to municipal law for certain purposes, do not frustrate the application of the VCLT.[89]

30 When the ILC discussed the parallel provision of the **VCLT II**, the question arose as to whether the Convention should be applicable if an agreement between

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[83] *Diverted Cargoes Case (United Kingdom v Greece)* 12 RIAA 65 (1955); see also *Jenks* (n 77) 151.

[84] *GR Delaume* The Proper Law of Loans Concluded by International Persons (1962) 56 AJIL 63, 76.

[85] 48 ILM 897 with reference.

[86] 155 UNTS 267.

[87] Provisions like Art X Sec 2 have caused significant confusion among States and scholars and hence have been dropped by the IBRD, *cf A Broches* International Legal Aspects of the Operations of the World Bank (1959) 98 RdC 301, 357. *Mann* (n 75) 38 interpreted the provision as a choice-of-law clause which makes the whole of the law of New York applicable to the agreement; for objections, see *Delaume* (n 84) 70; *Broches* (n 87) 358.

[88] See *Reuter* III 138–139 (Draft Art 2 para 1 lit a): "'treaty [...]' means an international agreement [...] in written form and governed principally by general international law".

[89] *Reuter* [1974-I] YbILC 133 para 26 ("mechanism of *renvoi*"). The ILC dropped the term "principally" because the phrase chosen in Art 2 para 1 lit a VCLT was regarded as sufficient since it was interpretable, *cf Yasseen* [1974-I] YbILC 146 para 17.

an international organization and one of its Member States is subjected to the internal rules of the international organization.[90]

Cf § 1.01 of the 1967 Guarantee Agreement between Colombia and the IBRD,[91] which states that the parties accept all the provisions of the IBRD Loan Regulations with the same force and effect as if they were fully set forth in the agreement.

31 In order to exclude agreements governed by the internal law of an international organization from the scope of the 1986 Convention, SR *Reuter* suggested the phrase "governed by **general international law**".[92] The ILC has rightly rejected this addition since – unlike municipal law – the internal rules of an international organization cannot be strictly segregated from international law. International law – *eg* Art 53 VCLT (*ius cogens*) – governs the constituent instrument of an international organization and consequently its derivative internal rules. Therefore, an agreement subjected to the internal rules of an international organization is ultimately governed by international law.

8. Intention to Establish a Legal Relationship

32 Even if the final wording of Art 2 para 1 lit a does not reflect the necessity of the parties' intention to establish a legal relationship, the respective *consensus ad idem*[93] still constitutes a decisive element in order to characterize treaties as being different from political instruments: no will, no law (**voluntarist approach**).[94] Contrary to the ILC,[95] the States quite broadly discussed the phrase 'intended to create rights and obligations'[96] as a desirable amendment to *Waldock*'s Draft Art 2.[97] The Drafting Committee, however, emphasized that the phrase 'governed

[90] Art 2 para 1 lit a VCLT II, *cf Reuter* X 49–50.

[91] 614 UNTS 48.

[92] *Reuter* III 132.

[93] *K Widdows* What Is an Agreement in International Law? (1979) 50 BYIL 117, 119.

[94] Critical *A Pellet* The Normative Dilemma: Will and Consent in International Law-Making (1988–1989) 12 AYIL 22.

[95] The discussion on 'intent' within the ILC was proceeded along two tracks and somewhat jumbled: in the first place, the notion was regarded as an element to distinguish agreements governed by international law from those governed by municipal law (see n 71). However, the ILC discussion followed a different track since the element of intent was regarded as necessary to distinguish between legally binding and non-binding instruments; *cf Klabbers* 58.

[96] *Lauterpacht* I 90 (Draft Art 1); for alternative wordings, see *Brierly* I 223 (Draft Art 1 lit a: "which establishes a relationship under international law"); *Fitzmaurice* I 107 (Draft Art 2 para 1: "intended to create rights and obligations, or to establish relationships, governed by international law").

[97] *Waldock* I 31. See the criticism of Austria [1965-II] YbILC 10 and the amendments proposed by Chile UN Doc A/CONF.39/C.1/L.16, and Malaysia and Mexico UN Doc A/CONF.39/C.1/L.33 and Add.1, UNCLOT III 111; for a comprehensive overview of the discussion, see *Klabbers* 58–62.

by international law' would embrace the **element of intent** and thus rejected the amendment.[98]

33 As a general rule, the parties must intend to create a legally binding instrument comprising **rights and obligations** in order to conclude a 'treaty' in terms of the VCLT. Such legal rights and obligations necessarily correspond, *ie* the obligations incumbent on one subject always match the right of the other subject (**correlation of rights and duties**).[99] On the other hand, the agreed rights and obligations need not be equally distributed among the parties (unequal treaty; → Art 52 MN 16). Moreover, the compliance structure of the treaty does not have to be reciprocal (→ Art 26 MN 34–36).[100]

34 In some cases, the parties' consent does not produce tangible legal rights and obligations; non-etheless it amounts to a 'treaty' in terms of the VCLT if the parties' will establishes or affects a **legal relationship** in a broader sense. Some treaties derogate pre-existing international rights and obligations; others authoritatively reinterpret a preceding treaty but are treaties in themselves (→ Art 31 MN 72–75).[101] If a document, however, gives a mere account of the discussion and a summary of facts, considerations, explanations and statements[102] rather than commitments, it constitutes a simple record of a meeting without being a treaty.[103]

35 The element 'intent to establish a legal relationship' is crucial for the distinction between legally binding treaties and **non-binding instruments**. If the parties have not made their intention to enter into legal relations – or the lack of such intention[104] – explicit (*eg* with a ratification clause[105]), the determination of the legally binding character of the respective instrument has to be based on indications.[106]

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[98] *Yasseen* (Chairman of the Drafting Committee) UNCLOT II 346 para 22; see also *Waldock* IV 12.

[99] SR *R Ago* Second Report on State Responsibility [1970-II] YbILC 192 para 46; *B Simma* Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge (1972) 52–54.

[100] *Cf* the dissenting opinion of Judges *Adatci*, *Kellogg*, *Rolin-Jaequemyns*, *Hurst*, *Schücking*, *van Eysinga*, *Wang* in PCIJ *Customs Régime between Germany and Austria* (n 16) 74.

[101] *Cf* ILC Report 11th Session [1959-II] YbILC 96 para b.

[102] For an exchange of declaratory statements, see Federal Court (Switzerland) *Jecker v Geonafta* 3 ILR 333, 334 (1925).

[103] ICJ *Qatar v Bahrain* (n 3) para 25; (1945–1954) 5 RoP Art 102 para 31 lit e.

[104] See *eg* the 1975 Helsinki Final Act 14 ILM 1292, 1325: "this Final Act, which is not eligible for registration under Article 102 of the Charter of the United Nations".

[105] *Cf JES Fawcett* The Legal Character of International Agreements (1953) 30 BYIL 381, 388; *Klabbers* 74; *Aust* 34–35.

[106] *C Chinkin* A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations between States (1997) 10 Leiden JIL 223, 241; *A Aust* The Theory and Practice of Informal International Instruments (1986) 35 ICLQ 787, 800–806.

The ICJ decided on intention with view to the drafting history,[107] the language of the agreement[108] and the circumstances of its conclusion[109] as well as the subsequent practice (*eg* documents submitted for registration under Art 102 UN Charter).[110] In contrast, the designation and the form of the act[111] as well as the failure to register was considered irrelevant.[112] The same holds true for the presence of signatures since it does not necessarily denote a legally binding consent (*cf* the 1975 Helsinki Final Act).[113]

If the intent of the parties to be legally bound under international law cannot be determined on the basis of objective criteria, it has to be assumed that no legal relations have been established.[114] If the scrutiny of all objective criteria reveals that some parties to a multilateral instrument have considered it a legally binding treaty whereas the other participants have lacked the intention to establish a legal relationship, it has to be determined whether treaty relations have been established between the former groups. The question has to be answered in the affirmative unless the intended distribution of rights and obligations among the participants necessarily demands the participation of the latter group in the treaty (substantive reciprocity; → MN 33). If the requirements of Art 48 are met (→ Art 48 MN 11–30), a party to the former group may invoke an **error** in order to invalidate its consent to be bound by the treaty. **36**

9. Non-legally Binding Agreements

The terms commonly used to capture the character of non-legally binding agreements vary: 'soft law',[115] 'extra-legal commitment', 'gentlemen's agreement', '*de facto* agreement', 'non-treaty agreement', 'political commitment' or 'informal understanding'.[116] The same holds true for their official designation: 'declaration', 'statement', 'guideline', 'recommendation' or 'programme' are just a few among many designations selected by the parties to accentuate the non-legal character **37**

[107]ICJ *South West Africa* (n 19) 330 (negotiating history).

[108]*Ibid* 330–331 (preamble); *cf Aust* 33–34.

[109]ICJ *Aegean Sea* (n 20) para 96; *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, paras 22–23.

[110]ICJ *South West Africa* (n 19) 332–333.

[111]*Ibid* 331; ICJ *Aegean Sea* (n 20) para 96.

[112]ICJ *South West Africa* (n 19) 332; *Qatar v Bahrain* (n 3) para 29.

[113]*Klabbers* 75.

[114]UN Treaty Handbook (2001) para 5.3.4: "clear on the face of the instrument".

[115]The term 'soft law' is polymorphic in the sense that it is applied in several ways: apart from the equation with 'non-legally binding agreement', an alternative view considers 'soft law' as open-textured, vague and thus 'soft' principles within treaties (*eg* Art 5 of the 1949 North Atlantic Treaty 34 UNTS 243), see *W Heusel* Weiches Völkerrecht (1991) 236–257; *H Hillenberg* A Fresh Look at Soft Law (1999) 10 EJIL 499, 500; *A Boyle* Some Reflections on the Relationship of Treaties and Soft Law (1999) 48 ICLQ 901, 906–909; others apply the term 'soft law' to rules not readily enforceable through binding dispute resolutions, *cf Boyle ibid* 909–912.

[116]*Cf Aust* (n 106) 787; *Klabbers* 16 with further references.

of the instrument. The name, however, neither determines the status nor the effects of the instrument (→ MN 5).[117]

38 The reasons to opt for a non-legally binding instrument may be manifold (*eg* simplicity,[118] secrecy[119] or necessity[120]) but are, reducible to the primacy of leeway over legal certainty.[121] A much discussed but somewhat academic systematization of non-legally binding agreements has been introduced by *Eisemann*[122]: whereas "accords informels politiques" are to be programmatic in character,[123] "accords informels supplétifs (interprétatifs)" serve to prevent a procedural paralysis within organs of international organizations.[124] Finally, the States agree on "accords informels normatifs" when regulating their future conduct in a treaty-like but informal manner.[125] As is the case with the term 'soft law', the latter category institutes a law-making process without substantiating it.

39 It is undisputed that non-legal instruments produce the **political** or **moral obligation** for the participating States to perform their mutual commitments. No different from treaties, the willingness to perform these non-legal commitments depends strongly on their reciprocal (self-)interest.[126] Contrary to treaties, the neglect of political commitment must not entail countermeasures (**reprisals**) according to the law of State responsibility but may yield unfriendly but lawful responses (**retorsions**).

40 The distinction between non-legal agreements between States and **true gentlemen's agreements** has more historical value than actual importance: the latter are to be **personal pledges of honor** given by the official in his or her private capacity but yet closely related to his or her political position, influence and fate.[127] If the expectations in the officials' actions are belied, no retaliatory acts may be taken against the official's State other than unfriendly but lawful responses (retorsions).

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[117] *Cf* International Agreement Regulations of the US State Department 22 Code of Federal Regulations Part 181 (a.5); reprinted by *Aust* (n 106) 799.

[118] See *eg* the agreement on the distribution of seats in the UN Security Council or the ILC.

[119] See *eg* the UK–US Memorandum of Understanding on UK Participation in the US Strategic Defense Initiative Research Program, *cf Aust* (n 106) 793 footnote 19.

[120] See *eg* the Atlantic Charter of 17 August 1941, consciously non-binding *inter alia* to prevent "territorial integrity claims" of the defeated States, *cf G Schwarzenberger* Power Politics (1964) 290.

[121] For reasons to opt for a binding treaty, see *JL Goldsmith/EA Posner* A Rational Choice Approach (2003) 44 VaJIL 113, 122–134.

[122] *PM Eisemann* Le 'Gentlemen's Agreement' comme source de droit international (1979) 106 JDI 326, 331–338.

[123] For example the Atlantic Charter (n 120).

[124] For example agreements on decision-making, *cf* the EEC Council Compromise of Luxembourg (1966) 8 Bulletin of the European Economic Community No 3.

[125] For example the Helsinki Final Act (n 104).

[126] *K Zemanek* Is the Term 'Soft Law' Convenient? in *G Hafner et al* (eds) Festschrift Seidl-Hohenveldern (1998) 843, 856.

[127] *Eisemann* (n 122) 327–329; *Hillenberg* (n 115) 500; *Klabbers* 16 with references to historical cases.

There is strong disagreement among scholars whether non-legally binding agreements can produce legal consequences *via* the **principle of estoppel**.[128] If a State relies upon mutual but non-legal commitments and takes proper actions, the question arises whether the State's confidence in the other State's compliance or the other States' confidence in the continuance of actions is worthy of legal protection. It is not so worthy if the intention of both States to create a non-legally binding instrument can be established.[129] In that case, all participating States are aware that none of them is legally estopped from changing the conduct; their remaining discretionary powers are unfolded. Therefore, the existence of a non-legally binding agreement does rather oppose the operation of the estoppel principle more than support it. However, non-legally binding agreements may shape consent for future treaties. If the participating parties change their *opinio iuris*, a non-legally binding agreement may generate a feeling of necessity (*opinio necessitatis*) and lead to custom. **41**

There are a few cases in which **international courts and tribunals** have applied 'soft law', most of them non-binding resolutions of international organizations.[130] An exceptional example for the judicial application of a non-legally binding agreement between States is the Charter on Fundamental Rights of the European Union,[131] referred to by the ECJ in order to emphasize the importance of certain human rights within the EU legal order.[132] This approach represents the characteristic of most international decisions that consult soft law instruments: non-legally binding principles are exploited to unveil the content of treaty or custom, *ie* traditional sources of international law. **42**

II. Ratification, Acceptance, Approval and Accession (para 1 lit b)

→ Art 14 MN 9–20, Art 15 MN 7–10 **43**

III. Full Powers (para 1 lit c)

→ Art 7 MN 10–14 **44**

[128] *Eisemann* (n 122) 347; *Aust* 54–55; *id* (n 106) 810.

[129] *Heusel* (n 115) 214 instances *inter alia* the 1969 Austro-Italian 'operation calendar' for South Tyrol (English translation in *AE Alcock* The History of the South Tyrol Question (1970) 448–449).

[130] *J Klabbers* The Redundancy of Soft Law (1996) 65 Nordic JIL 167, 172–174.

[131] [2000] OJ L 364, 1.

[132] *Cf* ECJ (CJ) *Unibet* C-432/05 [2007] ECR I-2271, para 37; *Reynolds Tobacco et al v Commission* C-131/03 P [2006] ECR I-7795, para 122.

IV. Reservation (para 1 lit d)

45 → Art 19 MN 1–6

V. Negotiating State, Contracting State and Party (para 1 lit e–g)

46 The definitions of negotiating State, contracting State and Party align the legal position of States within the different stages of the treaty-making process. A **negotiating State** (Art 2 para 1 lit e) takes part in the drawing up and adoption of the text of a treaty (→ Art 9); at this stage, neither the intention of being later bound by a treaty nor the future fate of the adopted text is of any relevance. A **contracting State** (Art 2 para 1 lit f), on the other hand, has consented to be bound by the treaty (→ Arts 11–15), whether the treaty is in force or not. The very moment the treaty **enters into force**, *ie* the principle *pacta sunt servanda* applies (Art 26 MN 29), the contracting State transforms into a **party to the treaty** (Art 2 para 1 lit g),[133] making the two terms complementary and not mutually exclusive.[134] On that, SR *Waldock* temporarily advocated the term '**presumptive party**' to essentially mean a State bound by a treaty not yet entered into force.[135]

47 The category "**States entitled to become parties to the treaty**" (see *eg* Art 23 para 1, Art 40 para 3) was considered self-explanatory and thus skipped. Within the VCLT, the phrase is primarily used to embrace potential parties that satisfy the accession criteria stipulated by the respective multilateral treaty.

48 Another undefined category is the '**signatory State'**, which appears within the Convention in close conjunction with the "contracting State" (see Art 79). The conjunction 'and' between the two terms clarifies that, for the purpose of Art 79, a signatory State is a State which has established the text of a treaty as authentic by signature (→ Art 10 MN 8 [lit b]). In procedural terms, the signatory State interposes between the negotiating State, which may drop out before the authentication of the text (→ Art 9), and the contracting State, (→ Art 11) which may join after the authentication.

VI. Third State (para 1 lit h)

49 → Art 34 MN 10–12

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[133] It appears to be slightly inaccurate of Art 2 para 1 lit g to speak of "a State [. . .] for which the treaty is in force", since Arts 69 and 71 use the term "party" in cases of treaties void *ab initio*; *cf Ago* [1966-I/2] YbILC 291 para 50 and Final Draft, Commentary to Art 2, 190 para 12.

[134] *Waldock* [1966-I/2] YbILC 291.

[135] *Waldock* I 31.

VII. International Organizations (para 1 lit i)

Art 2 para 1 lit i contains a traditional but rudimentary definition of international organizations, limiting the term to **intergovernmental organizations** in order to exclude non-governmental organizations from the scope of both Conventions, the VCLT and the VCLT II. **50**

Naturally, the definition of this term is far more significant in the 1986 Convention and was consequently subject to a detailed discussion in the course of its drafting.[136] The ILC and the 1986 Vienna Conference decided to adhere to the 1969 definition because it proved satisfactory for the purpose of the 1986 Convention: either an international organization has the capacity to conclude at least one treaty, in which case the rules of the VCLT II are applicable to it, or, despite its title, it does not have that capacity, in which case it was considered pointless to state explicitly that the 1986 Convention does not apply to it.[137] **51**

When discussing the law of international organizations' responsibility in 2003, the ILC elaborated on a broader definition which reflects some considerations already made in 1986: "the term 'international organization' refers to an organization established by a treaty or other instrument governed by international law and possessing its own legal personality. International organizations may include as members, in addition to States, other entities".[138] As a matter of fact, the reference of Art 2 para 1 lit i to "intergovernmental organization[s]" describes a more historical concept than the present-day one of international organizations. Even if the States still constitute the vast majority of **members of international organizations**, international organizations themselves become increasingly active as founders and/or members of other organizations, if the latter's constitution so provides. Since it is not the purpose of Art 2 para 1 lit i to exclude those organizations from the scope of the Convention, the term "intergovernmental organization" embraces all organizations whose membership is composed of subjects of international law which are capable of concluding or acceding to the international instrument constituting the organization (→ Art 6). **52**

Supported by academic writing,[139] some States insist that non-State entities without assigned **agreement-making capacity** (→ Art 3 MN 11; Art 6 MN 26–31) cannot be regarded as proper international organizations.[140] Art 2 para 1 lit i of both the 1969 and the 1986 Convention does not follow this narrow understanding **53**

[136]See *eg* the comments and observations of governments and principal international organizations [1981-II/2] YbILC 181 *et seq*, particularly Canada (182 paras 3–4) and Romania (189 para 1); *Reuter* III 142 and X 50; Final Draft 1982, Commentary to Art 2, 20 paras 19 *et seq*; UNCLOTIO I 43.

[137]Final Draft 1982, Commentary to Art 2, 21 para 23.

[138]ILC Report 55th Session UN Doc A/58/10, 33 (Draft Art 2).

[139]*CF Amerasinghe* Principles of the Institutional Law of International Organizations (1996) 101; *DW Bowett* The Law of International Institutions (1982) 341 *et seq*; *C Dominicé* Immunité de jurisdiction et d'exécution des organisations internationales (1984) 189 RdC 145, 164; *JW Schneider* Treaty-Making Power of International Organizations (1959) 133.

[140]See the comments of Austria [1966-II] YbILC 281.

when simply equating international organizations with "intergovernmental organization[s]" without recourse to a possible treaty-making capacity.[141] In addition, Art 84 VCLT II assumes that international organizations may not be equipped with treaty-making capacity, which would naturally bar them from **accession** to the Convention.

VIII. Use of Terms in Internal Law

54 The multitude of terms that designate an 'international treaty' (→ MN 5) proliferates within the realm of domestic (constitutional) laws. In some cases, the default references to international treaties vary without cause.[142] Generally, however, constitutions create particular categories of international treaties in order to assign competences to various State organs or to subject them to the internal ratification process with respect to simplified procedures: 'executive agreement',[143] 'intergovernmental agreement'[144] and 'administrative agreement'[145] are some of the many designations introduced by domestic law for this very reason.[146] From that, it follows that in the domestic context, the term 'treaty' may be used differently from its definition in Art 2 para 1 lit b VCLT.[147]

> The specific usage of the term 'treaty' in the US Constitution (Art II § 2) emerged as an insurmountable obstacle to US ratification of the VCLT: 'treaties' under Art II § 2 US Constitution are international instruments to which the Senate must consent whereas "treaties" under the VCLT would also include other international instruments, *eg* those

[141] *HG Schermers/NM Blokker* International Institutional Law (2003) Sect. 1748; *K Schmalenbach* Die Haftung Internationaler Organisationen (2004) 58.

[142] *Cf* the German Constitution of 1949 (Basic Law) – Art 59 para 1: "Verträge" ('treaties'), Art 79 para 1: "völkerrechtliche Verträge" ('international treaties') and Art 123 para 2: "Staatsverträge" ('treaties with States or international organizations'); for the comparable terminology of the Austrian Constitution of 1920, see *F Cede/G Hafner* in *D Hollis/MR Blakeslee/LB Ederington* (eds) National Treaty Law and Practice (2005) 59, 61–63; for the terminology applied in the constitutions of Austria, Chile, Colombia, Japan, the Netherlands and the United States, see *M Leigh et al* (eds) National Treaty Law and Practice (1999).

[143] *Cf* n 148 *infra*.

[144] *Cf* Art 131 para 2 no 6 Constitution of the USSR of 1977.

[145] *Cf* Art 59 para 2 German Constitution of 1949 ("Verwaltungsabkommen").

[146] The South African Constitution distinguishes between binding "international agreements" (Art 231 paras 1–2) and "an international of 1996 agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive" (Art 231 para 3). Similarly, the French Constitution of 1958 provides for "un accord international non soumis à ratification" (Art 52) and "traités ou accords régulièrement ratifiés ou approuvés" (Art 55). The Austrian Constitution of 1920 in Art 50 para 1 and Art 66 para 2 differentiates between "political" ("politische") and other "Staatsverträge" (*eg* "Ressortabkommen").

[147] The term "treaty" in the Swiss Constitution of 1999 is also used for treaties between cantons (Arts 48, 186), treaties between the Swiss Federation and its cantons (Art 63a) or treaties between cantons and a foreign State (Arts 56, 186). In the latter sense, *cf* Art 16 Austrian Constitution; Art I Sect. 10 US Constitution of 1787.

solely authorized by the President.[148] The terminological divergence prompted a senatorial clarification: by reducing the scope of the VCLT definition to that of Art II § 2 US Constitution, the Senate stresses that the VCLT could not hold the United States bound to any 'treaty' which the Senate had not accepted (→ Art 46). This senatorial clarification was not acceptable to the Department of State: other States could lose their faith in the United States' readiness to honour all its treaties (→ Art 26). Since no progress has been made in resolving this dispute, the United States has not acceded to the VCLT yet.[149]

Within a national context, the terms '**ratification**', '**acceptance**' or '**approval**' refer – if not corresponding with the definition of Art 2 para 1 lit b VCLT[150] – to the internal parliamentary or executive procedure preceding the ratification process under international law.[151] Even the usage of the term '**international organization**' may deviate from Art 2 para 1 lit i VCLT if the specific legal usage embraces non-governmental bodies and international conferences[152] or demands for treaty-making capacity in order to qualify as an international organization as such (→ Art 6 MN 26). **55**

The VCLT is aware of the divergent use of treaty-related terms in international and internal law. In order to prevent a possible predominance of the international usage at the expense of the domestic diction, Art 2 para 2 reiterates that all definitions listed in para 1 exhaust their meaning within the Convention (→ MN 2) and thus are without prejudice to the use of terms or to the meaning which may be given to them in the internal law of States and – according to Art 2 para 2 VCLT II – in the rules of international organizations. In the case of the United States (→ MN 54), the clause has not achieved its ends. **56**

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[148]US Department of State, Digest of US Practice in International Law (1974) 195–196. In the United States, there are three forms of international agreements which do not require the consent of the Senate according to Art II Sect. 2 of the Constitution: (a) congressional-executive agreements; (b) executive agreements pursuant to a treaty; and (c) sole executive agreements; see Restatement (Third) of Foreign Relations Law (1987) Sect. 303.

[149]*RE Dalton* The Vienna Convention on the Law of Treaties: Consequences for the United States (1984) 78 ASILP 276, 277.

[150]*Cf* the French Constitution of 1958: "la ratification ou l'approbation" (Art 74) or "ratifiés ou approuvés" (Arts 53, 54, 55); Spanish Constitution of 1978: "ratificados" (Art 10 para 2); South African Constitution of 1996: "approved" and "ratification or accession" (Art 231).

[151]"[L]as leyes aprobadas" in Art 91 Spanish Constitution of 1978 refers to all laws passed by the Cortes Generales; Art 50 para 1 Austrian Constitution of 1920 prescribes with the term "Genehmigung" the procedure to obtain acceptance from the first chamber (Nationalrat) and with the term "Zustimmung" the procedure to obtain approval from the second chamber (Bundesrat).

[152]*Cf* the practice of the European Union under Art 220 para 1 TFEU; for details, see *K Schmalenbach* in *C Calliess*/*M Ruffert* (eds) EUV/AEUV (4th ed 2011) Art 220 MN 3–4.

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Article 3

International agreements not within the scope of the present Convention

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(a) The legal force of such agreements;
(b) The application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
(c) The application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

Contents

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
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A. Purpose and Function

1 The insertion of the provision was the logical consequence of the ILC's decision to limit the scope of the Convention *ratione formae* (written form;→ Art 2 MN 19) and *ratione personae* (States;→ Art 1 MN 8). The sole purpose of Art 3 is to secure that no legal conclusions whatsoever can be drawn from the Convention's pragmatic step to focus on written interstate treaties. Thus, Art 3 lit a and b decides neither on the legal regime nor on the legal force of international agreements that remain excluded from the scope of the Convention; those questions are exclusively answered by the relevant rules of international customary law.[1] In that way, Art 3 lit b stresses the possible dual nature of substantive provisions of the Convention, which is reaffirmed in Art 4 (→ Art 4 MN 4).[2] And finally, Art 3 lit c clarifies that the Convention remains applicable between States Parties notwithstanding the fact that other parties to the same treaty are not bound by the Convention (→ Art 1 MN 3).

B. Historical Background and Negotiating History

2 Given its limited meaning, Art 3 – introduced by SR *Waldock*[3] – was unchallenged at the Vienna Conference.[4] For the historical background and negotiating history, see the relevant subsections on the various elements of Art 3: → MN 4–7 on oral agreements, → MN 21–23 on statehood of component units of federal States, → MN 37–38 on agreements with dependent territories, → MN 57 on agreements with indigenous peoples.

C. Elements of Article 3

I. International Agreements

3 Within the context of Art 2 para 1 lit a, the term 'international agreement' is used as an unspecific generic term, which envelops the decisive term 'treaty' (→ Art 2 MN 8). Art 3, however, applies the term 'international agreement' in a more concrete fashion. The overall picture of the elements of Art 3, particularly the linking of 'States' and '*other* subjects of international law', indicates that the provision exclusively concerns agreements concluded between subjects of international law possessing **internationally recognized agreement-making capacity** (→ MN 9–15).

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[1] See the statement by the representative of Ethiopia UNCLOT I 37 para 21.

[2] *ME Villiger* Customary International Law and Treaties (1997) para 419.

[3] *Waldock* I 35 (Draft Art 2 para 2).

[4] *Waldock* IV 16; for the discussion in the Committee of the Whole, see UNCLOT I 36–42.

II. Oral Agreements

On the international plane, oral agreements had made their regular appearance before and during the Westphalian era.[5] **4**

Legal writers *eg* refer to an ancient oral agreement between *Mithridates*, King of Pontus, and the Roman General *Sulla* in 84 BC.[6] In the Middle Ages, orally agreed personal pledges between sovereigns were quite common, *eg* between *Louis the German* and *Charles the Bald* in 870.[7] *Martens* referred to an oral agreement in the nature of an alliance between the Russian Czar *Peter the Great* and *Frederick III*, Elector of Brandenburg, in 1697.[8]

The relevance of purely oral agreements for the inter-State relations, however, declined in the twentieth century not only because of the States' duty to register their agreements (Art 18 League of Nations Covenant, Art 102 UN Charter) but also because of the States' increasing desire for legal certainty within their legal relations.[9] **5**

A rare example of publicly known oral agreements concluded in the 20th century is the telephone agreement of 1992 between the prime ministers of Denmark and Finland regarding the Great Belt Bridge.[10]

The **legal force** of oral agreements has been emphasized by the ILC[11] and the ICJ[12] and is widely undisputed among writers.[13] Nonetheless, the actual use of oral agreements gave rise to criticism. *McNair* branded them as "undemocratic" since their informal nature eliminates the involvement of any other political organ, which would normally participate in the municipal process of ratification.[14] **6**

Oral agreements are governed by **international customary law of treaties**, reflected *mutatis mutandis* in those provisions of the VCLT, which do not tie up to the writing criterion (*eg* Arts 6–8, 26–38). In practice, oral agreements are often recorded in minutes or *procès-verbaux*. Given that Art 2 para 1 lit a VCLT does not demand a formal appearance of the agreements (→ Art 2 MN 21), many **7**

[5] *Cf JW Garner* The International Binding Force of Unilateral Oral Declarations (1933) 27 AJIL 493, 494.

[6] *J Barbeyrac* Histoire des Anciens Traitéz, Supplément au corps universel diplomatique du droit des gens (1739) Vol I (I) CCCCLXXIII.

[7] *L Geßner* in *F Holtzendorff* (ed) Handbuch des Völkerrechts Vol 3 (1887) 86.

[8] *F de Martens* Traité de droit international Vol 1 (1883) 541.

[9] *Villiger* (n 2) paras 169–170.

[10] (1993) 32 ILM 103; for further examples *cf Xiaocheng Quin* Oral International Agreements and China's Relevant Practice (2005) 4 Chinese JIL 465, 472–476.

[11] [1966 II] YbILC 190 para 3.

[12] ICJ *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, para 45.

[13] Harvard Draft 689 (commentary to Art 1); Restatement (Third) of Foreign Relations Law (1987) § 301, *Garner* (n 5) 496.

[14] *McNair* 8; critical *GM Feder* The Developing Concept of 'Treaty' (1965) 4 Columbia JTL 48, 61.

contentious 'oral' agreements have been in fact written treaties, which fall within the scope of the VCLT.[15]

III. States

8 → Art 1 MN 8–11

IV. Other Subjects of International Law

9 Subjects of international law are commonly defined as entities **capable of possessing international rights and/or duties**.[16] This broad concept of international personality does not necessarily embrace the international **agreement-making capacity** of the said entity, *eg* of individuals. Art 3 presupposes that capacity by referring to "international agreements" concluded by international persons other than States (→ MN 3). Thus, the provision addresses first and foremost agreements of subjects with internationally approved agreement-making capacity (→ MN 10–15). In addition, the provision is open for a **future expansion** of the distinguished circle. It is an open issue, however, under which conditions the expansion of subjects with international agreement-making capacity may take place. In this regard, the differentiation between original and derivative agreement-making capacity is of fundamental importance.

1. Original Agreement-Making Capacity

10 As the term indicates, original agreement-making capacity is directly established by international customary law. It is the international legal order alone, which allocates that capacity to the relevant entity. Among the category of original capacity, the description as 'inherent' or 'inevitable'[17] capacity is commonly reserved for States to emphasize the unlimited scope and the irreversibility of their treaty-making capacity due to their singular legal position under the prevailing Westphalian system (→ Art 6 MN 11). Apart from this particular case, the agreement-making capacity established by international customary law may be subject to **substantive limitations** and to **changes in international practice and legal opinion** (*eg* ICRC → MN 43; Order of Malta → MN 45; liberation movements → MN 50).

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[15] *Cf* the dispute between China and Japan in 1905 concerning a commitment recorded in a minute, *Garner* (n 5) 496–497.

[16] ICJ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179; *MN Shaw* International Law (6th edn 2008) 196.

[17] *H Mosler* Die Erweiterung des Kreises der Völkerrechtssubjekte (1962) 22 ZaöRV 1, 31.

2. Derived Agreement-Making Capacity

Derived agreement-making capacity is conferred upon a single non-State entity by those possessing that capacity themselves. The **act of allocation** is essential for the acquisition of derived agreement-making capacity. **11**

a) Allocation Through International Agreement

The established method to assign agreement-making capacity to a non-State entity is to agree on it by way of **international treaty** (*eg* constituent instruments of international organizations; for details, see → Art 6 MN 26–31). **12**

> The Special Court of Sierra Leone was established by a bilateral agreement between the United Nations and Sierra Leone signed on 16 January 2002. According to Art 11 of this agreement, the Court "shall possess the juridical capacity necessary to [. . .] (d) enter into agreements with States as may be necessary for the exercise of its functions and the operation of the Court". In contrast, the Special Tribunal for Lebanon is established as an enforcement measure under UNSC Res 1757 (2007) after Lebanon has refused to ratify the annexed agreement originally aimed to establish the Tribunal. According to Art 7 of that annexed 'Agreement', the tribunal possesses international agreement-making capacity. Due to the specific circumstances of the case, Art 7 should be interpreted as the authorization of the Tribunal as a subsidiary organ of the Security Council to conclude international agreements on behalf of the UN.

Within the limits of their (implied) powers, non-State entities (*eg* international organizations) may agree to **passing on their derived agreement-making capacity** to a newly established international legal entity. **13**

> The Joint Vienna Institute, established in 1997 by four international organizations[18] and equipped with international personality (Art I Agreement for the Establishment of the Joint Vienna Institute[19]) entered the same year into a headquarters agreement with the host State Austria.[20]

b) Allocation Through Unilateral Act

Derived agreement-making capacity may also be **unilaterally conferred upon a non-State entity**, first and foremost through an act of national legislation (*eg* a federal constitution for the benefit of component units of federal States, → MN 24–26). Whether a single State may confer international agreement-making capacity by simply concluding with a non-State entity, an agreement submitted to international law is disputed among legal writers (→ MN 66–72).[21] **14**

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[18]Founding members are OECD, IMF, IBRD, and BIS. The EBRD acceded to the agreement in 1998.

[19]2029 UNTS 392.

[20]1997 UNTS 424.

[21]For an overview, see *U Kischel* State Contracts (1992) 269–281.

15 Considering that States enjoy **unlimited legal capacities** under international law, there are no grounds to withhold from States the capacity to unilaterally allocate agreement-making capacity to a non-State entity. **International customary law**, however, restricts the legal effects of such unilateral acts on the international plane:[22] first, the unilateral allocation of agreement-making capacity does not bring about any legal effects under international law for third parties (***res inter alios acta***; → Art 34). This fundamental rule applies unless the **third party** recognizes either the unilaterally assigned agreement-making capacity (*eg* by concluding an agreement with a component unit of a federal State, → MN 24) or the right or status obtained by the non-State entity under the agreement. Second, no act of the unilaterally endowed non-State entity contributes to the **body of international law** (*eg* customary treaty law) unless international practice amounts to a **collective approval** of the respective non-State entity as an international person capable of contributing to the evolution of international law by concluding international agreements (**international law-making capacity**).[23]

D. Legal Consequences

I. Legal Force (lit a)

16 By stressing the legally binding character of international agreements, Art 3 refers to the universally recognized principle ***pacta sunt servanda*** (→ Preamble MN 7), both a general principle of law (→ Art 26 MN 21) and a customary rule of fundamental importance for the international legal order (→ Art 26 MN 20). Even though **internationalized contracts** are generally not considered 'international agreements' in the sense of Art 3 (→ MN 64–72), it does not mean that the *pacta sunt servanda* principle cannot be declared applicable (→ Art 26 MN 27).

II. Application of Identical Rules of a Different Source (lit b)

17 Lit b refers to **international customary treaty law** (→ Art 1 MN 3; → Art 4 MN 4–6) and **general principles of treaty law** (*eg* good faith), which mirror substantive provisions of the Convention.[24] Subject to the *pacta tertiis* rule (Art 35), Art 3 lit b does not oblige non-parties to the Convention to apply in

[22] See generally on the relation between legal capacity, authorization and restriction in international law PCIJ *SS 'Lotus'* PCIJ Ser A No 10, 18 (1927); ICJ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 52.

[23] *Kischel* (n 21) 270; *F Rigaux* Des dieux et des héros (1978) 67 RCDIP 435, 455; According to *Mosler* (n 17) 44, States are only competent to confer treaty-making capacity on an entity for the purpose of the international legal order, *ie* for a common interest, which is not the case if a State confers that capacity unilaterally on a subject not known by the international legal order.

[24] *Villiger* Art 3 MN 6.

their treaty relations these identical rules. Cautiously phrased ("shall not affect . . . the application"), lit b simply points out that non-parties may consult the Convention in order to make rules of customary treaty law and general principles of treaty law visible.[25] Naturally, non-parties are free to declare by common accord that in their treaty relations certain provisions of the Convention are directly applicable.

III. *Mélange* of the Legal Regimes Governing One Treaty (lit c)

Even though the Convention strives for universal participation (→ Art 15 MN 19), a great number of international actors are either unwilling or unable to accede. Consequently, most multilateral treaties are '**mixed**' in the sense that some of their parties are States Parties to the Convention, whereas others are not.[26] By declaring the Convention applicable to States Parties' treaty relations established by a mixed international agreement, lit c contributed to the **fragmentation of the treaty relations** within each international agreement (→ Art 1 MN 3).[27] **18**

E. Agreements with or Between International Organizations

→ Art 6 MN 21–32 **19**

F. Agreements with Component Units of Federal States

I. Statehood of Component Units

The legal position of federal States[28] and their component units (referred to as states, regions, cantons, provinces, *etc*) in international law has been all along subject to controversial discussions in theory and practice.[29] Today, it is widely undisputed that component units of federations cannot be considered as 'States' in the eyes of international law,[30] regardless of whether their federations deem them 'States' in **20**

[25] *Cf Yasseen* (Chair of the Drafting Committee) UNCLOT I 146 para 5.

[26] *Y Le Bouthilliere/J-F Bonin* in *Corten/Klein* Art 3 MN 5.

[27] *Villiger* Art 3 MN 7.

[28] For the purpose of this commentary, the term 'federal State' is understood in a broad sense: it comprises not only 'classical' federal States whose constitutions qualify their component units as 'states' but also unitary States with (partially) autonomous subdivisions.

[29] For an excellent overview, see *I Bernier* International Legal Aspects of Federalism (1973) 13–82.

[30] Art 2 of the 1933 Montevideo Convention on the Rights and Duties of States 165 LNTS 19; *H Steinberger* Constitutional Subdivisions of States or Unions and Their Capacity to Conclude Treaties (1967) 27 ZaöRV 411, 416.

terms of constitutional law.[31] In international law, inherent and thus unlimited international legal capacities are characteristics attributed to the federal States alone,[32] commonly equated with the federal State's exclusive entitlement to 'full sovereignty' (→ Art 1 MN 8).[33] This unitary conception has developed in international practice due to the traditionally strong desire of the federal State to appear unrestricted and in unity *vis-à-vis* third States.[34] Given that each federal State has its own notion of the component units' legal position in municipal and international law, the ponderous and lurching discussion within the ILC is quite understandable.

II. Negotiating History

21 SR *Brierly*, proceeding from his premise that the VCLT should only deal with treaties between States, avoided an unequivocal classification of component units as States.[35] His successor, SR *Lauterpacht*,[36] advocated a broader scope of the VCLT with view to numerous constitutions of federal States authorizing their component units to conclude international treaties with third States.[37] Only if those treaties have been concluded in disregard of the federation's constitution, the character as an international treaty should be denied.[38] Consequently, *Lauterpacht* considered the question whether an agreement has to be regarded as an international treaty rather a question of validity than of definition.[39] With respect to the legal origin of the units' treaty-making capacity, *Lauterpacht* qualified the **constitutional devolution** of the treaty-making capacity as a mere delegation of the

[31] For the German notion of 'Länder-statehood', see Federal Constitutional Court (Germany) 34 BVerfGE 9, 19 (1972).

[32] *Briggs* [1962-I] YbILC 59 para 21, *Bernier* (n 29) 17–24; *L Wildhaber* Treaty-Making Power and Constitution (1971) 257; *McNair* 335.

[33] *J Crawford* The Creation of States in International Law (2006) 89; *Wildhaber* (n 32) 257; *L Di Marzo* Component Units of Federal States and International Agreements (1980) 4–12.

[34] *Bernier* (n 29) 29 with references to national jurisprudence; *Wildhaber* (n 32) 259.

[35] *Brierly* I 223 (Draft Art 1 lit c); *Brierly*, however, accepted that component units might have (limited) treaty-making capacity to conclude international treaties depending on the constitution of the federal State, see *Brierly* III 50.

[36] *Lauterpacht* I 138.

[37] See *eg* Arts 72, 79 of the 1993 Constitution of the Russian Federation and its predecessor, Art 80 of the 1977 Constitution of the USSR; Art 32 of the 1949 German Basic Law and its predecessor Art 78 of the 1919 Weimar Constitution; Art 56 of the 1999 Swiss Federal Constitution and its predecessor, Art 9 of the 1848 Swiss Constitution; Art 16 of the 1920 Austrian Federal Constitution since 1988; Art I § 10 cl 2 of the 1787 US Constitution; Art 167 § 1 in conjunction with Art 127 § 1 Belgian Constitution of 1994; for further references related to these municipal provisions, see *C Schreuer* The Waning of the Sovereign State (1993) 4 EJIL 447, 451.

[38] *Lauterpacht* I 139.

[39] *Ibid* 95.

federal State's international capacity to their political subdivision,[40] comparable to the delegated treaty-making capacity of international organizations.

22 His successor SR *Fitzmaurice* headed in a different direction. According to his Draft Art 8 on treaty-making capacity, component units of federal States, even if acting in their own name, do so as **agents for the federal State**, and it is the federal State alone that is responsible for carrying out the treaty.[41] Only halfway along that line was SR *Waldock*'s concept: if a constitution of a federation "confers upon its constituent States the power to enter into agreements directly with foreign States, the constituent State normally exercises this power in the capacity only of an organ of the federal State or Union, as the case may be".[42] *Waldock*, however, did regard it as an exercise of the component unit's own international treaty-making capacity if that unit is a **member of the United Nations**[43] or possesses a separate international personality **recognized** by both the constitution of the federal State and the foreign State with which the treaty is concluded.[44] The Drafting Committee redesigned the capacity article from scratch,[45] which in turn was subject to a controversial discussion in the ILC.[46] Finally, in his report to the General Assembly in 1962, SR *Waldock* simplified his complex "capacity article"[47] by simply stating that "the capacity of the member states of a federal Union to conclude treaties depends on the federal constitution".[48] But even this streamlined approach caused major difficulties in the ILC discussion process.[49]

23 Due to the severe but discordant criticism by several governments,[50] it was finally agreed that *Waldock*'s Draft Art 3 should be deleted as a whole.[51] In the Committee of the Whole, the federation clause had its reappearance on the agenda and became hotly disputed between Canada, advocating the deletion of the federation clause for constitutional reasons, and France, supporting the retention with

[40] *Ibid* 139.

[41] *Fitzmaurice* III 24 (Draft Art 8); for this school of thought see also *JL Kunz* Staatenverbindungen (1929) 664; *RC Ghosh* Treaties and Federal Constitutions: Their Mutual Impact (1961) 81.

[42] *Waldock* I 36 (Draft Art 3).

[43] *Waldock* had the Ukrainian SSR and the Byelorussian SSR in mind when proposing this draft, both being component units of the USSR and founding members of the United Nations.

[44] *Waldock* I 37.

[45] [1962-I] YbILC 240 para 16: "In a federal state, the capacity of the federal state and its component states to conclude treaties depends on the federal constitution."

[46] *Briggs* [1962-I] YbILC 240 paras 17 *et seq* objected the proposed phrase (n 45) because it suggests that the capacity of the federal State to conclude treaties depends on the constitution, whereas - according to Briggs - it is based on international law.

[47] *Waldock* I 35–36 (Draft Art 3).

[48] ILC Report 14th Session [1962-II] YbILC 164.

[49] *Waldock* [1965-I] YbILC 23 paras 2–3.

[50] See *eg* the comments of Austria, Finland, Israel, Japan, Sweden, the United Kingdom and the United States [1965-II] YbILC 16–17. For a summary of the discussion, see *JS Stanford* United Nations Law of Treaties Conference: First Session (1969) 19 University of Toronto LJ 59, 60–61.

[51] *Waldock* IV 18.

a view to its treaty relations with the Canadian province of Quebec.[52] A plenary meeting of the Conference was required to finally reach the understanding that the Convention should exclusively deal with treaties concluded between sovereign States (→ Art 1 MN 5), leaving aside the capacities of their non-sovereign component units.[53]

III. Agreement-Making Capacity

24 The fact that, first, the VCLT does not embrace agreements concluded between component units and third States and, second, these agreements are not registered under Art 102 UN Charter,[54] does not impair the units' **derived**[55] **agreement-making capacity** (→ MN 11).[56] In principle, that capacity resembles that of international organizations (→ Art 6 MN 26–31):[57] it is the outcome of the lengthy historical process of federal nation building that today, international customary law leaves it to the constitution of the federal State whether it confers on its component units the capacity to enter into international agreements.[58] This implies, however, that international customary law recognizes *a priori* the **potential agreement-making capacity** of component units of federal States. It is, however, the federal States' constitution that has the final say in that matter (→ MN 14).[59] If third

[52]See *RD Kearney*/*RE Dalton* The Treaty on Treaties (1970) 64 AJIL 495, 507.

[53]UNCLOT II 10–16.

[54](1995–1999) 6 RoP Supp No 9 Art 102 para 5: "During the period under review, the Secretariat declined to register an agreement concluded between the IFAD and the State of Bahia (Brazil), an administrative entity not usually considered to be governed by international law for the purpose of entering into treaties."

[55]*H Nawiasky* Der Bundesstaat als Rechtsbegriff (1920) 109 advocates the view that component units have inherent agreement-making capacity, subject to constitutional limits; for criticism ("purely theoretical viewpoint"), see *Wildhaber* (n 32) 263. *Nawiasky*'s opinion, however, entails the validity of agreements in principle, without prejudice to Art 46 VCLT.

[56]The notion of the PCIJ that "the right of entering into international engagements is an attribute of State sovereignty" (PCIJ *SS 'Wimbledon'* PCIJ Ser A No 1, 25 (1923)) is overruled by international practice, which accepts non-sovereign international organizations as international actors as well.

[57]*Cf V Zellweger* Völkerrecht und Bundesstaat (1992) 52.

[58]For constitutions which approve external activities such as the conclusion of agreements, see n 37; for a constitution of a federal State which centers the competence to conclude treaties on the federal State, see *eg* Art 246 para 1 Constitution of India, enacted 1950, in connection with Art 14 Union List 7th Schedule; for further references, see *JY Morin* La conclusion d'accords internationaux par les provinces canadiennes à la lumière du droit comparé (1965) 3 CanYIL 127, 148–155.

[59]One school of thought denies the distinct legal position in international law, arguing that the rights of component units stem exclusively from the federal foreign affairs power and that the component units thus act as federal organs; *cf* n 41.

States[60] actually enter into contractual relations with a capable component unit, this component unit gains restricted international personality distinct from that of its federal State (**constitutive recognition**).

Some federal constitutions call for the federal government's **prior affirmation** in the conclusions of the agreement[61] as an internal instrument of federal supervision. However, a conclusion of an agreement in defiance of that procedure does not affect the validity of the agreement (→ Art 46). **25**

> The Canadian Constitution keeps silent about the agreement-making capacity of the Canadian provinces which prompted the Canadian Supreme Court in 1956 to stress that governments of provinces may enter into arrangements of a non-binding character with foreign States.[62] In order to enable provinces to enter into legally binding treaty relations, the Canadian government either notifies the foreign State its approval before the agreement is signed or concludes an umbrella agreement with the foreign State.[63] The Canadian practice gives an example for a non-constitutional case-by-case authorization which – interpreted as a delegation of federal authority – gives grounds for the presumption that the province acts as an organ of the federal State and thus binds the latter.[64]

If the component unit acts within the limits of its derived and defined agreement-making capacity, it follows from its separate international personality that only the unit – not the federal State – is **subject of the respective contractual rights and duties** under international law.[65] The rich international agreement practice[66] of component units verifies that the rules of the VCLT mirror *mutatis mutandis* the **customary law** applicable to the agreement relations of component units. **26**

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[60]Or another traditional subject of international law such as the Holy See; *cf* the 1998 Agreement (*concordat*) between the German Land of Sachsen-Anhalt and the Holy See [1998] Gesetz- und Verordnungsblatt des Landes Sachsen-Anhalt No 13, 90 Acta Apostolicae Sedis 470.

[61]See *eg* Art 32 para 3 German Basic Law of 1949; Art 16 para 2 Austrian Federal Constitution of 1920; Art I § 10 cl 3 US Constitution of 1787.

[62]Supreme Court (Canada) *Attorney General for Ontario v Scott* 1 Dominion Law Reports (2nd) 433, [1956] SCR 137 (1956); see also the legal opinion of the Legal Bureau in the Canadian Department of External Affairs (1980) 18 CanYIL 316.

[63]*GF Fitzgerald* Educational and Cultural Agreements and Ententes: France, Canada and Quebec – Birth of a New Treaty-Making Technique for Federal States? (1966) 60 AJIL 529; *Bernier* (n 29) 52–64; *MC Rand* International Agreements between Canadian Provinces and Foreign States (1967) 25 FacLR 75.

[64]*Bernier* (n 29) 59 with references to the legal opinion of the Government of Canada and the dissenting opinion of the province of Quebec; for the legal position of the German Federal Government, see *M Schweitzer*/*A Weber* Handbuch der Völkerrechtspraxis der Bundesrepublik Deutschland (2004) para 73: the Länder of the Federal Republik of Germany may subordinate their agreements with foreign States to a previous exchange of notes between the federal State and the relevant foreign State with the legal consequence that the Federal Republic of Germany acquires the position of a guarantor for both parties.

[65]Federal Constitutional Court (Germany) 2 BVerfGE 247, 371 (1953).

[66]For Germany, see *U Beyerlin*/*Y Lejeune* Sammlung der internationalen Vereinbarungen der Länder der Bundesrepublik Deutschland (1994); for Switzerland, see *Y Lejeune* Recueil des accords internationaux conclus par les Cantons Suisses (1982).

IV. Legal Consequences of *ultra vires* Acts

27 If a third State chooses to conclude an international agreement with a component unit lacking **agreement-making capacity** or **exceeding the assigned capacity**, the former violates international law by interfering in the internal affairs of the federal States, whereas the latter violates the federal constitution.

28 Given that the agreement-making capacity of both parties is an essential legal precondition for the legal existence of a bilateral agreement under international law, it seems obvious that the agreement is **null and void** in view of the fact that the component unit is not capable of acting in that specific field and thus does not act as a subject of international law.[67] However, with **Art 46 para 2 VCLT II** in mind (rules of international organizations regarding competence to conclude treaties), there may be some reasons to argue in favour of the stability of treaty relations (manifest violation; → Art 46 MN 42–53).[68]

29 If the federal State **subsequently agrees** in the (temporary) execution of the *ultra vires* agreement, this act can be interpreted in different ways: On the one hand, the confirmation may constitute a 'remedial' delegation of federal authority with the legal effect that the agreement is binding on the federal State.[69] At any rate, such a replacement of a contracting party requires the consent of the other party.

> The agreement of the Austrian component units Vorarlberg and Tirol with Switzerland in 1945 was concluded in clear violation of Art 10 para 1 no 3 Austrian Federal Constitution[70] and was marked as that by the Austrian Federal Government. Nonetheless, the agreement was executed until the Austrian Federal Government concluded a new treaty with Switzerland, leaving it to Vorarlberg and Tirol to denounce the *ultra vires* agreement.[71]

30 On the other hand, the subsequent confirmation of the federal State can be understood as a 'remedial' extension of the unit's agreement-making capacity. It is no concern of international law whether the federal State, in doing so, exceeds any constitutional limits. In any case, the (implicit) assent of the federal State constitutes the **apparent agreement-making capacity** of the component unit if the foreign State is unaware of the *ultra vires* issue.[72] The federal State is estopped from the belated assertion of nullity.

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[67] See the legal opinion of the Canadian Legal Bureau (n 62) 316; *Bernier* (n 29) 116; *Steinberger* (n 30) 427.

[68] *Cf Wildhaber* (n 32) 271 para 150 (voidability).

[69] *Cf Bernier* (n 29) 119 without explicitly advocating the legal construction of the component unit acting as a federal organ.

[70] Art 10 para 2 Austrian Federal Constitution of 1920 entrusted the exclusive competence to conclude international treaties to the federal State; the rule was abolished in 1988 (*cf* n 37).

[71] *I Seidl-Hohenveldern* Relation of International Law to Internal Law in Austria (1955) 49 AJIL 451, 474.

[72] German Federal Constitutional Court (n 65) 371.

V. Responsibility for Breaches

Acting within the limits of its agreement-making capacity, the component unit is responsible for breaches *vis-à-vis* the other party (→ MN 26). However, the injured party's choice of **countermeasures** is necessarily limited since they affect all too easily the federal State itself, *eg* due to the identity of nationals and economy. **31**

The federal State's internal affirmation of the component unit's agreement (→ MN 25) does not trigger the federal responsibility for the latter's non-compliance. Responsibility occurs, however, if the federal State utilizes its **supervising powers** to prevent the unit's compliance with an agreement (*cf* Arts 17, 18 ILC Articles on the Law of State Responsibility[73]) or if the unit's non-compliance effectuates at the same time a violation of an international obligation owed by the federal State itself.[74] **32**

VI. Agreements Between Component Units of Two Federal States

Numerous component units of federal States enter into **transboundary arrangements** with neighbouring component units of other States.[75] These arrangements can be considered agreements in the sense of international law under the condition that all parties to the agreement possess derived agreement-making capacity and thus separate international personality (→ MN 26). **33**

Transboundary arrangements which involve units without international agreement-making capacity are frequently subject to **framework agreements** between the States to which the units belong.[76] These framework agreements provide the legal basis for the delegation of authority (→ MN 25) and for the decision on the proper law of the arrangement.[77] **34**

[73] Annex to UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83.

[74] ICJ *LaGrand (Germany v United States)* (Provisional Measures) [1999] ICJ Rep 9, para 28.

[75] *Cf* the 1982 Agreement on Acid Precipitation between New York and Quebec 21 ILM 721.

[76] See *eg* 2005 Outline Agreement between the Government of the Federal Republic of Germany and the Government of the French Republic on Transfrontier Sanitary Cooperation [2006-II] German BGBl 1332; 1993 Outline Agreement between the Republic of Austria and the Italian Republic on Transfrontier Cooperation between Territorial Communities 1889 UNTS 431; both Outline Agreements follow the pattern of the 1980 European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities ETS 106, 1272 UNTS 61.

[77] *Cf* Art 4 para 6 of the 1996 Karlsruhe Agreement between Germany, France, Luxembourg, and Switzerland (on behalf of some of its cantons) on Transfrontier Cooperation between Territorial Communities and Local Public Bodies [1997-II] German BGBl 1159: cooperation agreements between these entities are subject to national law.

VII. Agreements Between Component Units of One Federal State

35 *Inter se* arrangements between component units of one federal State cannot be considered agreements taking effect in international law, since these arrangements are primarily **governed by the constitutional and/or federal law** of the federal State.[78] It is reminiscent of the former sovereign character of founding members of federal States *and* a consequence of their formal equality within the federation that some component units consider the international rules of treaty law the adequate corpus of law for their *inter-se* 'treaty' relations, applicable *mutatis mutandis* to all aspects not determined authoritatively by the *inter se* arrangement itself and by the federal constitution (*eg* rules of termination).[79]

G. Agreements with Dependent Territories

36 The term 'dependent territory' is referring as a generic term to all entities short of statehood (*eg* colonies, trust territories, overseas territories) that are placed under the authority of a **metropolitan State** (mainland).[80] In contrast, a **protected State** (protectorate[81]) retains its legal personality as a State in international law[82] and therefore has inherent treaty-making capacity even though its exercise may be limited or controlled according to the treaty of protection (→ Art 6 MN 5).[83]

37 As a rule, **colonies**, **mandated territories** (League of Nations), and **trust territories** (United Nations), all phenomena of the past, had no agreement-making

[78] *Waldock* I 37; the same applies to 'agreements' between the federal States and one of its component units, see *eg* the 1994 'Agreement' between the Russian Federation and Tatarstan, which defines Tatarstan as a State entitled to participate in international relations in accordance with the Constitution of the Russian Federation, *cf GM Danilenko* The New Russian Constitution and International Law (1994) 88 AJIL 451, 457; for the efforts of the Tatarstan authorities to place this arrangement under international law, see *J Quigley* The Israel-PLO Interim Agreements: Are They Treaties? (1997) 30 Cornell ILJ 717.

[79] *Cf* Federal Constitutional Court (Germany) 36 BVerfGE 1, 24 (1973); Federal Administrative Court (Germany) 40 NJW 1826 (1980) (interpretation, termination).

[80] For the historic discussion on the treaty-making capacity of Commonwealth countries, see → MN 38.

[81] UK law differs between British Protectorates and British Protected States; the former is a non-self-governing territory.

[82] ICJ *Rights of Nationals of the United States of America in Morocco (France v United States)* [1952] ICJ Rep 176, 185.

[83] For example, according to Art 4 of the 1884 Treaty of Protection between Britain and Transvaal (*GF de Martens* Nouveau recueil général de traités 1e série Vol 10 (1885–1886) 180), treaties entered into by Transvaal had to be approved by the UK government, which was assumed after the expiration of a six-month time limit; the UK government claimed the invalidity of the 1895 Extradition Treaty between Transvaal and the Netherlands due to the disregard of this Art 4, see *P Heilborn* L'Angleterre et le Transvaal (1896) 3 RGDIP 26, 166; for further examples, see *JES Fawcett* Some Recent Developments in Commonwealth Treaty Practice (1966) 2 AYIL 129.

capacity of their own.[84] On their gradual way to independence, however, some already self-governed territories had been entrusted by the metropolitan State with the power of concluding certain agreements (derived agreement-making capacity).

> With regard to the international status of the self-governing Federation of Rhodesia (1953–1963), the UK Secretary of State for Commonwealth Relations declared in 1953: "The United Kingdom Government expressly *delegated* to the Southern Rhodesia Government authority to negotiate and conclude trade agreements with foreign governments so far as those are related to the treatment of goods."[85]

38 In the past, it was highly disputed whether **Class A League of Nations mandates** (Art 22 para 4 League of Nations Covenant) must be considered protected States with inherent but (partly) renounced treaty-making capacity or mere mandated territories with derived agreement-making capacity (*eg* Iraq and Transjordan).[86] In the interwar period, the **British dominions** of the British Empire – among them Canada, Australia, New Zealand – received the power to conclude treaties without any reference to the Empire and were accordingly recognized by the United Kingdom as separate States.[87]

39 Today, the capacity issue remains relevant to **overseas territories**.[88] Whereas it is beyond doubt that, from the perspective of international law, the metropolitan State possesses the capacity to bind its dependent territories by international treaty,[89] the agreement-making capacity of the dependent territory depends largely on the policy of the metropolitan State.

> Greenland and the Faroe Islands are self-governing dependencies of the Kingdom of Denmark. In a circular note of 7 November 2005, Denmark informed the United Nations and its Member States about national legislation providing full powers for the Government of Greenland and the Government of the Faroes to conclude certain treaties.[90] When acting

[84] *McNair* 117.

[85] Reprinted in *HR Starck* Sanctions: The Case of Rhodesia 1888–1965 (1966) 3 (emphasis added).

[86] *Cf R Geiger* Die völkerrechtliche Beschränkung der Vertragsschlussfähigkeit von Staaten (1979) 85.

[87] As recommended at the Imperial Conferences of 1923 and 1926, reprinted in *AB Keith* Speeches and Documents on the British Dominions 1918–1931 (1932) 313, 320, and 380; on the international status of the British dominions, see *K Johnson* Dominion Status in International Law (1927) 21 AJIL 481; *AB Keith* The International Status of the Dominions (1923) 1 Journal of Comparative Legislation and International Law 161.

[88] For the overseas territories of EU Member States, see Annex II TFEU.

[89] See *eg* the 1999 Convention for the Unification of Certain Rules for International Carriage by Air entered into by New Zealand in respect of Tokelau, 2242 UNTS 350; Declaration of France to the effect that ratification of the Madrid Agreement shall apply to all the territories of the French Republic, 828 UNTS 165.

[90] Act No 577 of 24 June 2005 on the Conclusion of Agreements under International Law by the Government of Greenland and Act No 579 of 24 June 2005 on the Conclusion of Agreements under International Law by the Government of the Faroes; for the insertion of 'colonial application clauses' to limit or to clarify the territorial scope of the treaty entered into by the metropolitan State, see *McNair* 119 and *JES Fawcett* Treaty Relations of British Overseas Territories (1994) 26 BYIL 86, 106.

under full powers, the Governments of Greenland or the Faroes act as organs of the realm and therefore "on behalf of the Kingdom of Denmark" (*cf* Art 1 VCLT).[91] If the agreement is concluded between governments rather than States (*eg* administrative agreements), the local governments may appear as the parties but act nonetheless on behalf of the Kingdom of Denmark. The circular note aims to clarify that neither Greenland nor the Faroe Islands enjoy derived agreement-making capacity according to the Danish constitution and laws.

The British Overseas Territories retain responsibility for external affairs through their Governor appointed by the Crown. International agreements concluded by the Governor are therefore concluded on behalf of the United Kingdom even if the territorial scope of these treaties is limited to the respective overseas territory.[92]

40 The fact that international agreements entered into by dependent territories as parties are not subject to registration under Art 102 UN Charter[93] does not contradict the internationally recognized **derived agreement-making capacity** of dependent territories, subject to the condition that the metropolitan State has in fact assigned that capacity (→ MN 14).

In 2002, one year after the People's Republic of China ratified the WTO Agreement, Taiwan (Chinese Taipei) became the 144th member of the WTO. As the WTO membership is not only open for sovereign States but also to separate customs territories possessing full autonomy in the conduct of their external commercial relations and of the other matters provided for in the WTO Agreement and the Multilateral Trade Agreements (Art XII:1 WTO Agreement). China made its assent to Taiwan's accession subject to the condition that Taiwan is qualified as a separate custom territory. In view of the disputed status of Taiwan in international law, the question whether Taiwan's agreement-making capacity has been assigned by China remains deliberately untouched.

41 **International administrations of territories** have signed international agreements on behalf of the respective territory,[94] on behalf of the institutions of self-government,[95] or as the international administration.[96] The binding force of these agreements follows from the treaty-making capacity of the administering international organization, acting within its functions and powers (→ Art 6 MN 26–33).

[91]Territorially, these treaties do not apply to Denmark, the metropolitan territory.

[92]The British Overseas Territories are parties to many agreements concluded under the auspices of CARICOM, see *eg* the 1974 Agreement Establishing the Caribbean Agriculture Research and Development Institute (2285 UNTS 607) to which the British Virgin Islands and Montserrat have acceded. Nonetheless, the Agreement has been registered with the United Nations in 2004. For the UN registration practice with regard to dependent territories, see (1945–1954) RoP Art 102 para 31 lit d; (1979–1984) 6 RoP Supp No 6 Art 102 paras 5–11.

[93]See (1945–1954) 5 RoP Art 102 para 31 lit d; (1989–1994) 6 RoP Supp No 8 Art 102 paras 5–11.

[94]For the participation of the Saar Basin Governing Commission (1920–1935) in international treaties, see *eg* 77 UNTS 199, 251 and 85 UNTS 451.

[95]See *eg* the 2003 Free Trade Agreement between the United Nations Interim Administration Mission in Kosovo (UNMIK) on behalf of the Provisional Institutions of Self-Government in Kosovo and Albania, UNMIK Official Gazette UNMIK/FTA/2003/1.

[96]See the Energy Community Treaty concluded between the European Community on the one hand and, *inter alia*, UNMIK on the other hand [2006] OJ L 198, 18.

H. Agreements with the Holy See

Even if the Holy See is – unlike the Vatican City – no State in terms of international law,[97] the Holy See is party to the VCLT (→ Art 1 MN 8). Thus, Art 3 lit a and b[98] does not concern treaties concluded by the Holy See.[99] **42**

I. Agreements with the International Committee of the Red Cross

The International Committee of the Red Cross (ICRC) is a private association of Swiss citizens established under the Swiss Civil Code. Even if the ICRC cannot be qualified as an international organization due to its non-governmental character, its **partial international personality** is beyond doubt. The Geneva Conventions of 1949 and the two Protocols of 1977 confer international rights and duties on the association and, as a consequence thereof, the ICRC has concluded several international agreements with States, *eg* to secure their right to visit imprisoned persons[100] and their privileges and immunities when deployed in a conflict region or in a third State.[101] The **original agreement-making capacity** of the ICRC, which is derived neither from a group of States nor from Switzerland, is functionally limited (→ MN 10). **43**

Despite the undisputed international nature of the agreements concluded by the ICRC, they are not subject to **registration** by the UN Secretary-General in accordance with Art 102 UN Charter for the simple but unconvincing reason that the ICRC cannot be considered an intergovernmental organization and thus its agreements cannot be considered "international agreements" for the purpose of Art 102 UN Charter.[102] **44**

[97] *RJ Araujo* The International Personality of the Holy See (2001) 50 Catholic University LR 291, 322.

[98] In Art 1 ("definitions") of an early ILC Draft, the term 'treaty' meant not only treaties between States but also between "other subjects of international law". In this context, the ILC considered the Holy See as a typical "other subject" in the sense of Draft Art 1, "which enters into treaties on the same basis as States"; see ILC Report 14th Session [1962-II] YbILC 159, 162 para 8.

[99] Treaties entered into by the Holy See fall into two categories: treaties covering conventional subject matters and concordats addressing issues concerning the affairs of the Catholic Church in the contracting State, see *T Maluwa* The Treaty-Making Capacity of the Holy See in Theory and Practice (1987) 10 Comparative and International Law Journal of Southern Africa 155, 163.

[100] See *eg* the 2006 Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons Deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court, ICC Doc ICC-Pres/02-01-06.

[101] See *eg* the 1993 Agreement between the International Committee of the Red Cross and the Swiss Federal Council to Determine the Legal Status of the Committee in Switzerland (1993) 293 International Review of the Red Cross 152; according to the ICRC's Annual Report 2003, 21, the ICRC has concluded headquarters agreements with 74 States.

[102] (1970–1978) 5 RoP Supp No 5 Art 102 para 6.

J. Agreements with the Order of Malta

45 The Sovereign Military Hospitaller Order of St John of Jerusalem, of Rhodes and of Malta, today known as the 'Order of Malta', is an internationally recognized subject of international law by virtue of its intermittent historical status as a sovereign State[103] and – after the final loss of Malta in 1814/1815 – the continuing international recognition of its sovereignty.[104]

46 Today, the status of the Order of Malta is still that of an **original international person**[105] whose position in international law is – contrary to international organizations – not derived from States but has become – similar to international organizations – functional in nature, given its modern character as a humanitarian organization.[106] Apart from the 1935 Treaty of Amity between the Order and San Marino,[107] the Order is party to several bilateral agreements. Most of them concern postal services (recognition of stamps issued by the Order[108]), others have humanitarian subject matters.[109]

K. Agreements with Non-recognized States

47 States do, in practice, conclude agreements with régimes they do not have recognized as States (*de facto* régimes[110]).[111] The question whether these agreements

[103] *C d'Oliver Ferran* The Sovereign Order of Malta in International Law (1954) 3 ICLQ 217, 222.

[104] Due to the extraterritorial residence of the Order in Rome, its legal character in international law has been discussed in several decisions of Italian courts, see *eg* Court of Cassation *Sovereign Order of Malta v Brunelli, Tacali et al* 6 ILR 88 (1931); *Nanni et al v Pace and the Sovereign Order of Malta* 8 ILR 2 (1935); Tribunal of Rome *Sovereign Order of Malta v Soc. An. Commerciale* 22 ILR 1 (1954); Court of Appeal of Rome *Piccoli v Association of Italian Knights of The Sovereign Order of Malta* 77 ILR 613 (1978).

[105] *R Monaco* Osservazione sulla condizione giuridica internazionale dell'Ordine di Malta (1981) 64 Rivista di diritto internazionale 14, 27.

[106] Judgment of a special tribunal established by a Pontifical Decree issued by the Holy See in December 1951, reprinted in *AC Breycha-Vouthier/M Potulicki* The Order of St. John in International Law (1954) 48 AJIL 554, 561.

[107] *D'Oliver Ferran* (n 103) 224.

[108] For the postal agreement concluded between Austria and the Order in 1989, see [1989] Austrian öBGBl No 447; for an agreement registered with the United Nations, see the 1979 Postal Agreement between the Philippines and the Order of Malta 1195 UNTS 411; the latter appears to have been mistaken by the Treaty Section of the UN Office of Legal Affairs to be a treaty between the Philippines and the *Republic* of Malta which could explain why it was – contrary to the Secretary-General's practice – registered and included in the UNTS.

[109] For references, see *GB Hafkemeyer* Der Malteserorden und die Völkerrechtsgemeinschaft in *A Wienand* (ed) Der Johanniterorden/Malteserorden (1988) 427, 436; *H Himmer* Der Souveräne Malteser-Ritterorden als Völkerrechtssubjekt in *J Goydke et al* (eds) Festschrift Remmers (1995) 213, 229.

[110] *JA Frowein* Das de facto-Regime im Völkerrecht (1968) 4.

[111] For a survey of the international practice, see *Frowein* (n 110) 94–148; *BR Bot* Nonrecognition and Treaty Relations (1968) 67–123.

must be considered "treaties" in terms of Art 1, "agreements" in terms of Art 3 or non-international contracts depends largely on the respective approach towards the interdependency of **recognition** and **statehood**. In addition, international practice strongly distinguishes between **largely recognized States** (*eg* Israel, GDR) and **collectively non-recognized entities**. In the former case, the statehood of a largely recognized State and therefore its inherent treaty-making capacity (Art 6) is legally not disputable (see *eg* the treaty relations between the Federal Republic of Germany and the German Democratic Republic[112]); the bilateral treaty relations with a State that constantly refuses formal recognition is, nonetheless, governed by international law (→ Art 2 MN 27).

48 Agreements between States and **collectively non-recognized régimes** are rare (see *eg* the cultural agreement between the Turkish Republic of Northern Cyprus and Malawi,[113] the 2006 fisheries agreement between Yemen and Somaliland). The reasons for an almost collective non-recognition policy are often rooted in "birth defects" of the respective régime, *eg* an unconstitutional secession unsupported by international law, the lack of independence (puppet régime) or the violation of fundamental international norms (*eg* the prohibition of racism,[114] the right to self-determination).[115]

> Most collectively non-recognized entities gradually expand their international (treaty) relations right up to an almost universal recognition. Especially at the outset of this progression, the inherent treaty-making capacity linked to statehood may be categorically denied by some States, as it is reflected in the US and UK statements concerning the registration practice under Art 102 UN Charter: "The United States Government wishes to make clear that it regards 'registration' of these instruments by a United Nations Member as without significance because in its opinion the regimes in question (North Korea, Chinese Communists, East German) do not possess international capacity and the instruments do not constitute treaties or international agreements within the meaning of Article 102 of the Charter."[116] The Republic of Cyprus shares this notion with view to the few bilateral treaties concluded between the almost collectively non-recognized Turkish Republic of Northern Cyprus and third States.[117]

49 The conclusion of bilateral treaties with a non-recognized State is narrowly interwoven with the doctrine of **implied recognition**.[118] To prevent this, some

[112]Federal Constitutional Court (Germany) 31 BVerfGE 1, 23 (1973), English translation 78 ILR 149, 166.

[113]See Annex V to the Annan Plan of 31 March 2004 (final version), Reference No 829 (http://www.hri.org/docs/annan/).

[114]The unilateral declaration of independence by the apartheid régime of Southern Rhodesia was condemned by UNSC Res 216, 12 November 1965, UN Doc S/RES/216, and UNSC Res 217, 20 November 1965, UN Doc S/RES/217.

[115]*J Crawford* The Creation of States in International Law (2006) 74–83; *J Dugard* Collective Non-Recognition: The Failure of South Africa's Bantustan States in Boutros-Ghali amicorum discipulorumque liber Vol 1 (1998) 383.

[116](1954–1955) 2 RoP Supp No 1 Art 102 para 15; for the United Kingdom, see para 19.

[117]*F Hoffmeister* Legal Aspects of the Cyprus Problem (2006) 168.

[118]*TC Chen* The International Law of Recognition (1951) 192; *Bot* (n 111) 30.

States adamantly refuse contractual relationships,[119] whereas others declare that the conclusion shall not be interpreted as an implied recognition.[120] Such disclaimer, however, cannot prevent the international character of the treaty.[121] If the access to a multilateral treaty does not require unanimous case-by-case approval of all parties (→ Art 15 MN 25), States Parties try to impede an implied recognition of the non-recognized State by reservation or declaration (→ Art 19).[122]

L. Agreements with Liberation Movements

50 National liberation movements have the ultimate goal to set up an independent and sovereign State. The pacific or belligerent activities of liberation movements against colonial domination, a racist regime or alien occupation are closely linked with the **people's right to self-determination**,[123] whose mouthpiece they claim to be. If it is internationally recognized[124] that the national liberation movement represents a people entitled to self-determination (*eg* the PLO for the people of Palestine[125]), international practice confirms the international agreement-making capacity of the liberation movement, acting on behalf of the people.[126]

> In 1967, the United Kingdom and the National Front for the Liberation of Occupied South Yemen entered into a "Memorandum of Agreed Points Relating to Independence for South Arabia",[127] and in 1979, the United Kingdom, the African National Council and the Patriotic

[119]For the British practice, see *MM Whiteman* Digest of International Law Vol 2 (1963) 658.

[120]For examples, see *Frowein* (n 110) 96–107.

[121]The treaty-making capacity of the Turkish Republic of Northern Cyprus has been indirectly recognized by the Annan Plan (n 113), which suggests that some of its bilateral treaties shall be binding for the future United Cyprus Republic, while others shall be determined according to international treaty law, *S Talmon* Kollektive Nichtanerkennung illegaler Staaten (2006) 380.

[122]See *eg* the reservation of Bahrain to the Genocide Convention: "[T]he accession by the State of Bahrain to the said Convention shall in no way constitute recognition of Israel or be a cause for the establishment of any relations of any kind therewith."

[123]*Cf* Art 1 para 4 of the 1977 Protocol I to the Geneva Conventions of 1949 which classifies an armed struggle for self-determination as an international conflict when the legal requirements of Art 1 are fulfilled; for the practice of the Secretary-General as a depositary, see (1954–1955) 2 RoP Supp No 1 Art 102.

[124]For details, see *PJ Travers* The Legal Effects of United Nations Action in Support of the Palestine Liberation Organization and the National Liberation Movements of Africa (1976) 17 Harvard ILJ 561, 578; *cf* the non-recognition of the liberation movement SWAPO as an exclusive representative of Namibia due to the absence of free and democratic elections, see the statement of German Minister of State *Wischnewski* of 12 March 1976, Lower House of German Parliament *Minutes of plenary proceedings* 12 March 1976, 15930 (B17).

[125]For a comprehensive review on Israeli–Palestinian Agreements, see *GY Watson* The Oslo Accords (2000); *P Malanczuk* Some Basic Aspects of the Agreements between Israel and the PLO from the Perspective of International Law (1996) 7 EJIL 485; *Quigley* (n 78) 733–740.

[126]*JA Barbaris* Nouvelles questions concernant la personnalité juridique internationale (1983) 179 RdC 145, 259–264.

[127]British Parliamentary Paper (1968) Cmnd 3504.

Front concluded the so-called Lancaster House Accords.[128] In 1974, Portugal entered into a decolonization agreement with the African Party for the Independence of Guinea-Bissau[129] and into an agreement with the Mozambique Liberation Front;[130] in 1975, Portugal concluded an agreement with the Liberation Movement of São Tomé and Princípe[131] and with the National Union for the Total Independence of Angola (UNITA).[132] In 1979, Mauritania entered into an agreement with POLISARIO seeking independence for Western Sahara.[133]

In addition, the agreement-making capacity of national liberation movements is assumed by Art 96 para 3 of the 1977 Additional Protocol I of the Geneva Conventions. Under this article, a liberation movement being engaged in an **armed conflict for self-determination**[134] may unilaterally declare the four Geneva Conventions of 1949 and its Protocol I of 1977 applicable in the conflict. Consequently, the unilateral declaration addressed to the depositary (→ Art 77 MN10) generates reciprocal treaty relations between the liberation movement and the parties to the Geneva Conventions. It is noteworthy that the restricted agreement-making capacity acknowledged by Art 96 para 3 Protocol I is not dependent on the **international recognition** of the movement as the legitimate representative of the people but exclusively on the fulfillment of the legal requirements embodied in Art 1 para 4 Protocol I.[135] **51**

M. Agreements with Opposition Movements (Civil War Factions)

The question whether opposition movements enjoy international agreement-making capacity arises in **civil war situations**.[136] International practice is rich in cease-fire, peace, and amnesty agreements between States and civil war factions (rebel groups, insurgents, guerrillas, belligerents), mired in religious, ethnic or political conflicts in the former's territory, often aiming at secession. **52**

See *eg* the agreement concluded in 1996 between the Government of Guatemala and the Guatemalan National Revolutionary United,[137] the 1988 Preliminary Cease-fire Agreement

[128] 19 ILM 398, 401.

[129] 13 ILM 1244.

[130] 13 ILM 1467.

[131] 14 ILM 39.

[132] *Cf Barbaris* (n 126) 261.

[133] Reprinted in Official Records of the General Assembly 34th Session 1161st Meeting, UN Doc A/AC.109/PV.1161, 61 (1979).

[134] Art 1 para 4 of the 1977 Additional Protocol I of the Geneva Conventions.

[135] The proposal to require recognition by a competent regional international organization was not adopted, *B Zimmermann*, in *Y Sandoz*/*C Swinarski*/*B Zimmermann* (eds) Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987), Art 96 Protocol I para 3763 with further references.

[136] This question has to be distinguished from a possible international personality of insurgents, which is commonly deduced from the common Art 3 of the four Geneva Conventions, *G Abi-Saab* Non-International Armed Conflict in *UNESCO* (ed) International Dimensions of Humanitarian Law (1988) 217, 223; for an opposite view *L Moir* The Law of Internal Armed Conflict (2002) 65.

[137] 36 ILM 258.

between Nicaragua and the Nicaraguan Resistance,[138] the 1996 Lomé Agreement between Sierra Leone and the Revolutionary United Front,[139] the 2003 Agreement on Permanent Cease-fire and Security Arrangements between the Government of the Sudan and the Sudan People's Liberation Movement, and the 2002 Cease-fire Agreement between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam.

53 Most cease-fire and peace agreements concluded with civil war factions are signed by the combated *de iure* government of the State and by third States, representatives of the UN or regional organizations, functioning as witnesses or (moral) guarantors.[140] It depends on the circumstances of each single case whether the State actors and international organizations intend to create international treaty obligations for the civil war faction *vis-à-vis* all signatories by accepting the latter as a party to the international peace treaty.[141]

54 In line with the ILC,[142] **academic writers** predominantly advocate the international agreement-making capacity of civil war factions, at least if they have achieved the *de facto* administration of a specific territory.[143] Recent **international jurisprudence** does not entirely support this view.

The Special Court for Sierra Leone (Appeals Chamber) has decided on 13 March 2004[144] that the Lomé Agreement between Sierra Leone and the Revolutionary United Front (RUF) signed on 7 July 1996[145] cannot be qualified as an international agreement: "No doubt, the Sierra Leone Government regarded the RUF as an entity with which it could enter into an agreement. However, there is nothing to show that any other State had granted the RUF recognition as an entity with which it could enter into legal relations or that the Government of Sierra Leone regarded it as an entity other that a faction within Sierra Leone. [. . .] The RUF had no treaty-making capacity so as to make the Lomé Agreement an international

[138] 27 ILM 954.

[139] UN Doc S/1996/1034.

[140] See *eg* Art 28 of the peace agreement between the Republic of Sierra Leone and the RUF (n 139): "The Government of Côte d'Ivoire, the United Nations, the Organization of African Unity and the Commonwealth shall stand as moral guarantors that this Peace Agreement is implemented with integrity and in good faith by both parties."

[141] In favour of an international agreement-making capacity of civil war factions *PH Kooijmans* The Security Council and Non-State Entities as Parties to Conflicts in *K Wellens* (ed) Festschrift Suy (1998) 333, 339.

[142] ILC Report 14th Session [1962-II] YbILC 159, 162; see also *Fitzmaurice* III 24, 32: "for instance, insurgents recognized as belligerents in a civil war would certainly possess the capacity to enter into international agreements with third Powers about the conduct of the civil war and matters arising out of it, affecting those powers".

[143] *Shaw* (n 16) 63; *McNair* 680; *SC Neff* The Prerogatives of Violence – in Search of the Conceptual Foundations of Belligerents' Rights (1995) 35 GYIL 41; *A Cassese* The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty (2004) 2 Journal of International Criminal Justice 1130, 1134–1135.

[144] Special Court for Sierra Leone *Prosecutor v Kallon and Kamara* (Appeals Chamber) (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty) SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), 13 March 2004.

[145] See n 139.

agreement."[146] The Special Tribunal reached that conclusion because "international law does not seem to have vested (the insurgents) with such capacity".[147] It made no difference to the Tribunal that the Parliament of Sierra Leone had ratified the Lomé Agreement pursuant to the constitutional provision concerning international treaties.[148]

55 The multilayered international practice reveals that insurgents with effective authority over a territory (*de facto* governments) enjoy internationally recognized agreement-making capacity ***vis-à-vis* third States**, which is functionally limited to subject matters related to the *de facto* governance of the territory (*eg* the protection of foreign subjects and commercial interests) and the conduct of war.[149]

The United Kingdom has entered into treaty relations with the Confederate Government during the US Civil War (1861–1865).[150] In 1937, the United Kingdom entered into agreement for the exchange of agents with the nationalist government of General Franco, recognized as "a government which at present exercises *de facto* administrative control over all the Basque provinces of Spain".[151]

56 In contrast, it cannot be assumed that agreements between insurgents and the combated *de iure* government are governed by international law as well. As a rule, these agreements avoid any references to a possible international character in order to cloak the plain **conflict of interests**: the civil war faction seeks equal footing and thus the internationalization of the treaty relation whereas the contested *de iure* government avoids any determination of that kind. The **common Art 3 para 2 of the four Geneva Conventions of 1949** does not contradict the non-international character of 'special' agreements to be concluded between the parties to a non-international conflict since Art 3 "shall not affect the legal status of the Parties to the conflict".[152]

N. Agreements with Indigenous Peoples

57 Most treaty relations between (European and American) States and indigenous peoples have been established between the seventeenth and the nineteenth centuries and must be assessed in the light of the international law doctrine of the respective time.[153] Up to the second half of the nineteenth century, States regarded agreements with indigenous peoples by and large as legally binding on the international plane,

[146]Special Court for Sierra Leone *Prosecutor v Kallon and Kamara* (n 144) paras 47–48.

[147]*Ibid* para 48.

[148]*Ibid* para 43.

[149]*H Lauterpacht* Recognition of Insurgents as a de facto Government (1939) 3 Modern Law Review 1, 4. If the treaty exceeds these functional limits, the third State unlawfully intervenes into the internal affairs of the contested *de iure* government, see Restatement (Third) of Foreign Relations Law (1987) § 203.

[150]*McNair* 680.

[151]Letter of the Foreign Office addressed to Justice *Bucknill*, reprinted in *Lauterpacht* (n 149) 3.

[152]Art 3 para 2 subparagraph 4 of the four Geneva Conventions of 1949.

[153]*I Brownlie* Treaties and Indigenous Peoples (1992) 8–9.

at least in theory.[154] At the close of the nineteenth century, the notion prevailed that indigenous peoples are State-dominated entities lacking full sovereignty and, consequently, international treaty-making capacity.

> This approach is voiced by *Max Huber* in his 1928 *Island of Palmas* arbitral award, where he stated that "[i]n substance it is not an agreement between equals; it is rather a form of internal organization of a colonial territory, on the basis of autonomy for the natives."[155]

58 With reference to the current practice of recognizing historic treaties which are entered into on the basis of formal sovereign equality of the State and the indigenous people, one school of thought considers them instruments of international law due to the legal status of indigenous people at that time.[156] Others regard them as contracts under national law[157] or treaties *sui generis*[158] to which international law should not be mechanically applied:

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[154] *H Grotius* De jure belli ac pacis (1625) book II ch XV thesis VIII (*FW Kelsey* translation (1925) 397); *H Grotius* De jure praedae (1604/05) ch XII (*GL Williams* translation (1964) 216); for other early contributions, see *F de Vitoria* De Indis (1538/39) pars I and its fragmentary 'prelude': *F de Vitoria* De temperantia (1537) conclusiones IV, V, VI, VIII; *Vitoria* implied the equality of all human beings and of all peoples, see *J Soder* Die Idee der Völkergemeinschaft (1955) 80–94. On early theories of the universality of international law, see *H Bull* The Importance of Grotius in the Study of International Relations in *H Bull*/*B Kingsbury*/*A Roberts* (eds) Hugo Grotius and International Relations (1992) 65, 80–83. On *Grotius*' views with regard to indigenous peoples, see *R Higgins* Grotius and the Development of International Law in the United Nations Period in *H Bull*/*B Kingsbury*/*A Roberts* (eds) Hugo Grotius and International Relations (1992) 267, 278.

[155] *Island of Palmas Case (Netherlands v United States)* 2 RIAA 829, 831 (1928); for an earlier case, *Cayuga Indians (Great Britain v United States)* 6 RIAA 173, 176, 179 (1926).

[156] Final Report submitted by SR *Martínez*, Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations, 22 June 1999, UN Doc E/CN.4/Sub.2/1999/20, para 270; *Brownlie* (n 153) 8; *S Wiessner* American Indian Treaties and Modern International Law (1995) 7 St Thomas LR 576, 593. The US Supreme Court chose a somewhat similar approach in the so-called 'Marshall trilogy', notably in *Worcester v Georgia* 31 US 515, 559 (1832) where it ruled that Indian nations "rank among those powers who are capable of making treaties", whereas in *Cherokee Nation v Georgia* 30 US 1, 17 (1831) it had established that Indian tribes as "domestic dependent nations" had no treaty-making power with foreign States. The aftermath of these decisions is complex, and the Supreme Court's jurisprudence has not always been consistent and unambiguous. Tribal sovereignty in the United States today is subject to treaties concluded before the Act of 1871, federal statutes passed by Congress ("plenary power doctrine") and to limitations inherent to their status as "domestic dependent nations", so that Indian tribes retain but "elements of 'quasi-sovereign' authority"; see Supreme Court (United States) *Oliphant v Suquamish Indian Tribe* 435 US 191, 208 (1978). In *United States v Wheeler* 435 US 313, 323 (1978), the Supreme Court concluded that "[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."

[157] Federal Court Trial Division (Canada) *Pawis v The Queen* 102 DLR (3rd) 602, 607 (1979): a contract which constitutes special relations between the Sovereign and a group of her subjects.

[158] *S Grammond* Aboriginal Treaties and Canadian Law (1994) 20 Queen's LJ 57.

In a decision of 1941, the 1840 Treaty of Waitangi between the United Kingdom and the Maori People of New Zealand was held by the Privy Council to be an international treaty even though not litigable within the municipal system.[159] In a decision of 1985, the Canadian Supreme Court elaborates on the 1752 Treaty of Peace and Friendship with the Mick Mack Indians: "While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique: it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law."[160]

59 The United States restarted to conclude compacts under US federal laws with Indian tribes on a government-to-government basis in 1990.[161] Canada, too, revived its treaty practice in the second half of the twentieth century by concluding several modern claims settlement agreements with Indian peoples.[162] In Australia, the Native Title Act of 1993 provides for a comprehensive legal regime governing private and public agreements entered into with Aborigines.[163] All these agreements reflect and shape the **autonomous, self-governing status** of indigenous peoples within the national legal order.[164] Thus, without prejudice to the indigenous peoples' right to self-determination, the contemporary agreement practice does not support the view that indigenous peoples still enjoy original agreement-making capacity in the eyes of modern international law (→ MN 57).[165]

[159]Privy Council (New Zealand) *Haoni Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590.

[160]Supreme Court (Canada) *Simon v The Queen* [1995] 2 SCR 387, 24 DLR (4th) 690, para 33; see also *R v White and Bob* [1964] 50 DLR (2nd) 613 at 617.

[161]The agreements were concluded in the framework of the Tribal Self Governance Demonstration Project of 1988.

[162]For example, the 1975 James Bay Agreement, the 1975 Northern Québec Agreement, the 1978 Northeastern Québec Agreement and the 1984 Inuvialuit Final Agreement; see *Martínez* (n 156) para 87.

[163]The judicial 'turning point' in Australia was the High Court's decision in *Mabo v Queensland* 107 Australian Law Reports 1, 175 CLR 1 (1992); the Native Title Act of 1993 was the *Keating* government's affirmative legislative response to this judgment.

[164]See § 35 subsection 1 Canadian Constitution Act of 1982: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Subsection 3: "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."

[165]But see *SJ Anaya* Indigenous Peoples in International Law (2nd edn 2004) 175: "agreements with indigenous peoples increasingly are acknowledged to be matters of international concern and hence, in their own rights, can be said to have an international character".

O. Agreements with Non-governmental Organizations

60 States and particularly international organizations (*eg* UN, FAO, ILO, WHO,[166] UNHCR,[167] WFP,[168] *etc*) frequently enter into contractual relations with non-governmental organizations (NGOs),[169] for humanitarian operations or development assistance.[170] As a rule, these relationships are governed by **national law**, the **rules of the respective international organization** and/or **general principles of law**. In many cases, no direct choice of substantive law is made, leaving the decision on the issue to the arbitrator.[171]

> The status of NGOs as consultant partners of the United Nations is unilaterally granted by ECOSOC on the basis of Art 71 UN Charter and ECOSOC Res 1996/31 of 25 July 1996; for the FAO see FAO Regulation 39/57 (1958). The contracts between the European Union and NGOs in the field of humanitarian aid are governed by Council Regulation (EC) No 1257/1996 of 20 June 1996.[172]

61 There is nothing to be said against choosing international law as the proper law of the contractual relation with an NGO.[173] Such **internationalized contracts**, however, do not fall within the scope of Art 3 ('international agreements'; → MN 3) given that the agreement-making capacity of NGOs is not (yet) recognized under international customary law (see also → Art 26 MN 27).[174]

62 Remarkably, NGOs intensively participate in international treaty making, either by 'agenda setting' (initiating international treaties), 'standard setting' (preparing general norms), 'monitoring' (supervision of the implementation of international treaties) or simply by impeding the conclusion of international treaties.[175] Some

[166]The WHO concludes two types of contracts with NGOs: specific Project Agreements and Agreements for the Performance of Work, *cf A-K Lindblom* Non-Governmental Organisations in International Law (2005) 505.

[167]See the UNHCR's model Framework Agreement for Operational Partnership (FAOP).

[168]The WFP has concluded so called 'field level agreements' with about 16 NGOs, some 2,000 local NGOs. For details, see www.wfp.org/.

[169]The perplexing confusion in terminology is unraveled by *N Götz* Reframing NGOs: The Identity of an International Relations Non-Starter (2008) 14 European Journal of International Relations 231.

[170]For a survey of relevant Memoranda of Understanding, letters of understanding, partnership agreements, *etc,* see *Lindblom* (n 166) 496 *et seq*.

[171]*Lindblom* (n 166) 508.

[172][1996] OJ L 163, 1.

[173]*Lindblom* (n 166) 520.

[174]For the respective opinion in the ILC, see ILC Report 11th Session [1959-II] 87, 96 para 4; ILC Report 14th Session [1962-II] YbILC 159, 162 para 8.

[175]See *W Hummer* Internationale nichtstaatliche Organisationen im Zeitalter der Globalisierung: Abgrenzung, Handlungsbefugnisse, Rechtsnatur (2000) 39 BDGVR 45, 161–180. *S Charnovitz* Nongovernmental Organizations and International Law (2006) 100 AJIL 348, 352 *et seq* gives historic examples for the contributions of NGOs to "development, interpretation, judicial application, and enforcement of international law".

authors even advocate the right of NGOs to be consulted in the treaty-making process.[176]

The 1984 UN Convention Against Torture[177] was drafted after Amnesty International had pressed for years for the global proscription of torture; similarly, the realization of the Ottawa (Mine Ban) Treaty of 3 December 1997[178] was largely based upon long-lasting pressure by numerous NGOs. Under Art 1 of the 1995 Collective Complaints Protocol to the European Social Charter,[179] various national and international NGOs have a right to submit complaints to the Committee of Independent Experts. Art 14 of the 1993 North American Agreement on Environmental Cooperation[180] grants any NGO the right to submit complaints about a Member State's non-compliance with international environmental law.

Indirectly, certain rights and immunities are conferred upon NGOs by international treaties, particularly by headquarters agreements,[181] which in this respect can be described as third-party beneficiary treaties. **63**

P. Agreements with Individuals or Corporations (State Contracts)

International practice is rich in contracts made between States and private persons of foreign nationality, be it individuals or corporations (State contracts).[182] They cover a wide range of subject matters, including loan contracts, purchases of supply and services, infrastructure projects, and the exploitation of natural resources (concession contracts).[183] **64**

For contracts between an international organization and private persons see *eg* Art 21 of Annex III to the UN Convention on the Law of the Sea. The International Seabed Authority may enter into contractual relations with companies in order to regulate the conditions of prospecting, exploration and exploitation of the international seabed area beyond the limits of national jurisdiction. These contracts "shall be governed by the terms of the contract, the rules, regulations and procedures of the Authority, Part XI and other rules of international law not incompatible with this Convention".[184]

It was obvious for the ILC that individuals and legal persons established under national law (corporations, NGOs) do not fall under the category of "other subject **65**

[176]See *eg S Charnovitz* (n 175) 368–372. For the long-standing involvement of NGOs as 'treaty-sanctioned' consultation partners, see *eg ibid* 357–359.

[177]1465 UNTS 85.

[178]2056 UNTS 211.

[179]2045 UNTS 224.

[180]32 ILM 1480.

[181]See *eg* Art IV § 11 of the 1947 Agreement Regarding the Headquarters of the United Nations, UNGA Res 169 (II), UN Doc A/RES/169 (II), 11 UNTS 11. See also *Hummer* (n 175) 196–197.

[182]For a definition, see UNCTAD Series on Issues in International Investment Agreements, State Contracts (2004) 3.

[183]*I Brownlie* Principles of Public International Law (7th edn 2008) 546.

[184]1982 UN Convention on the Law of the Sea 1833 UNTS 3, Annex III, Art 21.

of international law possessed of agreement-making capacity".[185] As to that, the ILC could rely on authoritative, but now dated, international jurisprudence:

> In the *Serbian Loan* case of 1929, the PCIJ stated that "any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country".[186] The ICJ has not taken an explicit stand to that issue since it only clarified in the *Anglo-Iranian Oil Co* case that a contract between a State and a foreign corporation cannot be considered an international agreement entered into by the corporation's State of nationality.[187]

66 State contracts often refer to municipal law of the contracting State as the proper law of the contract. However, in particular cases, above all long-term **economic development contracts**,[188] the contracting private investor seeks to minimize risks by inserting stabilization clauses[189] in order to alienate governmental or legislative changes, leaving it more or less to the arbitrator to decide which law governs the contract and thus the dispute. At this point, the extensive and somehow frayed doctrinal debate about the **internationalization of State contracts** starts. By and large, four major schools of thought dominate the overall debate:

67 *Böckstiegel* anchors State contracts directly within the international legal order. According to his view, **international law** is applicable to State contracts ***ex lege*** since the State has unilaterally conferred agreement-making capacity to the contracting company (but see → MN 14–15).[190]

68 The **choice-of-law approach**, advocated by *Mann*[191] and the Institut de Droit Inter national (IDI),[192] is rooted in private international law and avoids the presumption that international law is completely indifferent to the expansion of subjects capable of concluding international agreements. International law is applicable to State contracts ***ex contractu***, provided that international law is the proper law[193] of the State contract

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[185]ILC Report 11th Session [1959-II] YbILC 87, 96 para 4; ILC Report 14th Session [1962-II] YbILC 159, 162 para 8.

[186]PCIJ *Payment of Various Serbian and Brazilian Loans Issued in France* PCIJ Ser A No 20/21, 42 (1929).

[187]ICJ *Anglo-Iranian Oil Co Case (United Kingdom v Iran)* (Jurisdiction) [1952] ICJ Rep 93, 112.

[188]UNCTAD (n 182) 6.

[189]On stabilization clauses, see *MTB Coal* Stabilization Clauses in International Petroleum Transactions (2002) 30 Denver JILP 217, 220–223.

[190]*K-H Böckstiegel* Der Staat als Vertragspartner ausländischer Privatunternehmen (1971) 344.

[191]*FA Mann* State Contracts and International Arbitration (1967) 42 BYIL 1–37; *id* The Theoretical Approach Towards the Law Governing Contracts between States and Private Persons (1975) 11 RBDI 562–567.

[192](1979) 58-II AnnIDI 192–195.

[193]It is disputed whether the proper law of the agreement chosen by the parties and the law from which the agreement's binding force derives have to be distinguished. The doctrine of the 'basic legal order' (Grundlegung) answers this question in the affirmative: *P Weil* Droit international et contrats d'État in D Bardonnet *et al* (eds) Mélanges offerts à Reuter (1981) 549, 559; *PY Tschanz* The Contribution of the Aminoil Award to the Law of State Contract (1984) 18 International Lawyer 245, 259; according to *AFM Maniruzzaman* Choice of Law in International Contracts (1999) 16 Journal of International Arbitration 141, 150, 153 the crucial question is which legal

according to the will[194] of the parties. This solution leaves the limited legal status of corporations within the international legal order unaffected.

According to the ***lex contractus* doctrine**, developed *inter alia* by *Verdross*[195] **69**
and *Bourquin*,[196] each State contract forms its own self-contained legal system *sui generis*, established by the common will of the parties. This *lex contractus*, which defines the parties' rights and obligation in a 'sovereign manner', may or may not refer to international or municipal law in order to fill gaps. The critics of this doctrine argue that neither the freedom to contract nor the binding force of contracts exist independent of a system of law.[197]

The fourth school of thought considers State contracts as governed by **transna-** **70**
tional law which, according to *Jessup*, includes "all laws which regulate actions or events that transcend national frontiers [...]. It includes what we know as public and private international law, and it includes national law both public and private."[198] Starting on *Jessup*'s broad concept, *Lalive* emphasizes the application of 'general principles of law' – supplemented with arbitral awards[199] – as the legal order, which bridges national and international law and thus dispenses from choosing between these two legal systems.[200] The modern ***lex mercatoria*** (merchant law), a brainchild of scholars such as *Goldman*,[201] *Fouchard*,[202] and *Schmidthoff*,[203] is closely related to this concept since it proceeds on the assumption that there exists a "communauté internationale des commerçants"[204] with a legal system

order permits the parties to choose a proper law on which basis the contract's binding force must be evaluated; this view is supported by Arbitrator *Dupuy* in *Texaco v Libya* 53 ILR 389, 443 (1977).

[194]It is disputed whether the parties' true intention to internationalize the contract may be presumed by certain contractual elements; see *RY Jennings* State Contracts in International Law (1961) 37 BYIL 156, 177; *O Schlachter* International Law in Theory and Practice (1991) 305–314.

[195]*A Verdross* Quasi-International Agreements (1964) 18 Yearbook of World Affairs 230.

[196]*M Bourquin* Arbitration and Economic Development Agreements (1960) 15 Business Lawyer 860, 868.

[197]*I Seidl-Hohenveldern* The Theory of Quasi-International and Partly International Agreements (1975) 11 RBDI 567, 569; *McNair* The General Principles of Law Recognized by Civilized Nations (1957) 33 BYIL 1, 7; *Di Marzo* (n 33) 147.

[198]*P Jessup* Transnational Law (1956) 2.

[199]*JF Lalive* Contrats entre États ou entreprises étatiques et personnes privées (1984) 181 RdC 9, 185.

[200]*JF Lalive* Contracts between a State or a State Agency and a Foreign Company (1964) 13 ICLQ 987, 1009.

[201]*B Goldman* Frontières du droit et lex mercatoria (1964) 9 Archives de philosophie du droit 177.

[202]*P Fouchard* L'arbitrage commercial international (1965) 423.

[203]*CM Schmitthoff* The New Source of the Law of International Trade (1963) 15 International Social Science Journal (UNESCO) 259.

[204]*Goldman* (n 201) 191.

of its own. *Lex mercatoria* has received enormous scholarly attention[205] but is frequently criticized for its limited use in practice.[206]

71 Numerous **arbitral awards** touch the issue of the law applicable to State contracts. Their diverging approaches cause the multilayered doctrinal debate rather than channel it.[207] Modern **arbitration systems for investment disputes** between a host State and a private investors (*eg* ICSID, UNCITRAL, ICC) have simplified the matter: if neither the bi- or multilateral investment treaty between the host State and the State of nationality,[208] nor the State contract between the host State and the investor, offers own rules on the law applicable to the dispute between the host State and the investor, the arbitral tribunal has to select the applicable law according to the rules of the respective arbitration system (*lex fori*).[209]

72 **Internationalized State contracts** are not (yet) appertaining to 'international agreements' within the meaning of Art 3 (→ MN 3) given that the agreement-making capacity of corporations is not (yet) recognized under international customary law (but see → Art 26 MN 27).

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[205] For an overview, see *KP Berger* The Creeping Codification of the lex mercatoria (1999); *H-P Schroeder* Die lex mercatoria arbitralis (2007).

[206] *GR Delaume* Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria (1989) 63 Tulane LR 575, 583.

[207] For a survey on international arbitral awards on State contracts and their place within the doctrinal debate, see *P Bernardini* The Law Applied by International Arbitrators to State Contracts in *R Briner et al* (eds) Liber Amicorum Böckstiegel (2001) 51; see also *RB Lillich* The Law Governing Disputes under Development Agreements in *RB Lillich/CN Browner* (eds) International Arbitration in the 21st Century (1994) 61.

[208] For examples, see *T Begic* Applicable Law in International Investment Disputes (2005) 27. The investor's acceptance of the host State's offer to refer the dispute to an arbitration system (embodied in bilateral or multilateral investment treaties or in national legislation) includes the acceptance of the stipulated clause on the applicable law, *C Schreuer* ICSID Commentary (2nd ed 2009) Art 42 para 55.

[209] See *eg* Art 42 of the 1965 ICSID Convention 575 UNTS 159; Art 35 of the 2010 UNCITRAL Arbitration Rules , GA Res 65/22 of 6 December 2010; Art 17 of the 1998 ICC Arbitration Rules 36 ILM 1612; for an overview of arbitral practice based on these arbitration systems see *Begic* (n 208) 107–152.

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Article 4

Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of present Convention with regard to such States.

Contents

A. Purpose and Function

As outlined in the **7th recital** of the Preamble, the Convention does not only codify existing norms of customary law but achieves a **progressive development** of the law of treaties as well. It is only the latter category that raises the issue of retroactivity. For the purpose of **legal certainty**, Art 4 – having the character of a **conflict rule** (→Art 28 MN 2) – explicitly precludes the application of progressive rules to past treaties. Assessed in the light of Art 28, the provision's main function is to clarify that retroactivity of the VCLT is not intended by the drafters (→MN 12). If, however, the VCLT provisions reflect **established customary law**, these rules are applicable to treaties concluded by States Parties prior to the entry into force of the Convention on **29 January 1980** or before the date of their accession (→ MN 11).[1] In addition, international customary law is qualified for filling gaps of the Convention (**8th recital** of the Preamble) and supplementing some of its provisions (see *eg* Arts 38, 43 and 53). **1**

[1] *Cf* ICJ *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep 1045, para 18; *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, para 125.

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B. Historical Background and Negotiating History

2 The insertion of a **non-retroactivity clause** in the Convention has been proposed and considered quite tardy in the negotiation process.[2] After the Swedish delegation raised the problem of retroactivity in the 94th meeting of the Committee of the Whole,[3] a comparatively vivid debate took place in the 101st and 102nd meeting. As one of the many supporters of a non-retroactivity provision, Venezuela considered it essential to limit the application of the VCLT *ratione temporis* to future treaties due to the changes made by it in the established rules of law, naming today's Art 49 (fraud), Art 50 (corruption), Art 56 (denunciation) and Art 60 (suspension) as examples.[4] Anxiety about possible uncertainties concerning the application of customary law resulted in the proposal to combine the non-retroactivity rule with a **safeguard clause on customary law**.[5]

3 Originally, the non-retroactivity clause was installed as Draft Art 77[6] but later transferred to Part I of the Convention because the Drafting Committee considered the provision as one of the general importance governing the Convention as a whole.[7]

C. Elements of Article 4

I. Rules of the Convention Reflecting Customary Law

4 There is no clear reference in the Convention which of its rules constitute a codification of customary international law and which have a progressive character. The **6th recital of the Preamble**,[8] referring *inter alia* to the prohibition of the use of force and the right to self-determination, does not elucidate the scope of Art 4. The enumerated fundamental principles do not belong to the body of law governing international treaties even though they may have effects on the validity of treaties (→ Arts 52, 53). In contrast, the **3rd recital of the Preamble** refers to the principle of free consent, good faith and *pacta sunt servanda*, all principles of international treaty law explicitly noted as "universally recognized" (Art 26, Art 31 para 1,

[2] *S Rosenne* The Temporal Application of the Vienna Convention on the Law of Treaties (1970) 4 Cornell ILJ 1, 5.

[3] UNCLOT II 273 para 52.

[4] UNCLOT II 316 para 64.

[5] So-called five-State proposal (Brazil, Chile, Kenya, Sweden and Tunisia) UNCLOT III 252 para 136; for criticism on the Venezuelan proposal, see *eg* the statements of the representatives of Uruguay and Spain UNCLOT II 323 para 2, 328 para 42; for details, see *PV McDade* The Effect of Article 4 of the Vienna Convention on the Law of Treaties (1986) ICLQ 499, 501.

[6] UNCLOT III 229 paras 136–143.

[7] *Yasseen* (Chairman of the Drafting Committee) UNCLOT II 165 para 8.

[8] The 6th recital of the Preamble also refers to the principle of equal rights, sovereign equality and independence of all States, non-interference, human rights and fundamental freedoms.

Art 34, Art 42). The spectrum of customary law reflected in the VCLT is much broader, though. The Convention's approach not to identify customary treaty law leaves room for the future transformation of 'progressive rules' into settled customary law.[9]

As codified in Art 38 para 1 lit b ICJ Statute, referring to "international custom, as evidence of a general practice accepted as law", the concept of international customary law is determined by two factors: *consuetudo* and *opinio iuris sive necessitatis*.[10] In its jurisprudence, the ICJ stresses the importance of both elements in order to elucidate a rule of international customary law.[11] Under certain conditions, substantive provisions of international treaties may crystallize identical customary rules, accepted as such by *opinio iuris*.[12] In the *North Sea Continental Shelf* jurisprudence, the ICJ considered the widespread and representative participation in a treaty as an essential requirement in this respect.[13] **5**

Many rules of customary treaty law have already existed prior to the VCLT,[14] while others have emerged after 1980 in the light of the Convention's slow growth into a universally accepted instrument (111 States Parties[15]). Even if States such as the United States and France abstain from acceding for some reason or another,[16] most of the Convention's provisions are today universally accepted: **6**

[9] *Cf* the statement of the representative of Italy UNCLOT II 320–321 para 36.

[10] For many, see *A Pellet* in *A Zimmermann/C Tomuschat/K Oellers-Frahm* (eds) The Statute of the International Court of Justice (2nd edn 2006) Art 38 MN 209 with further references to consistent jurisprudence of the ICJ.

[11] See *eg* ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, para 183; *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, 276–277; *North Sea Continental Shelf (Germany v Denmark, Germany v Netherlands)* [1969] ICJ Rep 3, para 77; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, paras 65 *et seq*; *Continental Shelf (Libya v Malta)* [1985] ICJ Rep 13, para 27.

[12] See *M Akehurst* Custom as a Source of International Law (1974/1975) 47 BYIL 1, 42 *et seq*; *RR Baxter* Treaties and Custom (1970) 129 RdC 25, 89–101; *H Thirlway* International Customary Law and Codification (1972) 80–81; for a critical approach, see *AM Weisburd* Customary International Law: The Problem of Treaties (1988) 21 Vanderbilt JTL 1, 11.

[13] ICJ *North Sea Continental Shelf* (n 11) para 73; *Asylum* (n 11) 277. *AE Boyle* The Law of Treaties and the Anglo-French Continental Shelf Arbitration (1980) 29 ICLQ 489, 507 rightly criticizes that the tendency to develop customary law by references to a convention, however widely supported, pays insufficient attention to the effects of reservations to the provisions that are considered reflecting customary law.

[14] The ILC regarded Art 52 (coercion by the threat or use of force) as *lex lata*, *cf* Final Draft, Commentary to Art 49, 247 para 7.

[15] Status of 1 August 2011.

[16] For France's resistance to the *ius cogens* concept in Art 53, see *O Deleau* Les positions françaises à la Conférence de Vienne sur le droit des traités (1969) 15 AFDI 7; for the refusal of the US Senate to give its consent to the Convention, see → Art 2 MN 54.

See **Art 6** MN 17 (treaty-making capacity); **Art 7** MN 9 (full powers); **Art 8** MN 6 (subsequent confirmation); **Art 9** para 1 MN 7 (adoption of the text); **Art 10** MN 5 (authentication of the text); **Art 11** MN 12 (means of expressing consent); **Art 12** MN 9 (signature); **Art 13** MN 5 (exchange of instruments); **Art 14** MN 8 (ratification, acceptance and approval); **Art 15** MN 6 (accession); **Art 16** MN 5 (exchange or deposit of instruments); **Art 17** MN 5 (choice); **Art 18** MN 5 (obligations prior to the treaties entry into force); **Art 19** lit a and b MN 133 (reservations); **Art 20** paras 1–3, 4 lit b (acceptance and objections), see Art 19 MN 133; **Art 22** MN 4 (withdrawal of reservations and objections, see also → Art 19 MN 132); **Art 23** para 2 MN 25 (procedure, see also → Art 19 MN 132); **Art 24** para 1 MN 9; para 2 MN 24, para 3 MN 25, para 4 MN 6, 28 (entry into force); **Art 25** MN 2 (provisional application); **Art 26** MN 20 (*pacta sunt servanda*); **Art 27** MN 4 (internal law); **Art 28** MN 5 (non-retroactivity); **Art 29** MN 3 (territorial scope); **Art 30** MN 9 (successive treaties); **Art 31** MN 6 (general rule of interpretation); **Art 32** MN 3 (supplementary means of interpretation); Art 33 MN 5 (authenticated in two or more languages); **Art 34** MN 4 (*parta tertiis*); **Art 35** MN 1 (obligations for third States); **Art 36** MN 20–25 (rights for third States); **Art 39** MN 7 (general rule regarding the amendment of treaties); Art 45 MN 7 limited to principle of acquiescence (loss of a right to invoke invalidity *etc*) but see also → MN 9; **Art 46** MN 77 (internal law); **Art 47** MN 36 (authority to express consent); **Art 48** MN 44 (error); **Art 51** MN 32 (coercion of a representative); **Art 52** MN 53 (coercion of a State); **Art 53** MN 1 (*ius cogens*); **Art 54** MN 8 (termination and withdrawal); **Art 55** MN 14 in the light of *pacta sunt servanda* (reduction of parties); **Art 56** para 1 lit a MN 52 (no treaty provision regarding termination *etc*); **Art 57** MN 6 (suspension); **Art 58** MN 38, 43 (multilateral agreement); **Art 59** MN 2 (later treaty); **Art 60** paras 1, 2 lit a, paras 3, 4 and 5 MN 87 (material breach); **Art 61** MN 2 (impossibility of performance); **Art 62** MN 103–108 (changes of circumstances); **Art 63** MN 52–55 (severance of diplomatic relations); **Art 64** MN 18 (new *ius cogens*); **Art 67** MN 4 (Instruments for declaring invalid); **Art 68** MN 3 (Revocation of notification); **Art 70** MN 38 (consequences of the termination); **Art 72** MN 23 (Consequences of suspension); **Art 74** MN 3 (diplomatic and consular relations); **Art 76** para 2 MN 29 (Depositaries); **Art 77** MN 5 (function of depositaries); **Art 78** lit a MN 5 (notifications and communications) but see also → MN 9; **Art 79** MN 3 (correction of errors).

7 National courts of States Parties[17] and third States[18] consistently refer to provisions of the VCLT in order to establish rules of customary treaty

[17]See *eg* Federal Constitutional Court (Germany) 40 BVerfGE 141, 167, 176 (1975); see also *A Haratsch/S Schmahl* Die Anwendung ratione temporis der Wiener Konvention über das Recht der Verträge (2003) 58 ZÖR 105, 107 footnote 14.

[18]For the United States, see Restatement (Third) of Foreign Relations Law Vol 1 (1987) Introductory Note 144–147; Supreme Court (United States) *Weinberger v Rossi* 456 US 25 (1982); *Sale v Haitian Centers Council* (dissenting opinion *Blackmun*) 509 US 155, 191 (1993); US Court of Appeals for the 2nd Circuit (United States) *Fujitsu v Federal Express* 247 F3d 423, 433 (2001); *Chubb & Son v Asiana Airlines* 214 F3d 301, 308 (2000); Supreme Court of New Mexico (United States) *State v Martinez-Rodriguez* 33 P3d 267, 273 n 3 (2001). For France see *eg* Court of Cassation [2006-I] Bulletin 325 (no 378); [2003-IV] Bulletin 134 (no 117).

law. The same is true for supranational[19] and international courts[20] and tribunals.[21]

II. Rules Not Reflecting Customary Law

Most **procedural rules** of the Convention to be observed by States Parties when invoking certain legal effects under the Convention cannot be regarded as a codification of customary law (**Art 20** para 5 MN 54; **Art 65** MN 7–9; but see **Art 67** MN 4), even though some aspects may reflect principles which are based on an obligation to act in good faith.[22] The same is valid for the provision on **dispute settlement** (**Art 66** lit b MN 2–4); as **a compromissory clause Art 66** lit a is unqualified for a customary equivalent for the simple reason that Non-States Parties must agree to the jurisdiction of the ICJ on the basis of the ICJ Statute (Art 36 ICJ Statute, see also Art 53 MN 59; Art 66 MN 16).[23] **8**

Some **substantive rules** of the Convention remain conventional law, at least as things stand at present: **9**

> **Art 19** lit c MN 133, **Art 20** para 4 lit a, c see Art 19 MN 133; **Art 40** MN 5 (amendment of multilateral treaties); **Art 41** MN 6 (modification of multilateral treaties); **Art 44** MN 9 (separability of treaty provisions); **Art 45** MN 7 (loss of a right to invoke invalidity *etc*), but see also → MN 6; **Art 49** MN 37, but general principle of law (fraud); **Art 50** MN 16–17, but general principle of law (corruption); **Art 56** para 1 lit b MN 53 (no treaty provision regarding termination, *etc*); **Art 60** para 2 lit b and c MN 88 (material breach); **Art 71**

[19]ECJ (CJ) *Racke* C-162/96 [1998] ECR I-3655; *Opinion 1/91* [1991] ECR I-6079, 6101 (*clausula rebus sic stantibus*); *Biret International SA v Council* C-93/02 P [2003] ECR I-10497, para 99 (reservation); ECJ (CFI) *Greece v Commission* T-231/04 [2007] ECR II-63, para 86 (Art 18 VCLT).

[20]ICJ *Fisheries Jurisdiction (United Kingdom v Iceland)* (Jurisdiction of the Court) [1973] ICJ Rep 3, para 24 (Art 52 VCLT), 36 (Art 62 VCLT); *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Jurisdiction of the Court) [1973] ICJ Rep 49, para 24 (Art 52 VCLT), 38 (Art 62 VCLT); *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 Rep 16, 47; *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* [1994] ICJ Rep 6, 16; *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 paras 46, 99; ECtHR *Golder v United Kingdom* App No 4451/70, Ser A 18, paras 29, 30 (1975).

[21]ICTY *Prosecutor v Jelisić* (Trial Chamber) IT-95-10-T, 14 December 1999, para 61 (Arts 31–32 VCLT); *Prosecutor v Milošević* (Trial Chamber) (Decision on Preliminary Motions) IT-99-37-PT, 8 November 2001, para 47 (Art 27 VCLT); *Delimitation of the Continental Shelf between the United Kingdom and France (United Kingdom v France)* 18 RIAA 3, para 61 (1977) (Art 21 para 3 VCLT).

[22]ICJ *Gabčíkovo-Nagymaros Project* (n 20) para 109: "Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith."

[23]ICJ *Armed Activities on the Territory of the Congo* (n 1) para 125; see already *Rosenne* (n 2) 21.

MN 36 (consequences of invalidity); **Art 75** MN 5 (aggressor); **Art 78** lit b and c MN 5 (notification and communications).

In the case of **Art 69**, a definite commitment to the status under customary law would be a conjecture: MN 43 (Consequences of the invalidity of a treaty).

10 Other provisions of the Convention concern exclusively the operation of the Convention or contain **declaratory caveats**, thus are unqualified to develop into rules of international customary law:

Art 1 (scope of the Convention); **Art 4** (non-retroactivity of the Convention); **Art 5** constituent instrument of international organizations); **Art 38** (third States and customary law); **Art 42** MN 11 (impeachment of the validity of a treaty); **Art 43** (obligations imposed by international law independent of a treaty); **Art 73** (State succession, State responsibility and outbreak of hostilities); **Arts 81–85** (final provisions).

III. Non-retroactivity of the Convention

11 It is a settled general principle of international law[24] and an **essential requirement of legality** that, as a rule, a fact or act has to be judged in the light of the valid rules in force at the time the fact or act occurred (→ Art 28).[25] It is, however, no matter of course to apply the non-retroactivity principle to **continuous legal relations** established by past treaties. If, for example, a treaty was concluded due to fraudulent conduct of one State Party prior to the entering into force of the VCLT, the question arises whether the injured State may invoke after 1980[26] the fraud as invaliding its consent pursuant to Art 49. As stated by the **modern doctrine of inter-temporal law** (→ Art 64 MN 14–15), legal rights acquired in a legally valid manner at the time of their creation must be maintained according to the evolution of international law.[27] This approach is commonly traced back to the famous *Island of Palmas*

[24]See the statement by the representative of Switzerland UNCLOT II 330 para 7.

[25]*Island of Palmas Case (Netherlands v United States)* 2 RIAA 829, 845 (1928); see also *Clipperton Island Case (Mexico v France)* 2 RIAA 1105, 1110 (1931); *Grisbadarna Case (Norway v Sweden)* 11 RIAA 147, 159 (1909); ICJ *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, para 79; *Rights of Nationals of the United States of America in Morocco (France v United States)* [1952] ICJ Rep 176, 189; *South West Africa (Ethiopia v South Africa, Liberia v South Africa)* (Second Phase) [1966] ICJ Rep 6, para 19.

[26]The year the VCLT entered into force.

[27]*TO Elias* The Doctrine of Intertemporal Law (1980) 74 AJIL 285, 286; *G Fitzmaurice* Law and Procedures of the International Court of Justice 1951–1954 (1953) 30 BYIL 1, 6; the meaning and the scope of inter-temporal law was extensively raised by Chad in its oral and written pleadings before the ICJ in *Territorial Dispute (Libya v Chad)*, Counter-Memorial of the Government of the Republic of Chad, 27 March 1992 [1992] ICJ Pleadings 94.

arbitration award of Judge *Max Huber*.[28] Stressing the non-retroactivity of the VCLT, Art 4 clarifies that the provisions of the Convention cannot be invoked in order to effectuate the modern evolution of treaty law at the expense of established treaty rights.

The question whether or not it is permissible to **retroactively apply a customary rule of treaty law** to treaties concluded prior to the emergence of that rule in customary law has to be answered on the basis of the established principle of international law. At least in the field of the law of treaties, the modern intertemporal law doctrine is not generally accepted.[29] The propensity of international courts and tribunals to dynamically interpret treaties in the light of subsequent developments in international law causes retroactive effects of that new substantive law, not of Art 31 VCLT or its customary equivalent.[30] **12**

The non-retroactivity rule is ***dispositif***. A past treaty can be subsequently subjected to the VCLT provisions, either *ad hoc* in case of a dispute or by another form of subsequent consent.[31] **13**

IV. Timeline: 'Conclusion' and 'Entry into Force'

The VCLT entered into force on 27 January 1980. Consequently, the Convention is applicable to all treaties concluded by States Parties after that date. The usage of the term 'concluded' in the Convention is far from clear, given that Art 2 does not provide for a definition. With view to Part II of the Convention, a treaty is 'concluded' if at least two States express their **consent to be bound** by a treaty irrespective of whether the treaty has entered into force that very moment.[32] It therefore follows that the Convention is applicable to treaties whose parties have expressed their consent to be bound after 27 January 1980 irrespective of whether treaty's text was already adopted before 27 January 1980. In contrast, the Convention is not applicable to treaties that entered into force after 27 January 1980 when **14**

[28] *Island of Palmas* (n 25) 845; for an analysis of the *Huber dictum*, which falls into two parts, a conservative non-retroactivity statement and a progressive resumption of the conservative position, see *M Kotzur* Intertemporal Law in MPEPIL (2008) MN 6; *R Higgins* Some Observations on the Inter-Temporal Rules in International Law in *J Makarcyk* (ed) Essays in Honour of Skubiszewski (1996) 173, 174.

[29] See the criticism of *P Tavernier* Recherches sur l'application dans le temps des actes et des règles en droit international public (1970) 271–276; for the ambiguous position of the ICJ, see *M Koskenniemi* From Apology to Utopia (2005) 456–457.

[30] For a dynamic interpretation of a treaty, see ICJ *Namibia* (n 20) para 41.

[31] ICJ *Armed Activities on the Territory of the Congo* (n 1) para 125.

[32] *F Dopagne* in *Corten/Klein* Art 4 MN 8; for an in-depth discussion on the question whether signature is sufficient or ratification is required, see *McDade* (n 5) 508–510. Generally on determining the initiation of international treaties, see *E Orhuela Calatayud* Los tratados internacionales y su aplicación en el tiempo (2004).

the parties have expressed their consent to be bound before that date. The number of treaties that falls within this legal gap is negligibly small.[33]

V. Application of the VCLT to the VCLT

15 Being a 'treaty' in the sense of Art 2 para 1 lit a (→ Art 2 MN 6–36), the question arises as to whether the provisions of the Convention (*eg* on interpretation or invalidity) govern the Convention. Taken literally, Art 4 does not rule out the prospect of applying the VCLT to the provisions of the VCLT when the parties concerned have acceded to the Convention after 27 January 1980. Contrary to the open wording of the Convention, some authors categorically deny the self-application of a conventional regime to its own rules as a logical paradox.[34] As to that, *Villiger* rightly pointed at the self-regulatory effects of many treaties that contain provisions on the entry into force, retroactivity, interpretation, *etc*.[35] Art 4 itself underlines the self-regulatory character of the Convention by providing a *lex specialis* rule that supplements the general non-retroactivity rule of Art 28 (→ Art 28 MN 3).[36]

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[33] See *eg* the Additional Protocol to the European Convention on State Immunity ETS 74A: Austria and Cyprus, both parties to the VCLT, have ratified the Additional Protocol before 1980; the Additional Protocol entered into force in 1985.

[34] *K Marek* Thoughts on Codification (1971) 31 ZaöRV 489, 510–511; *M Sørensen* The Modification of Collective Treaties without the Consent of All the Contracting Parties, (1938) 9 Acta Scandinavica Juris Gentium 153.

[35] *M Villiger* Customary International Law and Treaties (1997) MN 260.

[36] SR *Koskenniemi* (ILC) Study in the Function and Scope of the lex specialis Rule and the Question of 'Self-Contained Regimes' UN Doc ILC(LVI)/SG/FIL/CRD.1 and Add.1 (2004), 4.

Article 5

Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

Contents

A. Purpose and Function

The wording of Art 5 conveys the impression that the provision's main task is to determine the scope of the VCLT *ratione materiae*: constituent instruments of international organizations (→ Art 2 MN 50–53) as well as treaties adopted within an organ of an international organization fall within the scope of the Convention, provided that the members of the organization are party to the Convention (but see → Art 1 MN 3). The negotiating history (→ MN 2–4), however, reveals that the function of Art 5 is primarily that of a **general reservation clause**: even if the Convention (*lex generalis*) is in principle applicable to constituent instruments of international organizations and treaties adopted within international organizations, it is the subsidiary legal regime (→ Art 1 MN 2). In the first place, the relevant rules of the respective international organization (→ Art 2 MN 50) determine issues like amendment, modification and interpretation of the constituent instrument (*lex specialis*), subject to the condition that the parallel provisions of the VCLT are **optional treaty law** (→ MN 17–19).[1] In addition, the international organization may provide for special procedural rules to be applied when adopting the text of a treaty within the organization (→ MN 10–14, 20) **1**

[1] *Cf* the statement by the representative of Sweden UNCLOT I 45 para 34.

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B. Historical Background and Negotiating History

2 Originally, the ILC inserted **special reservation clauses for international organization rules** in the relevant chapters of their draft, *eg* the chapter on the termination of treaties.[2] If only because it might be difficult to oversee all possible situations in which rules of international organizations are *leges speciales* to the provisions of the VCLT,[3] SR *Waldock* proposed a general reservation provision within the introductory chapter of the Convention (Draft Art 3 *bis*). In his view, a general provision of this kind should explicitly refer to those provisions of the Convention, which cannot be overruled by international organization rules, in particular the provisions on invalidity and on *ius cogens* (Arts 46–53 and 64).[4] *Waldock*'s precaution was not deemed necessary by the Drafting Committee.[5]

3 Whereas the Convention's subsidiary function with respect to constituent instruments of international organizations was beyond dispute, many governments were at odds with a special legal regime governing treaties developed within the framework of international organizations.[6] In order to safeguard the States' **freedom of negotiation** as much as possible, international organizations should only have the power to restrict this freedom if the treaty was **adopted by an organ** of the relevant organization.[7] In contrast, treaties concluded at conferences held under the **auspices of international organizations** or merely through the **use of its facilities** should not be subject to international organization rules.[8] The ILC took note of these concerns and changed the phrase "drawn up within an international organization" to "adopted within an international organization" in order to ensure the limited scope of the reservation clause.[9]

4 The vivid discussion at the Vienna Conference circled around the wish of States to ensure a broad application of the Convention (*lex generalis*) by limiting the possibility to derogate from the Convention through rules of international organizations (*lex specialis*).[10] The Swedish representative, for example, considered Art 5 superfluous inasmuch as most provisions of the Convention were of a residual character anyway (*cf eg* Art 16: "Unless the treaty otherwise provides. . ."; → Art 1

[2][1963-II] YbILC 213 (Draft Art 48): "Where a treaty is a constituent instrument of an international organization, or has been drawn up within an international organization, the application of the provision of part II, section III, shall be subject to the established rules of the organization concerned."

[3]Final Draft, Commentary to Art 4, 191 para 1.

[4]*Waldock* IV 18.

[5][1965-I] YbILC 308 para 27.

[6]See the comments by the governments of Israel, Luxembourg and the Netherlands [1966-II] YbILC 300 (lit e), 312 (Art 48), 319 (Art 48).

[7]Final Draft, Commentary to Art 4, 191 para 2.

[8]See the comment by the government of Luxembourg [1966-II] YbILC 312.

[9]Final Draft, Commentary to Art 4, 191 para 2.

[10]See UNCLOT I 42–57.

MN 2).[11] Other delegates backed the proposal to delete Art 5 because they opposed the idea of the international organizations' latitude in treaty making.[12] In contrast, representatives of international organizations stressed the wide field of applicable *lex specialis*.[13] The final text proposed by the Drafting Committee[14] yields to the wish to emphasize the broad application of the Convention.

C. Elements of Article 5

I. Constituent Instruments of International Organizations

Art 5 specifies the term 'constituent instrument' by referring to the term '**treaty**' as defined in Art 2 para 1 lit a (→ Art 2 MN 3–36). Today, the definition is rightly enhanced by Art 5 VCLT II: a constituent instrument is a treaty governed by international law, entered into by States and, as the case may be, by international organizations with treaty-making capacity of their own (→ Art 6 MN 26). The parties to the constituent instrument create *qua* common will a new legal person, the international organization, which consequently has the power to generate internal rules of its own.[15] These **rules**[16] are **derived** from the treaty constituting the international organization but do not share its character as a constituent instrument for the simple reason that they are only the manifestation of the organization's separate personality and, consequently, the product of its unilateral volition. Considering that constituent instruments are international treaties in terms of Art 2 para 1 lit a, the Convention naturally applies to them. However, due to the residual character of many provisions of the Convention (→ Art 1 MN 2), the constituent instrument itself may by its terms provide for *lex specialis* as pointed out in Art 5 (→ MN 15). **5**

The contractual character of the constituent instrument (Art 2 para 1 lit a) is only the formal aspect of its legal nature. On a substantive level, the constituent instrument provides the legal foundation of the newly established international organization as well as its institutional and operational framework.[17] The constituent instruments' Janus face is the starting point of the controversy between the so- **6**

[11] UNCLOT I 45 para 34.

[12] See the statement by the representative of Ceylon UNCLOT I 45 para 38.

[13] See *eg* the statements by the observers for the ILO and the Council of Europe UNCLOT I 36 paras 3 *et seq*, 47 para 12.

[14] UNCLOT III 95, 116 para 57.

[15] For the differentiation between different types of rules, see *K Schmalenbach* International Organizations or Institutions, General Aspects in MPEPIL (2008) paras 66–75.

[16] Art 2 para 1 lit j VCLT II: "rules of the organization means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization".

[17] ICJ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, para 19.

called '**traditionalists**'[18] and '**constitutionalists**'.[19] Whereas the former school of thought stresses the contractual nature of constituent instruments, the latter emphasizes their self-contained and evolutionary nature. Being 'constitutions', they must adapt to the needs of the international organizations, especially their functional effectiveness, and – a rather recent trend – their constitutional values, legitimacy and restraint.[20]

7 Even if the Convention is applicable to the constituent instrument,[21] including its Art 31, it is up to each interpreter to decide whether the constitutional or the contractual face of the constituent instrument prevails. The **ICJ**, for example, still remains faithful to the traditional textual approach despite a certain tendency to interpret constituent instruments in a more dynamic, teleological fashion.[22] Given that the teleological approach is an interpretation tool envisaged in Art 31 (→ Art 31 MN 53–59), it is safe to say that the ICJ does not favour a particular school of thought. The ICJ moved towards 'constitutionalism' in its ***WHO* opinion** but, interestingly enough, not with regard to the WHO Constitution but with regard to the seamless allocation of responsibilities within the UN family ("overall system").[23]

II. Constituent Instruments of the European Union

8 There is a vivid and still undecided academic debate on the legal nature of the constituent instruments of the European Union; that is, whether they have discarded their original character as inter-State agreements governed by the international law

[18] *K Skubiszewski* Remarks on the Interpretation of the United Nations Charter in *R Bernhardt et al* (eds) Festschrift Mosler (1983) 891, 892; *H Kelsen* Principles of International Law (1952) 172.

[19] *R Monaco* Le charactère constitutionnel des actes institutifs d'organisations internationales in Mélanges offerts à Charles Rousseau (1974) 153, 154; *D Simon* L'interprétation judiciaire des traités des organisations internationales (1981) 157–166; *T Sato* Evolving Constitutions of International Organizations (1996) 230–232.

[20] *J Klabbers* Constitutionalism Lite (2004) 1 International Organizations LR 31–58; *K Wellens* Remedies Against International Organizations (2002) 14; *A Peters* Global Constitutionalism Revisited (2005) 11 International Legal Theory 39, 44; for a distinction between constitutionalism and functionalism, see *A Peters* Compensatory Constitutionalism (2006) 19 Leiden JIL 579, 594.

[21] *Cf Bartoš* [1963-I] YbILC 305 para 69; for the details of the debate within the ILC, see *S Rosenne* Developments in the Law of Treaties 1945–1986 (1989) 211–223.

[22] ICJ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 157: "[the Court] has recognized that the [UN] Charter is a multilateral treaty, albeit a treaty having certain special characteristics"; *Use of Nuclear Weapons* (n 17) paras 19, 21; *Effect of Awards of Compensation Made by the UN Administrative Tribunal* (Advisory Opinion) [1954] ICJ Rep 47, 57; *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 Rep 16; for an excellent analysis of the ICJ's jurisprudence, see *Sato* (n 19) 150–160.

[23] ICJ *Use of Nuclear Weapons* (n 17) para 26; see also *C Brölmann* The Institutional Veil in Public International Law (2007) 121.

of treaties.[24] The thoroughly constitutional approach of the ECJ is evident since the famous *Costa v ENEL* judgment in 1964, labeling the Treaty Establishing the European Economic Community – in contrast to 'ordinary' international treaties – an "**independent source of law**" of a "**special and original nature**".[25]

> In his opinion on the *Kadi* case, Advocate General *Maduro* expressed the view that "[t]he [ECJ] held that the Treaty is not merely an agreement between States, but an agreement between the peoples of Europe. [...] In other words, the Treaty has created a municipal legal order of trans-national dimensions, of which it forms the 'basic constitutional charter'."[26]

Not once have the European Courts applied the VCLT when interpreting the EC, ECSC and EURATOM Treaties.[27] The contrary is the case.[28] Already in 1964, the ECJ ruled out the legal possibility of Member States to invoke their right to suspend the operation of an international treaty in case of a material breach (*cf* Art 60 VCLT) in order to defend their non-performance of the EC Treaty.[29] In addition, the ECJ has denied that the subsequent practice of Member States has any influence on the interpretation of the EU Treaties (but *cf* Art 31 para 3 VCLT).[30] **9**

III. Treaties Adopted Within an International Organization

Since the establishment of the ILO in 1919, international organizations are increasingly involved in the drafting of multilateral treaties whose subject matters fall **10**

[24] *PJ Kuijper* The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties (1998) 25 Legal Issues of European Integration 1, 10; for an 'international legal order': *T Schilling* The Autonomy of the Community Legal Order: An Analysis of Possible Foundations (1996) 37 Harvard ILJ 389, 403–404; different opinion: *JH Weiler/UR Haltern* The Autonomy of the Community Legal Order – Through the Looking Glass (1996) 37 Harvard ILJ 411, 420–423; see also *TC Hartley* International Law and the Law of the European Union – A Reassessment (2001) 72 BYIL 1, 10; *M Sørensen* Autonomous Legal Orders (1983) 32 ICLQ 559.

[25] ECJ (CJ) *Costa v ENEL* 6/64 [1964] ECR 585.

[26] ECJ (CJ) *Kadi and Barakaat v Council and Commission* C-402/05, C-415/02 P (opinion AG Poiares Maduro), 16 January 2008, para 21.

[27] See *eg* the statement of the ECJ (CFI) in *SP SpA et al v Commission* T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03 [2007] ECR II-1357, para 58: "The reference to international law, and in particular to Articles 54 and 70 of the Vienna Convention (on the Law of Treaties), fails to have regard to the sui generis nature of the Community legal order. The indivisibility of the Community legal order and the lex specialis to lex generalis relationship between the ECSC and EC Treaties mean that the consequences of the expiry of the ECSC Treaty are not governed by the rules of international law but must be assessed in the light of the provisions existing within the Community legal order."

[28] However, the ECJ applies the VCLT to treaties concluded by the EU (formerly EC); see in this regard the comprehensive study of *F Hoffmeister* The Contribution of EU Practice to International Law in *M Cremona* (ed) Developments in EU External Relations Law (2008) 37.

[29] ECJ (CJ) *Commission v Luxembourg and Belgium* 90/63, 91/63 [1964] ECR 625; see also *Hedley Lomas (Ireland) Ltd* C-5/94 [1996] ECR I-2553, para 20.

[30] ECJ (CJ) *France v Commission* C-327/91 [1994] ECR I-3641, para 36.

within the scope of the international organization's respective functions.[31] These activities compete with the time-honored tradition of States to negotiate their treaties on **diplomatic conferences** from scratch.[32] If a treaty text has been drafted by organs of an international organization,[33] by and large, two different ways of proceedings are available: either the international organization decides to approach the traditional path and convenes a diplomatic conference of governmental representatives, or it officially adopts the draft treaty and submits it to the ratification process.

11 Art 5 exclusively deals with the latter *modus operandi*.[34] If it falls within the powers of the international organization to adopt treaties (or rather their texts),[35] the decision is normally taken by the plenary organ with a two-thirds majority.[36] Since the adoption replaces the authentication of the text by each State (→ Art 10 MN 7), States are barred from 'untying the package' by renegotiating the treaty text. If permitted at all, substantive modifications require a formal reservation (Art 19).[37] The adopted treaty is subject to the **ratification** by Member States in order to become internationally binding upon them. If the adopted treaty fails to become legally binding, the international organization's decision on the draft can be qualified as a **non-binding recommendation**.[38]

12 Some international organizations take decisions that are only binding on those Member States, which expressly accept them (**opt-in**).[39] Other organizations

[31] *CA Fleischhauer* in *Simma* Art 13 MN 1–5; *HG Schermers/NM Blokker* International Institutional Law (2003) § 1262.

[32] The tradition can be traced back to the multilateral conferences of Münster and Osnabrück that brought forth the Peace Treaty of Westphalia in 1648, *A Boyle/C Chinkin* The Making of International Law (2007) 141.

[33] Within the UN, several organs are competent to draft the treaty texts later adopted by the UNGA or traditionally on a diplomatic conference, first and foremost the ILC but also the Sixth Committee, special bodies (*eg* UNCITRAL) and *ad hoc* committees (*eg* the Committee on International Terrorism), for details, see *CA Fleischhauer* in *Simma* Art 13 MN 12–81; in the case of the Comprehensive Nuclear Test Ban Treaty of 24 September 1996, (1996) 35 ILM 1439, the Australian government submitted the draft to the UNGA after the diplomatic conference had failed to reach consensus; the UNGA adopted the text by Res 50/245, 10 September 1996, UN Doc A/RES/50/245, for details, see *Brölmann* (n 23) 106.

[34] Final Draft Commentary to Art 4, 191 para 3; *Villiger* Art 5 MN 6.

[35] On the discussion whether a competence is required, see *Schermers/Blokker* (n 31) § 1274.

[36] Art 13 para 1 lit a UN Charter; Art 15 Statute of the Council of Europe ETS No 1; Art 2 lit b of the 1958 IMO Convention 289 UNTS 3; Art 14 of the 1945 FAO Constitution Yearbook of the United Nations 1946–1947 part 2 ch 2 685, 693; Art 19 of the 1948 WHO Constitution 14 UNTS 185; Art IV para 4 of the 1946 UNESCO Constitution 4 UNTS 275; Art 19 of the 1919 ILO Constitution 15 UNTS 35.

[37] *F Maupain* The ILO's Standard-Setting Actions: International Legislation or Treaty Law? in *V Gowlland-Debbas* (ed) Multilateral Treaty-Making (2000) 129, 130.

[38] *Ibid* 130.

[39] Art 61 para 2 of the 1974 Treaty on the International Energy Agency 1040 UNTS 271; Art 7 of the 1945 Constitution of the League of Arab States 70 UNTS 248.

require Member States to explicitly opt out so that the decision will not be legally binding for them.[40] Strictly speaking, Art 5 does not apply to decisions – *ie* rules[41] – of international organizations (→ MN 5). However, under the condition that the unilaterally accepted decision creates reciprocal legal relationships between all approving Member States (→ Art 2 MN 32), the approved decision measures up to a "treaty adopted within an international organization" pursuant to Art 5.[42]

13 When the international organization convokes a conference of plenipotentiaries that negotiates and adopts the treaty text, the treaty is merely drawn up under the **auspices of an international organization**; the *lex specialis* reservation of Art 5 does not apply. This is valid for all conventions on international air law that have been adopted on a diplomatic conference on the occasion of the session of the ICAO Assembly (*eg* the Montreal Convention for the Unification of Certain Rules for International Carriage of 1971).[43] The UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) – convened by the United Nations and hosted by the FAO – gives another example of traditional treaty making within an institutionalized framework.[44] Despite its traditional genesis, the Rome Statute, being the constituent instrument of the ICC, falls under the *lex specialis* reservation of Art 5.

14 The **Council of the European Union** (Art 16 TEU) and the **European Council** (Art 15 TEU) are lacking the competence to adopt the text of 'European Union treaties' to be ratified by Member States.[45] In any case, Member States may utilize the institutional framework of the EU, operating as "the Representatives of the Governments of the Member States meeting within the Council".[46] Thus the *lex specialis* reservation of Art 5 does not apply (but see → MN 22).

[40] Art 12 of the 1947 Convention on the International Civil Aviation Organization (Chicago Convention) 15 UNTS 295.

[41] For the definition, see Art 2 para 1 lit j VCLT II.

[42] *Cf Schermers/Blokker* (n 31) § 1260.

[43] See ICAO Assembly Resolution A31-15, Appendix B ('Procedure for Approval of Draft Conventions on International Air Law').

[44] See for the drafting history *MC Bassiouni* Negotiating the Treaty of Rome on the Establishment of the International Criminal Court 32 Cornell ILJ (1999) 443.

[45] Under the 2002 Treaty of the European Union (Nice), the European Council was authorized to "establish conventions, which it shall recommend to the Member States for adoption in accordance with their respective constitutional instruments" (ex Art 34 para 2 lit d 2002 TEU). Ex-Art 34 para 2 lit d, which addressed so-called 'third pillar conventions', was repealed by the 2009 Lisbon Treaty.

[46] *Schermers/Blokker* (n 31) § 1273; see *eg* Agreement between the Member States of the European Union Concerning Claims Introduced by Each Member States Against Any Other Member States for Damage to Any Property Owned, Used or Operated by It or Injury or Death Suffered by Any Military or Civilian Staff of Its Services, in the Context of an EU Crisis Management Operation [2004] OJ C 116, 1.

D. Legal Consequences

I. Constituent Instruments of International Organizations

1. Primacy of the Rules of the International Organization Over the VCLT

15 According to Art 2 para 1 lit j VCLT II, the phrase "rules of the organization" denotes the **constituent instruments**, derived **decisions** and **resolutions** adopted within the international organization in accordance with the constituent instruments and the **established practice** of the organization. The definition fully applies to the 1969 Convention as well.[47] Art 5 clarifies that rules of the organization (*leges speciales*) supersede, in cases of conflict, the provisions of the Convention (*leges generales*).

16 The *lex specialis* character of constituent instruments, derived rules, case law and practice of international organizations in relation to the Convention is first and foremost relevant with respect to the **interpretation** and the **amendment** of constituent instruments.[48] Especially, the amendment of the constituent instrument by majority vote binding upon all Members deviates from the principle of consensus reflected in Art 40 para 4 VCLT.[49] Most notably, Art 20 para 3 VCLT anticipates the need for a special regime governing **reservations** to constituent instruments (acceptance of the competent organ of that international organization → Art 20 MN 36–41) without ruling out other solutions ("unless it otherwise provides"). With regard to the application of **successive treaties**, Art 30 para 1 VCLT minds the **priority of the UN Charter** over other international treaty obligations of UN Member States (Art 103 UN Charter). The accentuated reference to the UN Charter does not preclude other constituent instruments from prevailing over treaty obligations of Member States (for the EU see → MN 22).

2. Limits of Primacy

17 Placing Art 5 into the introductory chapter conveys the impression that all provisions of the Convention may be derogated by special legal regimes of international organizations irrespective of whether the provisions have a residual character or not (→ MN 4). Art 42 endorses this assumption, given that the **validity of a treaty** "may be impeached only through the application *of the present Convention*", which necessarily embraces Art 5. The genesis of Art 42, however, reveals that the provision exclusively refers to those articles dealing with the legal grounds for

[47] *Cf* the United Kingdom's understanding of the term "rules of international organizations" UNCLOT I 44 para 31.

[48] *Brölmann* (n 23) 116.

[49] *Cf* Art 108 UN Charter; Art 73 WHO Constitution (n 36); Art 13 UNESCO Constitution (n 36); Art 7 of the 1955 Articles of Agreement of the International Finance Corporation 264 UNTS 3791; Art 28 of the 1947 Convention of the World Meteorological Organization 77 UNTS 143.

impeaching the validity of a treaty (Arts 46–53 and 64) as well as the legal consequences thereof (Arts 69 and 71).[50] The idea to exhaustively enumerate all legal grounds of invalidity was considered a progressive but desirable evolution of the law of treaties since it strengthens the *pacta sunt servanda* principle.[51] Consequently, Art 5 is not a gateway for new rules on invalidity introduced by international organizations' rules but unknown to the Convention.

That being said, the question remains whether Arts 46–53, 64, 69, and 71 may be **abolished** by rules of international organizations to the effect that Member States shall not invoke the invalidity of the constituent instrument. Even if the aforementioned articles are exhaustive for the sake of *pacta sunt servanda*, they are not necessarily **mandatory** in the sense that no stricter treaty regime is allowed. Only those rules of the Convention are sacrosanct that are generally accepted as *ius cogens*.[52] This applies to **Art 52 (use of force)**, **Art 53** and **Art 64 (peremptory norms)** since the voidness of treaties conflicting with *ius cogens* is generally accepted as a **peremptory legal consequence**. **18**

Deduced from the consensual nature of international law, the ***pacta tertiis* rule** (Art 34) is one of the cornerstones of the international legal system. However, the principle does not belong to the canon of peremptory norms under international general law, given that the idea of *erga omnes* effects of treaties is passionately discussed in theory and practice.[53] Especially, **Art 2 para 6 UN Charter** is widely regarded as a lawful deviation from the *pacta tertiis* rule.[54] Irrespective of whether this perception is well founded, at least Art 5 does not bar States from providing their international organization with *erga omnes* powers. It is an entirely different matter whether such powers produce any legal effects on third States (→ Art 34 MN 39–60). **19**

II. Treaties Adopted Within International Organizations

Many reasons call for multilateral treaty making within the pales of international organizations. Apart from the reduction of transaction costs,[55] many international **20**

[50] See *Waldock* IV 67 para 9.

[51] Final Draft, Commentary to Art 39, 236 para 1.

[52] *Cf* the comment by the Observer for the Council of Europe UNCLOT I 47 para 15, mentioning Art 26 (*pacta sunt servanda*), Art 51 (coercion of a representative), Art 52 (coercion of a State) and Art 62 (*clausula rebus sic stantibus*) as *ius cogens* whereas he considered the bulk of the Convention's provisions *ius dispositivum*.

[53] See *eg E Klein* Statusverträge im Völkerrecht: Rechtsfragen territorialer Sonderregime (1980); *B Simma* The Antarctic Treaty as a Treaty Providing for an 'Objective Regime' (1986) 19 Cornell ILJ 189; for further references see → Art 34 MN 39–59.

[54] *W Graf Vitzthum* in *Simma* Art 2 para 6 MN 15; *RA Falk* The Authority of the United Nations to Control Non-Members (1965) 19 Rutgers LR 591, 619.

[55] *JE Alvarez* International Organizations as Law-Makers (2005) 446.

organizations go some way towards a more flexible and streamlined treaty-making procedure. For example, the **FAO**,[56] the **ILO**,[57] the **WHO**[58] and the **Council of Europe**[59] have developed special principles and procedures that govern treaties adopted by the respective organization. Art 5 acknowledges such derogations in cases of *ius dispositivum* (→ MN 16–18).

21 In contrast, the reservation clause of Art 5 does not apply to treaties drawn up by an international organization and adopted on an international conference convened by the organization (→ MN 13). In practice, however, the limited scope of the reservation clause has marginal legal effects. If the international organization enacts procedural rules deviating from the Convention *eg* on the majority needed for the adoption of the treaty on the conference, the participating (Member) States have the option to implicitly (tacit consent) or explicitly (*eg* acclamation) decide to apply these special rules in accordance with Art 9 para 2 (→ Art 9 MN 16), to modify the proposed rules or to leave the conference.[60]

III. *Inter se* Agreements Between Member States

22 Assessed on the basis of Arts 1 and 5, *inter se* agreements between Member States of an international organization (being party to the VCLT[61]) are exclusively governed by the Convention and special rules of the *inter se* agreement itself (→ Art 1 MN 2). However, TEU and TFEU impose legal constraints on the scope and the content of *inter se* agreements between EU Member States. These constraints concern not only their **limited competence**[62] to conclude international

[56]See FAO, Principles and Procedures Which Should Govern the Conventions and Agreements Concluded under Articles XIV and XV of the Constitution, Appendix D of the Report of the 9th Session of the FAO Conference (1957) as amended by FAO Res 8/91 (1991).

[57]Rules of the ILO Conference, Part II (Standing Orders Concerning Special Subjects) Section E (Convention and Recommendation Procedure), 21 November 1919, including all amendments up to 2002; see also UNCLOT I 36 para 5.

[58]The Framework Convention on Tobacco Control (2302 UNTS 166) is so far the only convention concluded under Art 2 lit k and Art 19 WHO Constitution; for the rules of the treaty-making process, see WHO Doc A/FCTC/WG1/5, adopted on the first meeting of the Working Group on the WHO Framework Convention on Tobacco Control, 3 September 1999.

[59]*J Polakiewicz* Treaty Making in the Council of Europe (1999) 19 *et seq*.

[60]*R Sabel* Procedures at International Conferences (2006) 35–36.

[61]Among EU Member States, only France, Malta and Romania have abstained from acceding to the VCLT.

[62]For the discussion on the limitation of Member States' external competences, see *D Scannell* Trespassing on Sacred Ground: The Implied External Competence of the European Community (2002) 4 Cambridge Yearbook of European Legal Studies 343; *M Cremona* External Relations and External Competence: The Emergence of an Integrated Policy in *P Craig*/*G de Búrca* (eds) The Evolution of EU Law (1999) 137; *T Tridimas*/*P Eeckhout* The External Competence of the Community and the Case-Law of the Court of Justice: Principle Versus Pragmatism (1994) 14 Yearbook of European Law 143.

treaties but also their lacking power to derogate from EU law. If the ECJ declares an *inter se* agreement incompatible with EU law (Arts 258, 259 TFEU Treaty), Member States must **terminate** the agreement according to Art 54 VCLT. Even before the termination, its provisions are **not applicable** in relation between the parties to the *inter se* agreement.[63] In other words: the ECJ does not tolerate the **relative validity** of *inter se* agreements as foreseen in Art 30 para 4 lit b VCLT (for the residual character of the provision, see → Art 30 MN 16).[64]

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[63] ECJ (CJ) *Exportur* C-3/91 [1992] ECR I-5529, para 8.

[64] *B de Witte* Old-Fashioned Flexibility: International Agreements between Member States of the European Union in *G de Búrca*/*J Scott* (eds) Constitutional Change in the EU: From Uniformity to Flexibility? (2000) 31, 47.

Part II
Conclusion and Entry into Force of Treaties

Section 1
Conclusion of Treaties

Article 6
Capacity of States to conclude treaties

Every State possesses capacity to conclude treaties.

Contents

A. Purpose and Function

At first glance, the laconic statement on the treaty-making capacity of States (*ius tractandi*) appears to be rather redundant and self-evident: all parties to the VCLT have sufficiently demonstrated their treaty-making capacity by ratifying the Convention. The provision's "**general jurisprudential character**",[1] however, shall not hide the fact that its adoption has initiated an important legal development. It is the purpose of Art 6 to safeguard the treaty-making capacity of States against any attempts to limit its scope. In contrast, Art 6 does not deal with the **competence of States** to conclude certain treaties (→ MN 18). The legal effects of a lack of that competence or the prohibition to conclude treaties on certain subject matters have to be assessed on the basis of other provisions of the Convention (Arts 27, 46, 53, *etc*). **1**

Art 6 does not decide on the treaty-making capacity of **component units of federal States** (for details, see → Art 3 MN 24–34). **2**

B. Historical Background and Negotiating History

Apart from the highly disputed questions whether the Convention should deal with the treaty-making capacity of international organizations (→ MN 26–31) and those **3**

[1] *S Rosenne* Developments in the Law of Treaties 1945–1968 (1989) 28.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
DOI 10.1007/978-3-642-19291-3_8, © Springer-Verlag Berlin Heidelberg 2012

of component units of federal States (→ Art 3 MN 24–26), the *travaux préparatoires* of Art 6 circle around the possible limits of the treaty-making capacity of States. This topic is rooted in the historic debate on the special status of **protectorates** and **neutralized States**.[2]

> The perception that the treaty is null and void if concluded by dependent States in excess of their capacity was now and then expressed in practice, for example by the United Kingdom in the South African Republic (Transvaal Republic) case. In 1895, the British vassal State Transvaal had concluded an extradition treaty with the Netherlands in disregard of the 1884 London Convention, in which the United Kingdom and Transvaal had agreed that the latter "conclude[s] no treaty or engagement with any State or nation other than the Orange Free States".[3]

4 The lack of conclusive international practice that substantiates the doctrine of limited capacities led to a rather cautious appraisal by *James Garner*, Reporter of the **Harvard Law School Codification Project on the Law of Treaties** (1935). It was the imponderable legal situation that finally gave rise to a general capacity clause ("Capacity to enter into treaties is possessed by all States. . ."), supplemented by the qualification ". . .but the capacity of a State to enter into certain treaties may be limited" (Art 3 Harvard Draft).[4]

5 The Harvard Draft found its way into the several **ILC drafts**.[5] By and large, all Special Rapporteurs proceeded on the assumption that the treaty-making capacity of States is *ius dispositivum* and that no legal reasons work towards the prohibition of limitations, especially with a view to dependent States or States under suzerainty. However, members of the ILC criticized the limitation clause as a fallback to the old rules on colonies and protectorates.[6] Under contemporary international law, so it was argued, limitations of treaty-making capacity are only valid if States freely agree with the limitation of their own capacity (*eg* by establishing a federation).[7]

> *Paul Reuter*'s proposal in 1965 reflects this debate: "The capacity to conclude treaties is an essential attribute of State sovereignty which a State cannot surrender except on the basis of the equality of States and of reciprocity."[8]

6 With no consensus on limitation clause in reach, SR *Waldock* finally gave way to the present Art 6 by emphasizing that it is the definition of 'State' – meaning "State for the purpose of international law" (→ Art 1 MN 5) – that makes the

[2] *McNair* 47; *Lauterpacht* I 138 para 3.

[3] Reported by *McNair* 44.

[4] Art 3 Harvard Draft: "Capacity to enter into treaties is possessed by all States, but the capacity of a State to enter into certain treaties may be limited."

[5] *Brierly* III 50 (Draft Art 1); *Lauterpacht* I 92 (Draft Art 10); *Fitzmaurice* III 24 (Draft Art 8 para 5); *Waldock* I 36 (Draft Art 3 para 3).

[6] *Tunkin* [1962-I] YbILC 59 paras 27 *et seq*; see in general the discussion in [1962-I] YbILC 57, 59.

[7] *Tunkin* [1965-I] YbILC 250 paras 18–25.

[8] *Reuter* [1965-I] YbILC 25 para 35.

solution acceptable.[9] On the basis of the ILC draft article, the Vienna Conference accepted the absence of a limitation clause in Art 6 without controversy.

C. Elements of Article 6

I. State

→ MN 6; Art 1 MN 8–12 **7**

II. Treaties

→ Art 2 MN 5–36 **8**

III. Legal Capacity to Conclude Treaties

Whereas international personality presupposes the legal ability **to bear** international rights and/or duties,[10] the international treaty-making capacity signifies the legal ability to **actively gain** treaty rights and duties. This capacity is the essential legal prerequisite for a legally relevant expression of **the intent to be bound by the treaty** (→ Art 11). **9**

As a rule, international legal personality does not necessarily entail the **legal capacity to act** on the international plane.[11] An international treaty may confer rights or duties upon international persons lacking the capacity to conclude this very treaty themselves, *eg* human beings. In addition, an international person may be deficient in the capacity to enter into a treaty without lacking the capacity to be a party to it.[12] In this case, the treaty is concluded on behalf of the subject that lacks the capacity to conclude the treaty, *eg* a **territory under international administration** (→ Art 3 MN 41).[13] A **State under occupation** or a **failed State** may be deprived of any State organ authorized to act on behalf of the State. Under these circumstances, the State is in fact temporarily incapable of acting on the **10**

[9] *Waldock* [1965-I] YbILC 251 para 44.

[10] *Bin Cheng* Introduction to Subjects of International Law in *M Bedjaoui* (ed) International Law: Achievements and Prospects (1991) 23; on the different understandings, see *C Brölmann* The Institutional Veil in Public International Law (2007) 69.

[11] But see *I Brownlie* Principles of Public International Law (7th edn 2008) 57: "A subject of law is an entity capable of possessing international rights and duties *and having the capacity to maintain its rights by bringing international claims*." This definition is, however, too international-organization-centric to be generally applicable.

[12] *R Geiger* Die völkerrechtliche Beschränkung der Vertragsschlußfähigkeit von Staaten (1979) 62.

[13] See Art 84 VCLT II: the UN Council for Namibia expresses Namibia's accession to the Convention; for further examples, see *C Stahn* The Law and Practice of International Territorial Administration (2008) 570.

international plane. Being nonetheless a State in terms of international law, it continues to possess the *de iure* capacity to conclude international treaties.

11 The treaty-making capacity of States requires no act of **recognition** by other subjects of international law. The very moment a State comes into existence in accordance with international law, its treaty-making capacity cannot be contested without denying the entity's legal status as a State. Even a widely (but not universally) recognized State bears inherent treaty-making capacity (→ Art 3 MN 47).

IV. Limitations of the Treaty-Making Capacity of States

1. Limitations Under the VCLT

12 The wording of Art 6 implicates the **legal irrelevance of any agreed or imposed limitation** of treaty-making capacity while remaining a sovereign State in terms of international law (→ Art 1 MN 5). This perception is supported by the *travaux préparatoires* of Art 6 (→ MN 5–6) and by its interpretation in the light of Art 42.[14] The latter provision stipulates that the consent of a State to be bound by a treaty may be impeached only through the application of the Convention (*numerus clausus* of grounds of invalidity[15]; → Art 42 MN 17). With that in mind, Art 6's silence on the possibility to limit the treaty-making capacity of States turns into an explicit rejection of any claim that the consent to be bound by a treaty is invalid due to a limitation of treaty-making capacity. Accordingly, the treaty-making capacity of any State is **unassailable** under the Convention.

13 Notwithstanding Art 6, sovereign States may establish a federal State and continue to exist as component units.[16] Since States are free to relinquish their existence as a 'States' under international law, Art 6 is not applicable to cases of extinction (voluntary absorption, merger or dissolution).

14 Assessed in the light of Art 6, the categorical prohibition to conclude treaties conflicting with **peremptory norms** (Art 53) does not limit the treaty-making capacity of States. The unilateral expression to be bound by a treaty contrary to *ius cogens* is, from a formal point of view, legally valid but the treaty is void due to its proscribed subject matter (→ Art 53 MN 54).

[14] *Geiger* (n 12) 159.

[15] *SE Nahlik* The Ground of Invalidity and Termination of Treaties (1971) 65 AJIL 736, 749.

[16] For the agreement-making capacity of component units of federal States, see → Art 3 MN 24–26.

2. Limitations Under Chapter VII of the UN Charter

Pursuant to Art 103 UN Charter, **enforcement measures** of the Security Council under Chapter VII prevail over the VCLT,[17] which in principle includes the provision on treaty-making capacity. **15**

Whereas the limitation of treaty-making capacity has never been seriously debated, it is, however, the constant practice of the Security Council to deny certain acts any legal effects on the international plane. **16**

> In the famous SC-Resolution 276 (1970) on the situation in Namibia, the Security Council declared that "the continued presence of the South African Authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate (for Namibia) are illegal and invalid".[18] This assessment cannot be interpreted as a limitation of South Africa's treaty-making capacity but as a denial of South Africa's right to act on behalf of Namibia.[19]

Most of the decisions of the Security Council on the voidness of certain acts have been declaratory in nature, *ie* the voidness is the legal consequence of the breach of a fundamental obligation under international law, *eg* the prohibition of annexation (→ Art 53 MN 72).[20] If, however, the Security Council **determines upon the nullity** of an act, which would be otherwise legally valid (even though unlawful), the measure can be qualified as a **sanction pursuant to Art 41 UN Charter**.[21] The enforcement measure brings about the legal duty of Member States to collectively non-recognize any legal effect of that act.[22]

3. Limitations under Customary Law

The question remains whether **general international law** allows any limitation of treaty-making capacity outside of the scope of the VCLT. According to *Sinclair*, **17**

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[17] ICJ *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident of Lockerbie (Libya v United States)* (Provisional Measures) [1992] ICJ Rep 114, para 42.

[18] *Cf* UNSC Res 670 (1990), 25 September 1990, UN Doc S/RES/670, 8th recital: "*Affirming* that any acts of the Government of Iraq which are contrary to the above mentioned resolutions or to Articles 25 and 48 of the UN Charter, such as Decree No. 377 of the Revolution Command Council of Iraq of 16 September 1990, are null and void"; see also UNSC Res 217 (1965), 20 November 1965, UN Doc S/RES/217 (declaration of independence of Southern Rhodesia); UNSC Res 476 (1980), 30 June 1980, UN Doc S/RES/476 (nullity of legislative and administrative measures taken by Israel, which purport the status of Jerusalem).

[19] *Cf* ICJ *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 Rep 16, para 126.

[20] *V Gowland-Debbas* Security Council Enforcement Action and the Issue of State Responsibility (1994) 43 ICLQ 55, 77.

[21] *Ibid* 75.

[22] *Ibid* 77.

Art 6 is "unquestionably expressive of a customary rule".[23] This assessment is undeniably valid with regard to the **inherent capacity** of every sovereign State to conclude treaties the moment it gains the status as a State under international law. However, the **freedom** of a State to agree freely with the limitation of its own treaty-making capacity flows from its sovereignty.[24]

4. Limitations of the Power to Conclude Treaties

18 The unassailable treaty-making capacity of States has to be distinct from possible limitations of the **State's power** (competence) to conclude certain treaties.[25] Whereas the term 'capacity' denotes the legal ability to perform a potential scale of acts on the international plane (→ MN 9), the term 'power' denotes the right to perform that act under international law. 'Power', *ie* the authority to perform particular acts, is synonymous with '**competence**',[26] as the wording of Art 5 para 1 TEU in conjunction with Art 7 TFEU indicates. The set of competences allocated to or remaining with an international person displays the scope of actions the international person is empowered to perform.[27]

> See *eg* the carefully chosen diction of the ICJ in the *East Timor* case: "[T]he effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the *treaty-making power* in matters relating to the continental shelf resources of East Timor."[28]

19 The starting point of any sovereign State is that of unlimited capacities and unlimited competences (powers) on the international plane.[29] Even though Art 6 rules out any limitations of treaty-making capacity, the State's competence to conclude certain treaties can be subjected to limitations according to international law.[30]

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[23] *Sinclair* 21.

[24] *Cf* PCIJ *SS 'Wimbledon'* PCIJ Ser A No 1, 25 (1923).

[25] The usage of the terms capacity, power and competence heavily varies in scholarly writings; some authors equate capacities and powers: *A Peters* Treaty-Making Power in MPEPIL (2008) MN 1; *HG Schermers* The International Organizations in *M Bedjaoui* (ed) International Law: Achievements and Prospects (1991) 67, 74; other authors, *eg PHF Bekker* The Legal Position of Intergovernmental Organizations (1994) 63, 78 consider 'powers' as an instrumental tool, available within a given sphere of competences; see for the usage of the term 'competences' *Brölmann* (n 10) 92.

[26] *HG Schermers/NM Blokker* International Institutional Law (2003) § 209.

[27] *Bekker* (n 25) 75.

[28] ICJ *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, para 34 (emphasis added).

[29] ICJ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, para 25.

[30] A well-known example for the limitation of the competence to conclude treaties is the division of the exclusive external competences between the European Union and its Member States see *D Verwey* The European Community, the European Union and the International Law of Treaties (2004) 15; *F Hoffmeister* The Contribution of EU Practice to International Law in *M Cremona* (ed) Developments in EU External Relations Law (2008) 37, 38.

If it is agreed not to conclude treaties on particular subject matters or with particular parties, the accord concerns exclusively the competence (power) to make unlimited use of the treaty-making capacity.[31] Treaties concluded in disregard of limitations of powers are legally valid and must be performed (Art 26).

Even though States may freely agree under general international law on the limitation of their treaty-making capacity (→ MN 17), the **principle of sovereign equality of States** conveys the presumption that any agreement to abstain from concluding particular treaties does not connote a restriction of the State's treaty-making capacity but merely limits the State's **freedom to contract** (treaty-making power). **20**

D. Treaties of International Organizations (1986 Convention)

I. Historical Background

Ever since international organizations have entered the international plane in the nineteenth century, they have been parties to international agreements. The first example of this practice is – according to *Hungdah Chiu*[32] – the headquarters agreement between France and the International Bureau of Weights and Measures concluded on 4 October 1875. Leaving aside the question whether such early entities met the qualifications associated with modern international organizations (→ Art 2 MN 50–53), it is safe to say that the League of Nations[33] paved the way for the explosion of[34] treaty-making activities of international organizations since 1945. Today, the treaty database of the European Union identifies 978 international agreements to which the Union (including the European Communities) is a party; the UN Treaty Series contains a total number of 1802 agreements with UN participation registered between 1946 and 2010. **21**

With regard to the spectrum of characteristic subject matters, SR *Reuter* identifies, by rule of thumb, two groups of agreements: agreements relating to the administrative functioning of the organization (*eg* headquarters and immunity agreements) and agreements on its operational activities (*eg* loan agreements of the IBRD).[35] Apart from the extensive and wide-raging treaty-practice of **22**

[31] *Schermers* (n 25) 73; but see *C Rousseau* L'indépendance de l'État dans l'ordre international (1948) 73 RdC 167, 248 about the unlimited competences of States.

[32] *Hungdah Chiu* The Capacity of International Organizations to Conclude Treaties and the Special Legal Aspects of the Treaties So Concluded (1966) 6.

[33] For an exhaustive overview of the treaty-making practice of the League of Nations, see *ibid* 12–13; predominantly, the League was not itself a party to the treaty but was entrusted by the parties with certain functions (*eg* guarantor for minorities, *cf ibid* 10). These treaty-based functions have been subject to the subsequent acceptance of the League Council.

[34] *Cf Reuter* I 173 ("agreement explosion").

[35] *Reuter* I 174.

the European Union, *SR* Reuter's observation is still valid. For several reasons,[36] international organizations are rarely parties to **multinational law-making treaties** (→ Art 2 MN 14). An increasing number of multilateral treaties, eg in the field of environmental protection, are open to the participation of 'regional economic integration organizations'[37], but so far only the European Union has acceded on such a basis. Thus, it can be stated that international organizations play a significant role in drafting and monitoring law-making treaties (→ Art 5 MN 10–13) but an undersized role in putting them into effect via participation.

II. Negotiating History of the 1986 Convention

23 When the UN General Assembly decided to convene a **Conference of Plenipotentiaries** in 1983[38] to negotiate the law of treaties to which international organizations are parties, the delegates could fall back on a set of draft articles prepared by the ILC over a period of 10 years.[39] The Conference was held at Vienna from 18 February to 21 March 1986. Overall 97 States participated in the Conference, as did also Namibia (represented by the UN Council for Namibia) and 19 intergovernmental organizations including the United Nations. The participation of international organizations in the Conference on an equal footing with States was strongly opposed by the USSR, which finally led to the compromise that the attending international organizations did not have the right to participate in votes.[40]

[36]For the main part, this inactivity is due to the widespread 'all State' clauses, which limit the access to many treaties (→ Art 1 MN 11). In addition, most multilateral law-making treaties deal with State-oriented issues – pertaining to sovereignty, inhabitants and territory – and do not concern the limited functions of most international organizations, 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, para 98.

[37]Arts 33-35 Convention on Biological Diversity 1760 UNTS 79; Art 24 Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998) 37 ILM 22; see also Art II FAO Constitution reprinted in (2011) 1 Basic texts of the FAO 1; a 'regional economic integration organization' is commonly defined as "an organization constituted by sovereign States of a given region which has competence in respect of matters governed by this Convention or its protocols and has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to the instruments concerned", *cf* Art 1 para 6 of the Vienna Convention for the Protection of the Ozone Layer 1513 UNTS 324.

[38]UNGA Res 38/139, 19 December 1983, UN Doc A/RES/38/139.

[39]After receiving a mandate from the UNGA in 1969 (Res 2501 (XXIV), 12 November 1969, UN Doc A/7746, 97), *Reuter* was appointed as Special Rapporteur in 1971. He presented his first of altogether 11 reports in 1972; the ILC finally adopted the Draft Articles in 1982, see [1982-II] YbILC 17.

[40]Arts 34, 60 Rules of Procedure for the Conference, UNCLOTIO I xix; see also *K Zemanek* The United Nations Conference on the Law of Treaties Between States and International Organizations or Between Organizations: The Unrecorded History of its 'General Agreement' in *K-H Böckstiegel et al* (eds) Festschrift Seidl-Hohenveldern (1988) 665, 667.

The Convention – adopted on 20 March 1986 by 67 votes to none with 23 abstentions – is not yet in force due to an **insufficient number of ratifications** by States (Art 85 VCLT II: deposit of 35 instruments). Interestingly enough, the actual number of formal confirmations deposited by international organizations (Art 83 VCLT II) is of no relevance for the commencement of the Convention (Art 85 para 1 VCLT II). This fact has to be understood against the background of the disagreement over the **formal equality of international organizations and States** within the framework of the Conference and the Convention. The draft of a final clause prepared by UN Legal Counsel *Al-Qaysi* laid down the right of international organizations partaking in the Conference to sign the Convention (Art 82 VCLT II).[41] Apparently to counterbalance this concession and to accent the eminent role of States as international lawmakers, *Al-Qaysi*'s deemed the support of States as indispensable for the Convention's entry into force (Art 85). The counterproposal of the USSR,[42] which was targeted solely against the international organizations' right to sign the Convention (Art 82), did not obtain a majority so that *Al-Qaysi*'s final clause package was adopted[43] without further debate on Art 85.[44] **24**

By and large, the 1986 Convention is closely modeled after its 1969 archetype. Some provisions, however, demand particular attention since they reflect the specific legal nature of international organizations. The most **controversial subjects** have been the representation of international organizations (Art 7),[45] the capacity of international organizations to enter into treaty relations (→ MN 26–31), the effect of their internal rules and limited competences on the treaty relations (→ Art 27 MN 15–16; Art 46 MN 62–64) and the legal consequences of international organizations' treaty obligations on Member States (→ Art 26 MN 55). **25**

III. Capacity of International Organizations to Conclude Treaties

The treaty-making capacity of international organizations is subject to controversies in theory and practice. One premise, however, is undisputed: international organizations are not barred from concluding an international treaty just because **26**

[41]UNGA Res 40/76, 11 December 1985, UN Doc A/RES/40/76, Annex III; for details, see *JP Dobbert* Evolution of the Treaty-Making Capacity of International Organizations, in FAO (ed) Essays in Memory of Jean Carroz (1987) 22.

[42]UNCLOTIO I 208 para 29.

[43]UNCLOTIO I 209 para 37.

[44]The Netherlands and the United Kingdom have submitted a proposal requiring 5 acts of formal confirmation or accession by international organizations in addition to 35 acts of ratification by States. According to *Zemanek* (n 40) 670–671, the main purpose of the move was to counterbalance the Soviet proposal, which is supported by the fact that the proposal was withdrawn after the Soviet proposal was defeated.

[45]For details see *JW Schneider* Treaty-Making Power of International Organizations (1963) 60–67.

they do not share the legal nature of States.[46] Apart from this common legal opinion consistent with the overwhelming international practice,[47] the scholarly debate can be roughly divided into two conflicting schools of thought that have both dominated the ILC discussion from 1950 to 1982[48]: according to the first approach, the organization's capacity to conclude treaties depends solely on its **constituent instrument**.[49] The second school of thought seeks the source of treaty-making capacity in **customary international law**; the rules of international organizations may modify that capacity by restrictive provisions.[50]

27 **Art 6 VCLT II** links the treaty-making capacity of an international organization up with the rules of that organization (Art 2 para 1 lit j VCLT II) and thus leans toward the first school of thought.[51] This course was adopted simply because the ILC decided not to decide on the question of the status of international organizations in international law.[52] Considering the difficulties to reach a common understanding of the sources of the international organizations' treaty-making capacities,[53] it is not surprising that an important but concealed addendum was introduced at the Vienna Conference in 1986.[54]

The **11th recital of the 1986 Convention's Preamble** emphasizes that "international organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfillment of their purposes". Given that the Preamble is significant for the interpretation of Art 6 (→ Art 31 MN 48, 50), the term "rules" in Art 6 comprises not only written provisions and established practice of the respective organization (Art 2 para 1 lit j VCLT II) but also unwritten rules **implied** in the constituent instrument due to functional necessities of its

[46]For the early view of Soviet writers that international organizations are not subjects of international law, see *S Krylov* Les notions principales du droit des gens: la doctrine soviétique du droit international (1947) 70 RdC 407, 448.

[47]For the analysis of this practice, see *Brölmann* (n 10) 125–128; *Hungdah Chiu* (n 32) 8–18.

[48]Final Draft 1982, Commentary to Art 7, 24 para 1.

[49]*I Seidl-Hohenveldern* The Legal Personality of International and Supranational Organisations (1965) 21 Revue égyptienne de droit international 35–72; *K Zemanek* Das Vertragsrecht der internationalen Organisationen (1957) 20.

[50]The main protagonist of this theory is still *F Seyersted* Common Law of International Organizations (2008) 401–405.

[51]For a similar approach of the ILC in the context of the 1969 Convention, see [1961-II] YbILC 164 (Draft Art 3 para 3); unsurprisingly, the decision on Art 6 VCLT II prompted critical remarks by *F Seyersted* Treaty-Making Capacity of International Organizations: Article 6 of the ILC's Draft Articles on the Law of Treaties between States and International Organizations and between International Organizations (1983) 34 ÖZöRV 261; see also *E Klein*/*M Pechstein* Das Vertragsrecht internationaler Organisationen (1985) 23.

[52]Final Draft 1982, Commentary to Art 7, 24 para 2

[53][1974-I] YbILC 144; for details on the ILC discussion on the 1969 Convention, see *Reuter* I 178–182.

[54]See *Zemanek* (n 40) 671.

existence.[55] On this footing, the Convention is all along the line with the ICJ ("necessary intendment").[56] Other authors have interpreted the 11th recital as a bow to the theory that today the capacity of all international organizations to conclude treaties is rooted in international customary law.[57]

As a rule, **Member States automatically recognize** the international personality of their international organization including all assigned legal capacities by ratifying the constituent instrument. On a few occasions, Member States negate the international personality of their creation by pointing at the entity's lacking capacity to conclude international treaties. **28**

> Austria, for example, expressed this view in the ILC: "An international organization lacking the capacity to conclude treaties would not be a subject of international law."[58] In the *Reparation for Injuries* proceedings, the UK government argued: "On this basis, the governing factors appear to be, first, that an entity possessed of juridical personality must be deemed, as an inherent and necessary attribute of its personality, to possess the capacity to protect its interests".[59] The States Parties to the 1947 Treaty Establishing the Benelux Economic Union clarified in an 'Aide-mémoire des Gouvernements': "C'est pour les même raisons que l'Union [. . .] n'a pas reçu la personnalité de droit international. [. . .] Elle n'est donc pas capable d'agir, comme personne de droit international, dans les relations extérieures, étant entendu que les intérêts extérieurs de l'Union seront sauvegardés conjointement par les Gouvernements des États-membres de l'Union [. . .]."[60]

Considering the ordinary definition of international personality (→ MN 9), it is difficult to adhere to the perception that treaty-making capacity is an essential prerequisite thereof. In the light of the disputed source of international organizations' treaty-making capacity, however, the cited perceptions fall into place: either customary international law interlinks the international personality of international **29**

[55] *Cf Waldock* I 36 (Draft Art 3 para 4): "International capacity to become a party to treaties is also possessed by international organizations and agencies which have a separate legal personality under international law if, and to the extent that, such treaty-making capacity is expressly created, or necessary implied, in the instrument prescribing the constitution and functions of the organizations or agency in question." See also *G Hafner* The Legal Personality of International Organizations in *A Reinisch et al* (eds) Liber Amicorum Neuhold (2007) 81, 99 ("consequence of their mere existence").

[56] ICJ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 180.

[57] *Zemanek* (n 40) 671; *J Klabbers* An Introduction to International Institutional Law (2009) 252; see also *Peters* (n 25) MN 13; *I Pernice* Völkerrechtliche Verträge internationaler Organisationen (1988) 48 ZaöRV 229, 236.

[58] [1966-II] YbILC 281; for a more non-committal approach, see SR *Lauterpacht*, UN Doc A/CN.4/L.161, 28 para 32 (cited in [1972-II] YbILC 179 n 74): "The capacity to conclude treaties is both a corollary of international personality and a condition of the effective fulfillment of their functions on the part of the international organizations."

[59] ICJ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Pleadings, Written statement presented by the Government of the United Kingdom 23, 34 para 15.

[60] Aide-mémoire des Gouvernements No 2, 6, cited in *A Bleckmann* Die Benelux-Wirtschaftsunion (1962) 22 ZaöRV 239, 293 footnote 324.

organizations with their functional treaty-making capacity, or the necessity to discharge their function effectively entails the constitutionally implied treaty-making capacity (11th recital of the Preamble of the VCLT II in conjunction with Art 6). Given that the treaty-making capacity of an international organization has hardly been challenged when its international personality is undisputed, it is safe to say that today the treaty-making capacity of international organizations is double safeguarded under international law: as a rule of customary law and as an explicit or implicit rule of the constituent instrument ('necessary intendment'). Member States are nonetheless 'masters of their creation', given that an **explicit exclusion of treaty-making capacity** overrules customary rules to the contrary (*lex specialis derogat legi generali*[61]). If the international organization concludes a treaty in disregard of the explicitly excluded treaty-making capacity, Art 46 para 2 VCLT II is applicable (→ Art 46 MN 60–76).

30 According to the principle *pacta tertiis nec nocent nec prosunt* (Art 34), **non-members** are not legally bound to recognize the legal personality of a foreign international organization resulting from its constituent instrument.[62] Of course, by entering into treaty relations with the foreign international organization, non-members implicitly recognize the latter's international personality.[63] In any case, the treaty-making capacity of a foreign international organization is not subject to a separate 'recognition' by a Non-Member State.

31 For those international organizations that wish to become party to the VCLT II, Art 6 is naturally of great significance. According to **Art 84 VCLT II (accession)** the Convention "shall remain open for accession [. . .] by any international organization which has the capacity to conclude treaties". The UN Secretary-General in his capacity as depositary (Art 84 para 3 VCLT II) has to appraise the request for accession *prima facie* on the international organization's formal declaration on its treaty-making capacity (Art 84 para 2 VCLT II).

IV. Competence of International Organizations to Conclude Treaties (Treaty-Making Power)

32 Whereas the functional treaty-making capacity of international organizations can be anchored in customary law and constituent instrument (→ MN 29), the latter is essential for the determination on the **treaty-making powers**. As a rule, the scope of treaty-making powers depends largely on the international organization's scope of functions, with the consequence that the treaty-making power conforms to the

[61] Even if it is not embodied in the VCLT, the *lex specialis* principle is a well-established conflict rule of international law. For an overview of scholarly literature, see *E Vranes* Lex superior, lex specialis, lex posterior – zur Rechtsnatur der 'Konfliktlösungsregeln' (2005) 65 ZaöRV 391.

[62] *Hungdah Chiu* (n 32) 30; for a different approach, see *R Higgins* Problems and Processes: International Law and How We Use It (1994) 48 ("objective reality").

[63] *Hafner* (n 55) 87.

treaty-making capacity. In its famous *Reparation for Injuries* opinion of 1949, the ICJ argued:

> "It must be acknowledged that its Members, by entrusting certain functions to it [the United Nations], with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged."[64]

However, constituent instruments of other international organizations may provide otherwise by explicitly limiting the treaty-making powers within the scope of the organization's broader functions.[65] The **European Union's external competences**, for example, are not congruent with the Union's functions (*cf* Arts 3, 4 TEU). The EU has the most developed and so far unique rules on external competences, established by a far-reaching jurisprudence of the ECJ.[66] According to the settled case law, the EU possesses external competences in particular policy fields if the TEU/TFEU explicitly or implicitly provides for it (now codified in Art 216 TEUF).[67]

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[64] ICJ *Reparation for Injuries* (n 56) 179.

[65] *Cf* ICJ *Use of Nuclear Weapons* (n 29), para 19: "In order to delineate the field of activities or the area of competences of an international organization, one must refer to the relevant rules of the organization and, in the first place, its constitution."

[66] ECJ (CJ) *Commission v Council* 22/70 [1971] ECR 263; *Kramer et al* Case 3/76, 4/76 and 6/76 [1976] ECR 1279; *Opinion 1/75* (*Understanding on a Local Cost Standard)* [1975] ECR 1355; *Opinion 2/91* (*Convention No 170 of the International Labour Convention Concerning Safety in the Use of Chemicals at Work)* [1993] ECR I-1061.

[67] *R Holdgaard* External Relations Law of the European Community (2008); *P Eeckhout* External Relations of the European Union (2004) 85–164; *id* The European Community's Implied External Competences of the Open Skies Cases (2003) 8 European Foreign Affairs Review 365, 368; for further references, see n 30.

Article 7
Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) he produces appropriate full powers; or
(b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
(b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
(c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Contents

A. Purpose and Function

Art 7 deals with the power to represent a State in treaty making. Its function is to **regulate the appropriate level of representation**, as the practice of States may vary in this respect. Its formulation "being one partly of counsel and partly an exposition of a legal freedom",[1] Art 7 creates guidance and legal certainty for the **1**

[1] *D Hutchinson* The Judicial Nature of Article 7 of the Vienna Convention on the Law of Treaties (1996) 17 AYIL 187, 207.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
DOI 10.1007/978-3-642-19291-3_9, © Springer-Verlag Berlin Heidelberg 2012

negotiating States. Once it is established that the participating negotiators have proper representational powers, there is no room for subsequent contestation of the legal significance of their acts. In short, Art 7 serves both the practical and legal purpose of facilitating the treaty-making process.

2 Art 7 is one of the introductory provisions of the first section in Part II of the Convention. As can be drawn from the chapeau of para 1 ("For the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by it"), it contains a **generic rule for every stage of treaty making**. It is therefore equally important for the relevant provisions on adoption (Art 9), authentication (Art 10) and the various means of expressing consent to be bound (Arts 11–17).

B. Historical Background and Negotiating History

3 The somewhat antiquated term "full powers" used in the title of Art 7 indicates that representational issues have a **long tradition** in international law and diplomacy. In ancient times, the supreme leader of a country acted on his own account. If a need arose to be represented by another person, the latter was given full power to act in the name of the leader. Accordingly, they were personal representatives of the ruler, comparable to the principal and an agent under private law.[2] The following example, recorded by *Grotius*,[3] is illustrative in this regard:

> *Hieronymus*, king of Syracuse, had made an agreement of alliance with *Hannibal*, as *Livy* relates; but afterwards he sent to Carthage in order to make the agreement of alliance into a treaty of alliance. Hence the statement of *Seneca* the father: 'The commanding general made a treaty; the Roman people seems to have made it and is bound by the treaty. This refers to those commanders of ancient times *who had received a special commission for such an act*'.

4 With the emanation of States as actors with legal personality, that **concept changed** around the sixteenth century. From then on, treaties no longer had quasi-personal character, but the ruler and his representatives acted on behalf of the State. Accordingly, while the leader of course kept the right to commit the State, the circle of representatives was enlarged due to the complexity and the length of treaty negotiations.[4] However, such negotiators needed to produce a specific authorization to reassure the treaty partner.[5] In particular, ambassadors serving in another country were given such a document by their head of State or government, which then made them a 'plenipotentiary' ambassador in the accrediting states;

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[2] *H Blix* Treaty-Making Power (1960) 4.

[3] *H Grotius* De jure belli ac pacis (1625) book 2 ch XV § III 1 (*FW Kelsey* translation (1925) 987–988 (emphasis added)).

[4] *P Kovács* in *Corten/Klein* Art 7 MN 3–4.

[5] *GE do Nascimento e Silva* Full Powers (1995) 2 EPIL 494, 495 noting that full powers in the 15th and 16th centuries were "extremely specific".

'plenipotentiaries' could, however, also be sent specifically for the purpose of negotiating a treaty.[6] The exact language of the full powers was of fundamental importance for two reasons: first, it gave authority to the representative to commit the State by his signature. Second, when the practice of subsequent ratification arose from the seventeenth century on (→ Art 14 MN 3), the Sovereign was expected to ratify a treaty as long as the representative had acted within the scope of his full powers.[7]

5 In the eighteenth century, the importance of full powers diminished over time. As rulers started to refuse ratification with the pretext that the agent had overstepped his full powers, they practically turned the obligation to ratify into an option. This trend continued in the nineteenth century with the emanation of early constitutional governments. As a politically and constitutionally required legislative assent was often difficult to predict, the precise determination of the extent of an agent's authority, to negotiate and sign, and excesses of that authority became less relevant.[8] Nevertheless, a number of instances still occurred in the nineteenth century, in which ratification although discretionary, was withheld with the express declaration that an agent had exceeded his authority.

> In 1809, the British government refused the ratification of an agreement with the United States on the ground that the British Minister to Washington had exceeded its instructions. In 1822, a British agent at Bushire on the Persian Gulf signed an agreement with a Persian minister subject to approval of the two governments. When rejecting the treaty, the British authorities informed the Persian Government that the agent was never in possession of any instructions to enter into treaty negotiations and had exceeded his powers. In 1879, the Chinese Minister Plenipotentiary to the Russian Tsar, *Chung How*, signed a treaty at Livadia concerning the return to China of the province of Ili. Upon his return, the throne found that he had disobeyed his instructions and exceeded his powers. The treaty was rejected and the emissary sentenced to death. Only after intervention of the Russian government and *Queen Victoria* did the Chinese Emperor change his mind and sent a new negotiator to St Petersburg. After some Russian hesitation, a new treaty was drawn up, signed and eventually ratified.[9]

In the twentieth century, questions of representation became influenced by the newer phenomenon to conclude treaties in simplified form (→ Art 12 MN 4). As those treaties themselves did not require any form, the requirements for producing full powers were also partly relaxed or dispensed with.[10]

6 Based on a draft presented by SR *Waldock* in his first report,[11] the ILC adopted a first **Draft Art 4 in 1962** on the authority to negotiate, sign, ratify, accede to or

[6] See the Preamble of the Treaty of Westphalia of 1648 between the Holy Roman Emperor and the King of France and their respective allies, mentioning the names of their respective plenipotentiary ambassadors sent to the negotiations held at Münster and Osnabrück 1 CTS 271.

[7] *JM Jones* Full Powers and Ratification (1946) 6 *et seq*; *Sinclair* 30.

[8] *Jones* (n 7) 39.

[9] *Blix* (n 2) 7–11.

[10] *Ibid* 49–50.

[11] *Waldock* I 38 *et seq*.

accept a treaty.[12] The main idea was to lay down a rising scale of evidentiary requirements depending on the function exercised by the representative in question. Heads of State, heads of government and foreign ministers do not have to furnish any evidence of their representational authority (para 1). Heads of diplomatic or permanent missions have negotiation powers *vis-à-vis* the State or international organizations to which they are accredited (para 2). Other representatives are required to furnish specific evidence to negotiate (para 3), which must take the form of full powers in the case of signature (para 4 lit a), unless the treaty is concluded in simplified form (para 4 lit b). According to para 5, specific evidence of a representative's authority is also necessary for expressing the consent to be bound, if the instrument in question is not signed by the head of State, the head of government or the foreign minister. Finally, para 6 laid down specific rules for cases of delay in the transmission of full powers.

7 In view of various moderately critical government comments,[13] the ILC shortened and rearranged the draft in 1965/1966. The new **Draft Art 6 of 1966** on full powers to represent the State in the conclusion of treaties was cut down to two paragraphs that are largely comparable with the present Art 7. Whereas the 1962 Draft set out the law from the perspective of the represented State, the new text stated the cases in which another negotiating State may call for the production of full powers and the cases in which it may safely proceed without doing so.[14] Moreover, the ILC did away with the rule that lower representatives would always have to give evidence of their authority, which was considered too strict by the Scandinavian States. Since the distinction between ordinary and simplified treaties was deemed unworkable, the relevant differentiation in the production of full powers was equally abolished, and the rules on delay were not deemed important enough to be maintained.[15]

8 The **diplomatic conference modified** the 1966 Draft Art 6 mainly on technical grounds. The title was shortened to "full powers". Incorporating a proposal from Ghana,[16] Art 7 para 1 lit b now emphasized that not only specific circumstances, but also State practice can serve as an indicator that the requirement of producing full powers has been dispensed with. Proposals to include in para 2 lit a references to domestic law and practices were rejected. Art 7 para 2 lit c was amended so that representatives accredited to an international organization are also considered as representing their State for the purpose of adopting the text of a treaty in that organization.

9 The final version of Art 7 was considered by *Reuter* to represent a pure codification of customary law practices.[17] Given that Art 7 para 2 lit c also deals with the

[12] [1962-II] YbILC 157, 165 *et seq*.

[13] *Waldock* IV 18–20.

[14] Final Draft, Commentary to Art 6, 192 para 1.

[15] Final Draft, Commentary to Art 6, 192–193 para 2.

[16] *Villiger* Art 7 MN 2.

[17] *Reuter* 7.

then relatively unstable practice in international organizations, the better view seems to be that it also contains a progressive development of the law.[18]

C. Elements of Article 7

I. Full Powers

Art 7 para 1 lit a contains the **basic rule** that a person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if he produces appropriate full powers. According to Art 2 para 1 lit c VCLT "full powers" means a document emanating from the competent authority of a State designating a person or persons to represent the State for these acts. In ancient times, the production of such a document was almost invariably requested, and it is still common in the conclusion of more formal types of treaty.[19] **10**

The reference to the "competent authorities" leaves it to the internal law of each State to determine the **person that issues the full powers**. Usually, such documents emanate from the head of State (or somebody to whom he has delegated the necessary powers),[20] head of government or the foreign minister and bear the official emblem and, in some cases, the seal of a country. **11**

> A typical British example is: "Sir Michael Hastings Jay, KCMG, Her Majesty's Ambassador at Paris, is hereby granted full powers to sign, on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland, the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Governments of the French Republic and the Federal Republic of Germany concerning scientific personnel at the Max Von Laue-Paul Langevin Institute.
> In witness thereof I, Robin Cook, Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs, have signed these presents.
> Signed and sealed at the Foreign and Commonwealth Office, London, the Fourth day of September, One thousand Nine hundred and Ninety-seven."[21]

In the case of international organizations, full powers are issued by the head of the organization's secretariat, as is the case with the UN Secretary-General.[22] For the EU, that function is vested in the President of the European Commission.

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[18] *Elias* 20.

[19] Final Draft, Commentary to Art 6, 193 para 3.

[20] *A Watts* The Legal Position in International Law of Heads of States, Heads of Governments, Foreign Ministers (1994) 247 RdC 19, 29.

[21] Reproduced from Appendix I of *Aust* 498. Older examples can be found in *Blix/Emerson* 37–41. *Cf* also UN Treaty Handbook (2007) 7.

[22] Observations of the UN representative [1981-II] YbILC 200.

12 There is flexibility with respect to the procedure of **producing and verifying** full powers. Traditionally, representatives exchanged their documents so that the other side could verify its authenticity. Traits of this practice may even be recorded in the text of the treaty itself.[23] In more recent times, this practice has been substituted by a simple presentation: a representative nowadays just presents the original document to his partner or the convening authority of the negotiation. If he fails to do so, a letter, a telegram or an e-mail with a scanned document from the capital evidencing the grant of full powers by the competent authority may be provisionally accepted, subject to the production in due course of an instrument of full powers, executed in proper form.[24]

> In 1967, the Director-General of the GATT, in his function as depositary, advised the Contracting Parties to follow a harmonized procedure in cases where GATT protocols or other instruments are accepted by signature. Contracting Parties should either issue general full powers to sign all GATT instruments or issue full powers for a particular instrument as follows: "(a) Full powers should be issued, in accordance with the constitutional procedures or each State, by the Head of State, the Head of Government or the Minister for Foreign Affairs to the plenipotentiary designated to sign the instrument. The title and date of the instrument, as well as the name of the plenipotentiary, should be stated in the full powers; (b) Provisional powers – to avoid administrative delays, or for reasons of urgency, a letter or telegram evidencing the grant of full powers, sent by the competent authority of the State concerned, by the Head of its Permanent Mission in Geneva of by the GATT liaison officer, is accepted provisionally, subject to the production in due course of full powers executed in proper form."[25]

13 Finally, by using the adjective "appropriate", Art 7 para 1 lit a also leaves it to the States to decide upon the **scope** of full powers. States may issue full powers to a person to represent it generally for all sorts of treaties or restrict the full powers to a specific instrument.[26] It is thus apparent that "full powers" are nothing more than the "powers" given by the competent authority in each case; moreover, before exercising them, the holder must still obtain specific instructions from his government.[27] Nevertheless, certain States still keep the distinction between "full powers" and (simple) "powers" in order to designate the level of the issuing authority.[28] However, such distinction does not have any effect on the scope of full powers, which must solely be determined by its content. The **minimum requirements** for full powers are the **mentioning of the authorized person's name**, the title of the treaty or treaties in question, the signature of the competent authority and the date

[23] See *eg* Preamble para 11 of the 1957 Treaty Establishing the European Economic Community 298 UNTS 3: "who have exchanged their full powers, found in good and due form".

[24] *Cf* Art 4 para 6 lit b of the 1962 ILC Draft [1962-II] YbILC 157, 165.

[25] Director-General, Note, Acceptance of GATT Legal Instruments – Powers of Plenipotentiaries, 1 May 1967, GATT Document L/2785.

[26] See examples reproduced in *Blix/Emerson* 37–41.

[27] *Aust* 75.

[28] *P Kovács* in *Corten/Klein* Art 7 MN 20, noting that in French practice "full powers" are issued by the President, whereas the Foreign Minister can only issue "powers".

and place of signature. Hence, full powers given *eg* "to the permanent representative" of a State cannot be accepted.[29]

The definition in Art 2 para 1 lit c recalls that full powers are related to "negotiating, adopting or authenticating the text of a treaty, [. . .] expressing the consent of the State to be bound by a treaty, **or for accomplishing any other act with respect to the treaty**." Accordingly, full powers not only cover acts in the treaty-making stage, but also extend to acts that touch *eg* upon the implementation or the status of the treaty. Thus, a representative with full powers is entitled to make declarations foreseen under the treaty (such as a declaration to accept a certain kind of optional dispute settlement under the treaty) or to declare invalid, to suspend or to terminate a treaty. The full powers to perform such acts only become invalid once the instrument is formally withdrawn.[30] **14**

II. Dispense

Art 7 para 1 lit b states that the production of full powers may not be necessary if States "**intend to dispense**" with it. Indeed, a considerable proportion of modern treaties is concluded in simplified form, when more often than not, the production of full powers is no longer required by States.[31] **15**

The intention to dispense may be inferred from the "**practice of the States concerned**". This is a flexible formula, which requires to establish dispense in every given case. For example, it was Swedish and US practice to authorize their representatives to sign treaties by sending cables from the capitals, which were exhibited at request and accepted by the other side.[32] In contrast, the VCLT falls short of a presumption that opting for the conclusion of a treaty in simplified form always entails the dispense of full powers.[33] **16**

Equally, "**other circumstances**" may indicate a mutual dispensation. The most common example of such practice and circumstances is bilateral negotiations where both negotiators simply do not ask their counterpart to produce full powers, but assume that they possess the relevant internal authorization.[34] Indeed, through modern ways of communication, negotiators nowadays are certain that their counterparts may receive frequent guidance from their capital.[35] **17**

[29] UN Treaty Section, 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, para 103.

[30] *Aust* 77.

[31] Final Draft, Commentary to Art 6, 193 para 3.

[32] *Blix* (n 2) 50–52.

[33] *F Hamzeh* Agreements in Simplified Form – Modern Perspective (1968–1969) 43 BYIL 179, 188.

[34] *Aust* 77.

[35] *Sinclair* 30.

> In the abovementioned 1967 note on the acceptance of GATT Legal Instruments,[36] the GATT Director-General allowed for the use of **telegraphic powers**: "a government wishing to use the procedure of telegraphic powers on a regular basis, thus dispensing with full powers, should provide the depositary with a statement, issued by the competent authority, to the effect that this procedure is in conformity with its constitutional requirements. The statement should designate the plenipotentiary empowered to sign and should specify that production of telegraphic instructions constitutes sufficient authority to bind the government by signature."

18 Furthermore, treaty **negotiations** may even be conducted entirely **in writing**; in such situations, the production of full powers is unnecessary as the exchange of letters by the foreign ministries themselves is a sufficient guarantee for the existence of the relevant treaty-making authority on both sides.

19 The mutual trust in the powers of the relevant negotiators may also flow from the **internal position** that they occupy. It would be uncommon to ask the minister or State secretary of a State in charge of another portfolio than foreign policy to produce full powers for a treaty dealing with the sector for which he or she is competent, or to demand such evidence from a commander in force when signing a cease-fire agreement. Similarly, the production of full powers in the context of high-level negotiators of international organizations is usually dispensed with.

III. Reliance on the Function of a Representative

20 Art 7 para 2 sets out three cases in which a person is considered in international law as representing his State without having to produce full powers. In these cases, the other representatives are entitled to **rely on the function** of the person concerned to represent his State without requiring evidence for it.[37]

1. Heads of State, Heads of Government and Foreign Ministers

21 Generally, international law is unconcerned with the distribution of powers between the various organs of the States. Some specific powers, however, are regularly vested in the heads of States, the heads of government and foreign ministers and therefore directly relevant for international law. Among those powers is the treaty-making power.[38]

22 For a **head of State** this power flows from his position at the top of a State's hierarchy. In the *Land and Maritime Boundary (Cameroon v Nigeria)* case, the Court confirmed that position with reference to the VCLT.[39] In the *Genocide* case,

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[36] Note by the Director-General (n 16).

[37] Final Draft, Commentary to Art 6, 193 para 4.

[38] *Watts* (n 20) 27, 100.

[39] ICJ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening)* [2002] ICJ Rep 303, para 265.

it also cited the Convention for the proposition (going beyond the law of treaties) that "every Head of State is presumed to be able to act on behalf of the State in its international relations".[40]

23 The **head of government** is usually the head of the executive authority under the domestic law of States.[41] His or her relative political power when compared with the head of State may vary considerably. Nevertheless, from an international law point of view, his or her function equally qualifies him to commit his State in the treaty-making stage as his power effectively covers the full range of a State's international activities.[42]

24 The **foreign minister**'s capacity to enter into international engagements for his State was first acknowledged by the PCIJ in the *Eastern Greenland* case[43] in connection with the '*Ihlen* Declaration'. Although that case concerned a unilateral declaration, the underlying capacity to express the consent to be bound is the same in the context of treaty making.[44] The ICJ confirmed this in the *Arrest Warrant* case in the following words:

> [T]he Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, for example, Article 7, paragraph 2(a), of the 1969 Vienna Convention on the Law of Treaties).[45]

25 States may therefore safely trust that any act of either of another State's '**Big Three**' in the treaty-making stage is imputable to that State, as set out in Art 7 para 2 lit a. Moreover, and importantly, there is a clear presumption that their signature of a treaty, which does not provide for ratification, engages the State, even if they may have violated domestic requirements. The plea that a head of State, a head of government or a foreign minister disregarded a constitutional requirement of ratification of fundamental importance (→ Art 46) is thus less likely to be heard.[46]

> In the *Qatar v Bahrain* case, the foreign ministers of Bahrain and Qatar had signed minutes on 25 December 1990, according to which either side could bring their maritime and territorial dispute to the ICJ provided that mediation by Saudi Arabia would fail by

[40] ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595, para 44.

[41] *Villiger* Art 7 MN 15.

[42] *Watts* (n 20) 100.

[43] PCIJ *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53, 71 (1933).

[44] *Blix* (n 2) 36–37, arguing that the *Ihlen declaration* was made in reply to a Danish request, which resembled treaty-making in simplified form.

[45] ICJ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3, para 53.

[46] *Watts* (n 20) 29–30.

May 1991. When Qatar seized the Court, Bahrain argued that the foreign minister was constitutionally not permitted to sign an agreement taking effect on signature concerning the territory of a State.[47] The ICJ did not discuss the argument of constitutional non-competence, but held that intentions of the Bahraini foreign minister were irrelevant given he had signed a text recording commitments.[48] The Court concluded that the minutes constituted an international agreement establishing jurisdiction of the Court.[49]

In the *Land and Maritime Boundary (Cameroon v Nigeria)* case, the heads of States of Cameroon and Nigeria signed in 1975 the 'Declaration of Maroua' on partial maritime delimitation. Nigeria contended that the agreement was invalid because it had not been ratified by the competent Nigerian legislative body of the time, the Supreme Military Council.[50] The ICJ considered that (lacking any contrary indication) the Declaration entered into force immediately upon signature and then discussed whether there was a manifest breach of fundamental importance of Nigeria's law within the meaning of Art 46 para 2 VCLT. Rejecting that proposition, it held that "a limitation of a Head of State's capacity in this respect is not manifest in the sense of Art 46 para 2, unless at least properly publicized. This is particularly so because Heads of State belong to the group of persons who, in accordance with Art 7 para 2, of the Convention 'by virtue of their functions and without having to produce full powers' are considered as representing their State."[51]

2. Heads of Diplomatic Missions

26 According to Art 3 para 1 lit c Vienna Convention on Diplomatic Relations, the functions of a diplomatic mission consist, *inter alia*, in negotiating with the government of the host State. Against that backdrop, Art 7 para 2 lit b considers heads of diplomatic missions as representing their State **for the purpose of adopting** the text of a treaty between the accrediting State and the State to which they are accredited. However, this function only covers the 'adoption' of the text, and not the expression of the consent to be bound.[52] For the latter act, the head of a diplomatic mission must also produce full powers, unless the requirement is dispensed with in accordance with the previous paragraph.

3. Representatives Accredited to an International Conference, Organization or Organ

27 There is also no need to require full powers from representatives accredited by States to an international conference or to an international organization or one of its organs. In such situation, their accreditation also indicates their **power to adopt** the

[47]ICJ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 112, para 26.

[48]*Ibid* para 27.

[49]*Ibid* para 30

[50]ICJ *Cameroon v Nigeria* (n 39) para 258.

[51]*Ibid* para 265.

[52]Final Draft, Commentary to Art 6, 193 para 5.

text of a treaty in that conference, organization or organ. However, as with Heads of diplomatic missions, such representatives may not express consent to be bound without having produced full powers.

28 Departing from the 1962 Draft, which reserved that function only for the Heads of Permanent Missions, Art 7 para 2 lit c includes all "**accredited representatives**". This flexible term allows States also to entrust expert negotiators with the final adoption of the text without being forced to be represented by their Permanent Delegate or to issue full powers to the negotiator. In practical terms, "accreditation" entails the submission of a letter, according to which the "accredited person" has been empowered to adopt the text of a treaty to be negotiated in one of the three *fora* mentioned.

29 The text does not specify at what **level** accreditation must be issued. A letter signed by one of the 'Big Three' is required in the UN context[53]; an accreditation signed by the Permanent Representative is not sufficient.[54] However, it is not precluded that according to the diplomatic 'usages' in other *fora* the accrediting authority can be of a lower level.

30 Art 7 para 2 lit c is silent on the **procedure of accreditation**. For UN conferences, it is standard practice to form a 'credentials committee', which has the task of verifying whether letters of accreditation of delegations conform to the technical requirements. A credentials committee hence examines the identity of the accredited person and the accreditation authority only. Although the committee usually presents its report to the plenary at the beginning of the negotiations, it is open to do so at the end, as was done at the diplomatic conference for the VCLT itself.[55]

31 When a treaty is negotiated under the auspices of the General Assembly, its standing credentials committee exercises this role according to Rules 27–29 of the UNGA's Rules of Procedures. The committee consists of nine members who are appointed upon proposal of the UNGA's President. The committee reports on a yearly basis to the Assembly whether the national accreditations have been accepted. Moreover, disputes with respect to conflicting credentials, where more than one authority claims to be the government entitled to represent a member of the UN are referred to the General Assembly.[56]

[53] *Cf* Rule 27 UNGA Rules of Procedure, September 2007, UN Doc A/520/Rev.16/Corr.1. For a regional integration organization, the UN requires the issuance of credentials by "the competent authority" (UN Office of Legal Affairs, Memorandum to the Coordinator, Ozone Secretariat UN Environmental Programme, 28 September 1993, [1993] UNJYB,427, UN Doc ST/LEG/SER. C/31).

[54] Opinion of the Legal Counsel of the UN Secretary-General, 25 February 1964 [1964] UNJYB 226.

[55] *P Kovács* in *Corten/Klein* Art 7 MN 40.

[56] *R Sabel* Procedures at International Conferences (2006) 65–66.

32 While accreditation is normally a rather **formal exercise**, it may exceptionally expose underlying differences between Members regarding the representational power of certain delegations in the multilateral context.

> In 1974, the General Assembly rejected the accreditation of the South African delegation, thereby suspending *de facto* a number of membership rights, including the right to negotiate new treaties in the UN context.[57] Another example has been the attempt of Arab States since 1982 to question the legality of the Israeli credential letter in the Credentials Committee. However, the relevant motion was regularly omitted from the committee's agenda due to a 'non-action' motion from the Nordic European States. In 1990, the Arab group accepted credential letters issued by Israel, but demanded that the report of the Credentials Committee contain the phrase "Credentials do not relate to or cover the Palestinian and other Arab territories occupied by Israel since 1967, namely, Jerusalem, the West Bank, the Gaza Strip and the Arab-Syrian Golan." However, as the group of Western States in the UN, including all Member States of the EC, informed partners that it would vote against such language, the Arab group decided to drop this requirement.[58]

33 When an international conference is convened by a host state, it is incumbent on it to verify the credentials even if such convenor is not to be the depositary of the treaty. This may put an additional burden on a host state, which must then become familiar with relevant depositary practice.

> In 1997, Norway convened the conference which adopted the Landmines Convention. Although the Convention was opened to signature in Ottawa, Canada,[59] and the depositary is the UN Secretary-General, it was Norway's task to verify the credentials of the participants.[60]

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[57] UNGA Res 3237 (XXIX), 22 November 1974, UN Doc A/RES/3237 (XXIX). See *E Klein* Zur Beschränkung von Mitgliedsrechten in den Vereinten Nationen – Eine Untersuchung zum Südafrika-Beschluss der Generalversammlung vom 12. November 1974 [1975] VN 51.

[58] *K-D Stadler* Die Europäische Gemeinschaft in den Vereinten Nationen: Die Rolle der EG im Entscheidungsprozeß der UN-Hauptorgane am Beispiel der Generalversammlung (1993) 288.

[59] 2056 UNTS 241.

[60] *Aust* 78.

Article 8

Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

Contents

A. Purpose and Function

Art 8 deals with the legal **consequences of an act performed by an unauthorized person** related to the conclusion of a treaty and the **options for the State concerned**. It thereby complements the previous article on full powers[1] and aims to bring about legal security in such situations. **1**

B. Historical Background and Negotiating History

The ILC did **not** find **many precedents** in this field. In 1908, a US minister signed two conventions in Romania without having been empowered to do so. A curious event occurred in 1951 on a technical level, where the Norwegian representative, *Mork*, signed a convention concerning the naming of cheeses not only on behalf of Norway, but also for Sweden at a conference held in Stresa.[2] In both cases, the treaty in question was subject to subsequent ratification, in which both the United States and Sweden actually confirmed the unauthorized act.[3] **2**

In light of this sparse, but uncontroversial practice, the ILC has encountered **few difficulties to formulate a satisfactory text**. SR *Waldock* proposed in his second report a Draft Art 6, according to which the State concerned may repudiate an **3**

[1] *Sinclair* 31.

[2] *H Blix* Treaty-Making Power (1960) 12.

[3] Final Draft, Commentary to Art 7, 211 para 2.

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unauthorized act of its representative, which purports to bind it, provided the State in question has not subsequently ratified or otherwise accepted it by its conduct.[4]

4 The ILC draft of 1963[5] dealt with the lack of authority to bind a State as a ground of invalidity in Draft Art 32 para 1 together with the transgression of restricted powers in Draft Art 32 para 2 (which later became Art 47). Importantly, with respect to the former, the ILC modified *Waldock*'s idea on the legal consequences of unauthorized acts. Rather than keeping their validity until they are subsequently repudiated or confirmed, they were found to be without any legal effect *ab initio* in the Commission's view. The **1963 Draft** also specified that subsequent confirmation may take place either expressly or impliedly.

5 In 1966, the ILC broadened the scope of the article from acts expressing consent to be bound to all acts relating to the conclusion of a treaty.[6] As this met the approval of States, the diplomatic conference only proceeded to a minor modification by replacing the words "confirmation by the competent authority of the State" with "confirmation by that State".

6 There was consensus in the diplomatic conference that Art 8 reflects **customary law**,[7] an assessment that is shared in doctrine with certain nuances.[8]

C. Elements of Article 8

I. Lack of Authority of the Acting Person

7 Art 8 refers to a person who cannot be considered under Art 7 as authorized to represent a State for that purpose. This formulation comprises **two categories of cases**.[9] There may be persons who are not authorized to represent a State at all, and there may be persons who have received full powers, but have gone beyond them by accepting unauthorized extensions or modifications of the treaty:

> A practical case for the latter category was Persia's attempt, in discussions in the Council of the League of Nations, to disavow the Treaty of Erzurum of 1847 between Persia and Turkey on the ground that the Persian representative had gone beyond his authority in accepting a certain explanatory note produced by the mediating powers Russia and United Kingdom when exchanging ratification.[10]

8 Another category of persons that may act without the necessary authority are heads of mission or representatives accredited to an international organization,

[4] *Waldock* II 46.

[5] [1963-II] YbILC 189–217.

[6] Final Draft, Draft Art 7, 193.

[7] UNCLOT I 79 para 34.

[8] *N Angelet/T Leidgens* in *Corten/Klein* Art 8 MN 6–7; *Villiger* Art 8 MN 9.

[9] *Elias* 21.

[10] Final Draft, Commentary to Art 8, 194 para 2. For more background on this incident, see *Blix* (n 1) 76–77.

conference or body. While their function includes the performance of preparatory acts in treaty making, they are not entitled to sign or express consent to be bound to a treaty without having produced full powers according to Art 7 para 2 lit b and lit c. If they were to do so nevertheless, the relevant acts would be without legal effect, unless it could be established by other means that the need to produce full powers was dispensed with under Art 7 para 1 lit b.

In return, Art 8 does not cover situations where a representative has authority to represent the State for the treaty in question, but did not observe **specific restrictions** in his full powers. This *cas de figure* is dealt with in Art 47 VCLT as a specific ground of the treaty's invalidity. Such omissions to observe specific restrictions to express consent to be bound may not be invoked as invalidating a consent expressed by the representative unless the restriction was brought to the knowledge of the other negotiating States prior to his expressing such consent. **9**

Neither can Art 8 come into play in order to question the representational power of one of the 'Big Three' mentioned in Art 7 (→ Art 7 MN 25) with reference to an alleged violation of domestic law. **10**

In the *Genocide* case, Yugoslavia pleaded inadmissibility of the case, *inter alia*, because *Alija Izetbegović* had issued instructions for the filing of the case at a time when he was not serving as President of the Republic of Bosnia and Herzegovina, but only as President of the State's three-member Presidency. Judge *ad hoc Kreća* argued in his dissenting opinion that Art 8 could be applied by analogy. For him, the instruction given by *Izetbegović* was a "non-existent measure" devoid of any legal effect because the official had acted outside the sphere of his competence.[11] The ICJ did not find it appropriate to invoke Art 8 in these circumstances. Rather, drawing on Art 7 para 2 lit a VCLT, it emphasized that the person issuing the instructions had been recognized as head of State having full powers to act on behalf of the State in international relations.[12]

II. The Act Relating to the Conclusion of the Treaty

Art 8 applies to all acts relating to the conclusion of a treaty. This **generic formulation** and the negotiating history make it clear that preparatory acts, signature and the different modes of expressing consent to be bound are equally covered.[13] That is important because States are hereby protected not only against the creation of legal obligations contained in an irregularly accepted treaty, but also against the *bona fide* obligations arising from the mere unauthorized signature under Art 18 VCLT, even if a treaty is subject to ratification. **11**

[11] ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) (dissenting opinion *Kreća*) [1996] ICJ Rep 658, paras 38–39.

[12] ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595, para 44.

[13] *N Angelet/T Leidgens* in *Corten/Klein* Art 8 MN 7.

III. No Legal Effect

12 According to Art 8, unauthorized acts are "without legal effect". The ILC explained that there was no question of any consent having been expressed by the act that could be either valid or invalid. The better explanation for the lack of any legal effect was that such acts are **not attributable to the State** in question in the first place.[14]

13 While the **difference between 'lack of legal effect' and invalidity** may seem a bit theoretical at first blush, there is one practical reason for that difference under the VCLT. Whereas a dispute over the existence or not of a ground of invalidity is subject to the procedural requirements laid down in Art 65, there is no comparable restraint with respect to acts performed by unauthorized persons.

IV. Subsequent Confirmation

14 Due to the non-existing legal effect of an unauthorized act, the State in question is **not obliged to repudiate** it. Silence does not change the law. On the other hand, there is no harm if a State exercises its right to disavow the act in question.[15] As a third option next to silence or repudiation, the State may confirm the act in question, as the last part of Art 8 clarifies.

15 Art 8 is silent on the **authority competent** to express the confirmation. It is therefore a matter for the domestic law of each State to designate the appropriate level.[16]

16 The **scope of subsequent confirmation** is left to the practice of States. An obvious option is that a competent authority of the State accepts its legal effect *ex tunc*. Alternatively, nothing in the text prevents States from accepting the legal effect of an unauthorized act *ex nunc*.[17] As the unauthorized act has had no legal effect so far, the State may choose in its act of confirmation whether it wants to cover the past.

17 Art 8 is equally silent on the **form of subsequent confirmation**. Certainly, a State may expressly refer to the act in question and declare its acceptance. It is also possible to bring about subsequent confirmation by implication.[18] As can be drawn from the US incident 1908 and the Swedish incident 1951 cited above (→ MN 2), subsequent ratification of the treaty in question remedies the lack of authority at the

[14] Final Draft, Commentary to Art 8, 194 para 1.

[15] *Ibid* para 3.

[16] *N Angelet/T Leidgens* in *Corten/Klein* Art 8 MN 11.

[17] For a different view, see *N Angelet/T Leidgens* in *Corten/Klein* Art 8 MN 6, 13–14, who argue that Art 8 only allows for retroactive confirmation, whereas a confirmation *ex nunc* would have to be based on customary law.

[18] Final Draft, Commentary to Art 8, 194 para 3; *GE do Nascimento e Silva* Full Powers (1995) 2 EPIL 494, 496.

signing stage. Confirmation of an unauthorized signature by subsequent ratification can also occur upon the change of political circumstances.

In 1941, the Danish Minister at Washington, *Kauffmann*, signed a treaty with the US government on the defense of Greenland without having been empowered to do so by the Danish government at a time when Denmark was under German occupation.[19] After signature, *Kauffmann* informed the authorities in Copenhagen that he had acted as a free representative of Danish sovereignty, as '*negotiorum gestor*'. The Danish government informed the US government that it strongly disapproved of his concluding the agreement without authorization and recalled him from the post.[20] After the liberation of Denmark, in May 1945, the Danish Prime Minister adhered to the Greenland agreement and submitted it to the Rigsdag for ratification, which eventually occurred.[21] Having healed the initially invalid signature, the treaty then entered into force *ex nunc*.

Another way of expressing subsequent confirmation is to publish the treaty or implementation legislation.[22] Finally, an unauthorized signature can also be confirmed in substance by the conclusion of a new treaty. **18**

In 1858, the Russian governor-general of Eastern Siberia, *Count Muraview*, induced the chief of the Chinese forces on the river Amur, *Prince Yishan*, to sign the Treaty of Aigun, in which China ceded to Russia a territory almost as large as France. The Chinese government refused to ratify the treaty and dismissed the Prince for overstepping his authority. In 1860, however, when French and English troops had occupied Beijing, a Russian diplomat convinced the Chinese ruler, *Prince Kung*, that he could induce the occupiers to withdraw their troops if China recognized the Treaty of Aigun. The allied troops were withdrawn (for other reasons) and by a treaty of 14 November 1860 with Russia, China confirmed the Treaty of Aigun.[23]

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[19]The treaty is reproduced in (1941) 35 AJIL Supp 129 and (1942) 11 ZaöRV 107–112.

[20]For more details, see *H Briggs* The Validity of the Greenland Agreement (1941) 35 AJIL 508, and *WG Grewe* Der Grönland-'Vertrag' von Washington (1941) 8 Monatshefte für auswärtige Politik 431.

[21]*Blix* (n 1) 60.

[22]*Aust* 83; *Blix* (n 1) 9.

[23]*Blix* (n 1) 9.

Article 9
Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.
2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

Contents

A. Purpose and Function

Art 9 deals with an important phase in treaty making. It contains a **residual rule** for cases where the negotiators have not specifically agreed on the majority needed for the adoption of the text. Its purpose and function is therefore limited to regulate some rare contentious cases, which might occur in particular in international *ad hoc* conferences. Art 9 does not deal with the adoption of treaties drawn up in an international organization: for such cases, Art 5 makes clear that the relevant rules of the organization apply. **1**

B. Historical Background and Negotiating History

As treaties were historically negotiated and concluded mainly between two parties, it was self-evident that their **consent** was necessary for the adoption of the text. If either side did not agree to a common text, the negotiations failed. However, the situation became more difficult in a multilateral setting. When several partners drew up a text, could one or more of them veto the adoption of the final convention? In particular, this question arose in the twentieth century within the framework of international organizations such as the League of Nations, the International Labour Organization and the United Nations, which provided a forum for States to negotiate norm-setting international conventions to which not all Member States could be expected to become a party. Indeed, important departures from the consent rule can be traced back to the Hague Peace Conferences of 1899 and 1907 (favouring near unanimity) and the Hague Codification Conference of 1930 under the auspices of the League of Nations (two-thirds rule). The trend to decide on matters of substance by a two-thirds majority (including the final adoption of the text) was then **2**

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consolidated at early UN conferences, such as the 1958 and 1960 UN Conferences on the Law of the Sea, the 1961 UN Conference on Diplomatic Intercourse and Immunities and the 1963 UN Conference on Consular Relations.[1]

3 In 1962, SR *Waldock* presented to the ILC for the first time a provision on the "adoption" of treaties.[2] He proposed to distinguish between five categories of treaties: bilateral treaties, plurilateral treaties, multilateral treaties drawn up at conferences convened by States, multilateral treaties drawn up at an international conference convened by an international organization and multilateral treaties drawn up in an international organization.[3] The ILC simplified this scheme in the same year. **Draft Art 6** lit a **of 1962** stated the two-thirds majority rule for the adoption of a text at international conferences (irrespective of the convening body), unless the same majority decided to adopt another voting rule. Treaties drawn up within an international organization shall be adopted by the voting rule applicable in the competent organ or organization in question (Draft Art 6 lit b). In other cases, the mutual agreement of the States participating in the negotiations was required under Draft Art 6 lit c.

4 In view of a few States' critical comments (Japan even asked to delete the entire article), the ILC followed the recommendations of SR *Waldock* and revised the **Draft in 1965**.[4] It now presented the rule on consent of the negotiating States as the general principle (Draft Art 8 para 1), allowing for different exceptions in international conferences and international organizations. Thus, in international conferences, a two-thirds majority should be required in default of another majority prescribed by the negotiators or by the established rules of an international organization that apply to the conference (Draft Art 8 para 2). In contrast, the adoption of a treaty by an organ of an international organization should always take place in accordance with the voting procedures prescribed by the established rules of the organization in question (Draft Art 8 para 3).

5 The **Final Draft of 1966** led to a further simplification. From then on, the ILC omitted any reference to treaties drawn up in an international organization, as this case was covered by the general rule in Draft Art 4 regarding the application of the rules of an international organization.[5] The Final Draft 1966 also deleted the reference to the applicable rules of an international organization to international conferences: since it is always left to the conference at issue to decide whether to make such rules applicable, there was no need for a separate mention.[6]

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[1] *LB Sohn* Voting Procedures in United Nations Conferences for the Codification of International Law (1975) 69 AJIL 310, 317–318.

[2] For the earlier discussions in the ILC on "establishment" or "authentication" see *M Kamto* in *Corten/Klein* Art 9 MN 3–5.

[3] *Waldock* I 39 *et seq*.

[4] [1965-II] YbILC 159–163.

[5] Final Draft, Commentary to Art 8, 195 para 6.

[6] Final Draft, Commentary to Art 8, 194 para 4.

The **diplomatic conference**[7] brought a minor linguistic change in para 1 (upon an Austrian proposal replacing "unanimous consent" by "consent of all the States") and a clarification in para 2: whereas the Final Draft referred to two-thirds of the States "participating in the conference", the Conference followed the suggestion of the UN Secretary-General's representative and employed the more precise formula of two-thirds of the States "present and voting". Overall, Art 9 VCLT does not deviate significantly from the 1966 ILC Draft as all amendments by States to make a distinction between certain types of multilateral treaties were not included in the final text by the Drafting Committee.[8] **6**

The consent principle in Art 9 para 1 codified **customary law**. However, with respect to the residual two-thirds majority rule in Art 9 para 2, the ILC was split. Some members considered that the procedural vote should even be passed by simple majority, whereas others felt that such a rule might not afford sufficient protection for minority groups at conferences.[9] The final rule laid down in Art 9 para 2 is thus a diplomatic compromise, which might be seen as a progressive development at the time,[10] reflecting the then growing practice of States employing a two-thirds majority for adopting the text of a multilateral treaty, in particular under the auspices of international organizations.[11] **7**

C. Elements of Article 9

I. Adoption by the Consent of All Participating States (para 1)

Art 9 para 1 recalls that the adoption of the text of the treaty takes place by the consent of all States participating in its drawing up. This **general rule** reflects the sovereign equality of States, as referred to in Art 2 para 1 UN Charter. The unanimity rule is particularly relevant for bilateral treaties and for treaties drawn up between few States.[12] **8**

Adoption means the final settling of the form and content of the proposed treaty.[13] In the bilateral context, adoption is often done by initialling or signing. At multilateral conferences, voting or expressing consensus is the more appropriate method. **9**

For the adoption of the text, the **consent** of all participating States is required. Consent means the expression of a State's will to support the adoption of the text. **10**

[7] For a detailed account of the discussions in Vienna on Art 9, see *Sohn* (n 1) 326–332.

[8] *Villiger* Art 9 MN 2.

[9] Final Draft, Commentary to Art 8, 195 para 5.

[10] *Sohn* (n 1) 332.

[11] *M Kamto* in *Corten/Klein* Art 9 MN 13.

[12] Final Draft, Commentary to Art 8, 194 para 2.

[13] *Aust* 84.

Such expression can take the form of a positive vote or of not breaking the consensus around the table when the chairperson asks for the adoption of the text.

11 **Participating States** are the States, which formally conduct the negotiations. They are also referred to in the VCLT as "**negotiating States**" (Art 2 para 1 lit e, → Art 2 MN 46). In modern diplomacy, it is not ruled out that certain negotiations are also attended by other actors. Such non-negotiating States may hence be invited to attend the negotiations as observers. However, this status does not confer upon them a right to participate in the adoption of the treaty.

12 Sometimes, third States or representatives from an international organization may even act as a driving force behind a treaty or as a **mediator** without becoming a negotiating party. Their participation in the negotiations may then be expressly mentioned, either in the Final Act of the negotiations or even in the text of the treaty itself.

> Upon request of both sides, the Algerian government acted as intermediary between the United States and Iran in seeking a mutually acceptable resolution of the dispute arising out of the detention of US nationals in Iran in 1979. The Algiers Accords were laid down in two declarations of the Algerian government of 19 January 1981 (one on the settlement of claims and one on other matters) and an undertaking of both the United States and Iran with respect to the latter declaration. Under Art VIII of the declaration on the settlement of claims, the agreement was to enter into force when the Government of Algeria had received from both Iran and the United States a notification of adherence to the agreement.[14] The agreement was hence a treaty between the United States and Iran only, although two of the three treaty bodies were laid down in declarations made by Algeria.[15]

13 In order to signal active participation of third actors, modern practice has also invented the category of '**witness**'. However, from a legal point of view, a witness is no more than any other non-participating State. His 'testimony' has no legal effect for the adoption of the text and does not imply any guarantee for the proper implementation of the agreement.[16]

> In 1994, US President *Clinton* acted as a witness when the Israeli–Jordanian Peace Treaty[17] was adopted. The Dayton Agreement between the Federal Republic of Yugoslavia, Bosnia-Herzegovina and Croatia[18] was signed at Paris in 1995 by the Presidents of the three republics, and signed by representatives from the United States, France, Germany, the United Kingdom, the European Union and Russia under the heading "witnessed by". In 2002, the agreement between Serbia and Montenegro on the foundation of the State union between the two States was 'witnessed' by the EU High Representative for Foreign and Security Policy, *Solana*.

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[14] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (1981) 20 ILM 230.

[15] *P Juillard* Le rôle joué par la République populaire et démocratique d'Algérie dans le règlement du contentieux entre les États-Unis d'Amérique et la République islamique d'Iran (1981) 27 AFDI 19, 40–44.

[16] *Aust* 101.

[17] 2042 UNTS 351.

[18] 1035 UNTS 167.

In other cases, a third side may become a **guarantor** with respect to a specific arrangement. If the guarantor's intention is to assume legal rights and obligations, it will become a party to the treaty or conclude a separate treaty which lays down the exact scope of the guarantor powers in question. **14**

On 2 February 1959, the United Kingdom, Greece and Turkey, as well as a representative of the Greek Cypriot and the Turkish Cypriot Community, agreed on an arrangement for Cyprus, called the 'London–Zurich Agreement'.[19] In order to guarantee the independence and the constitutional structure of the Republic of Cyprus as embodied in the constitution of Cyprus of 1960, the newborn Republic of Cyprus concluded an additional 'Treaty of Guarantee' with the United Kingdom, Greece and Turkey on 16 August 1960.[20] Cyprus undertook in Art I not to participate in union with any other State or to proceed to partition. The three powers guaranteed the independence, territorial integrity and security of the Republic, as well as the basic articles of its Constitution (Art II). Most importantly, under Art IV para 2, each Guarantor Power reserved the right to take action with the sole aim of re-establishing the state of affairs created by the treaty in the event of a breach of the treaty.[21]

If the **guarantee** is more seen **as political support** for the implementation of the treaty arrangement, the guarantor may express such intention in the process of adoption of the treaty by putting his or her signature on the text and explaining its meaning later on. **15**

The French President *Sarkozy*, in his capacity as acting President of the EU Council, brought about the six-point agreement of 12 August 2008 between the Russian Federation and Georgia on the cessation of hostilities. He put his signature next to the signature of the Georgian President *Saakashvili* on the French version of the agreement "pour l'Union européenne – la Présidence française". In a meeting on the implementation of the agreement between the French President, accompanied by the EU High Representative for Foreign and Security Policy, the President of the European Commission, and the Russian President in Moscow on 8 September 2008, it was further specified that the European Union "en tant que garante du principe de non-recours à la force" would deploy an observer mission in Georgia.

II. Adoption at International Conferences (para 2)

At an international conference, the participating States usually agree in advance on a set of **rules of procedure**. As such rules also contain a provision on the adoption of the treaty, the most important practical question is by which majority the rules of procedure themselves are adopted. In that respect, Art 9 para 2 indicates that a two-thirds majority of participating States present and voting is necessary. However, **16**

[19]Conference on Cyprus, Documents Signed and Initialled at Lancaster House on 19 February 1959, Cmnd 679.

[20]382 UNTS 5475.

[21]For an interpretation of that clause, see *F Hoffmeister* Legal Aspects of the Cyprus Problem – Annan Plan and EU Accession (2006) 41–47.

that rule only applies to international conferences outside the UN context.[22] If an international conference is convened by the UNGA or another UN body, a simple majority is sufficient to adopt the rules of procedure of the conference, following the general rule for deciding procedural questions by the UNGA. However, in practice, in almost all cases, rules of procedure are not adopted by vote, but by acclamation.[23]

17 When adopting the rules of procedure, the participating States are free to lay down the threshold, which they consider appropriate for the adoption of the envisaged convention. At the Vienna Conference itself, decisions on matters of substance were taken by a two-thirds majority of the representatives present and voting according to Rule 36 of the Rules of Procedure. A new practice emerged at the 3rd UN Conference on the Law of the Sea.

> On 27 June 1974, the Conference on the Law of the Sea adopted a declaration according to which the conference should make every effort to reach agreement on substantive matters by way of consensus and that there should be no voting on such matters until all efforts at consensus have been exhausted. Rule 37 para 2 further specified how to determine that all effort had been exhausted, and Rule 37 para 3 provided for a cooling-off period. Rule 39 para 2, however, clarified that the adoption of the Convention as a whole is not subject to Rule 37.[24] The decision on adopting the entire text could thus be taken by a two-thirds majority of the representatives present and voting, provided that such majority included at least a majority of the States participating in the session of the Conference.[25]

18 In the aftermath of this conference, it became a general practice to strive for **consensus** (*ie* overall support lacking a formal objection[26]) and to allow the adoption of a treaty with a two-thirds majority as a fallback, if no consensus can be achieved. Nowadays, the need to strive for consensus prior to voting is often expressly laid down in the rules of procedure.

> Under Rule 35 of the 1993–1995 UN Conference on Straddling Stocks, all decisions of the Conference on substance were to be taken by a two-thirds majority of the representatives present and voting.[27] However, this rule was "subject to Rule 33", which stipulated that the Conference should conduct its work on the basis of general agreement and that it may proceed to vote in accordance with Rule 35 only after all efforts at achieving general agreement have

[22] *Sinclair* 36.

[23] *R Sabel* Procedures at International Conferences (2006) 26.

[24] Rules of Procedure of the Third UN Conference on the Law of the Sea, UN Doc A/CONF.62/30/Rev.2.

[25] For the negotiations leading to consensus rule, see *Sohn* (n 1) 333–351 and for its application in practice, see *B Buzan* Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea (1981) 75 AJIL 324, 332–339, noting that the principle only became workable when the presidents of the several committees were allowed to put before the delegations an informal single negotiating text (at 334).

[26] See Art 67 para 7 lit e UNCLOS and *Sabel* (n 21) 335–338.

[27] Rules of Procedure of the UN Conference on Straddling Stocks, 3 May 1993, UN Doc A/CONF.164/6.

been exhausted, which the Chairperson shall officially announce to the Conference prior to allowing a vote. The Convention was adopted without a vote on 4 August 1995.[28]

When a convention is indeed adopted by consensus, it also has a much better chance of being signed and ratified and of entering into force rapidly.[29]

The **(fall-back) rule on voting** with two-thirds majority allows the finalizing of complex conventions, negotiated by an ever-growing number of participating States, whose final text may not necessarily find the support of every delegation. **19**

In 1998, Rule 34 of the Rules of Procedure for negotiating the Rome Statute on the International Criminal Court provided for the adoption of the Statute by general agreement. However, in the absence of consensus, a two-thirds majority of the States present and voting – provided that such majority included at least a majority of the States participating in the Conference – was sufficient to adopt the Statute under Rule 36.[30] Although negotiators tried hard to reach consensus for the adoption of the text, that goal could not be achieved among the negotiating States. In the final session of the Conference, 120 States voted for the adoption of the text, while seven nations (including the United States, Israel, China, Iraq and Qatar) voted against and twenty-one countries abstained. As the necessary threshold was passed, the text was hence adopted.[31]

Moreover, even in consensus-based negotiations voting may also occur at interim stages of the negotiating process. Such votes may be indicative to ascertain the inclination of the room, or used to adopt binding decisions on substantive matters. **20**

In 2003, the UNGA Sixth (Legal) Committee took a procedural vote on a proposal to negotiate a convention to prohibit all forms of human cloning. The latter proposal was defeated by one vote (80 to 79, with 15 abstentions). Had the proposal succeeded, the UN would have to be involved in the negotiation of a major international treaty in the field.[32]

In particular areas, **States** may nevertheless **continue to require consensus** for the adoption of a convention. Such practice continues *eg* in the disarmament field, where it is felt that support for all States or a particular text is of utmost importance for the instrument in question to become effective. **21**

In 1979–1980 a UN conference elaborated on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW). The conference adopted the Convention and three additional Protocols on 10 October 1980 by consensus.[33] Art 8 para 1 lit b of the Convention provides that amendments "shall be adopted [...] in the same manner as this Convention".

[28]Final Act of the UN Conference on Straddling Stocks, 7 September 1995, UN Doc A/CONF.164/38 para 30.

[29]*E Suy* Consensus (1992) 1 EPIL 759, 760.

[30]Rules of Procedure of the UN Conference on Establishing the International Criminal Court, 23 June 1998, UN Doc A/CONF.183/6.

[31]1998 Rome Statute of the International Criminal Court 2187 UNTS 90.

[32]*A Pronto* Some Thoughts on the Making of International Law (2008) 19 EJIL 601, 609.

[33]1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (with Protocols I, II and III) 1342 UNTS 137.

22 However, subsequent negotiations in the CCW framework were stuck on some issues due to the consensus rule. In such situations, there is nothing in law to prevent like-minded States to have **recourse to another forum**, where they might push for the adoption of a more ambitious text under a different rule on adoption.

> Acting on the basis of consensus, the first Review Conference of the UN Conventional Weapons Convention (1995–1996) revised Protocol II on landmines.[34] The amendment extended the restrictions on landmine use to internal conflicts, established reliability standards for remotely delivered landmines and prohibited the use of non-detectable fragments in anti-personnel landmines. It is currently binding on over 70 States, including the major producers of anti-personnel landmines (China, India, Russia, the United States, Pakistan, and Israel). However, as the amendment fell short of a total ban for anti-personal landmines, like-minded States convened an international conference outside the UN disarmament framework in October 1996. The rules for that intergovernmental conference obliged to strive for general agreement, but allowed voting by two-thirds majority of States present and voting, provided that at least 30 negotiating States are present.[35] On 18 September 1997, over a hundred States adopted the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.[36] Art 13 para 4 of the Convention, which today has more than 150 States Parties, provides that amendments shall be adopted by a majority of two-thirds of the States Parties present and voting at the Amendment Conference.

23 Such 'forum shopping' for the adoption of an international treaty may put some **pressure on the stricter forum to relax its rules**. Indeed, after the experience with anti-personnel landmines, there were discussions whether or not to abandon the consensus rule in the CCW framework, but to no avail with the consequence that the forum was again short-circuited afterwards.

> When adopting Rule 34 of its Rules of Procedure (stating that decision making in the Conference is governed by Art 8 CCW Convention), the third CCW Review Conference (2006) affirmed that "in the deliberations and negotiations relating to the Convention and its annexed Protocols, High Contracting Parties have proceeded on the basis of consensus and no decisions have been taken by vote."[37] In view of the fact that the conference did not reach a consensus on outlawing cluster munitions, the Norwegian government announced on 17 November 2006, the final day of the CCW conference, that it would convene an intergovernmental conference to negotiate a convention outside the CCW context. The negotiations on the Convention on Cluster Munitions have been finalized in May 2008,[38] and the Convention was opened for signature in December 2008 in Oslo.

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[34] Final Document of the First Review Conference of the Conventional Weapons Convention, 3 May 1996, UN Doc CCW/CONF.I/16 (Part I) para 37.

[35] Compare the Rules 13–16 of the Rules of Procedure of the [First] Meeting of the States Parties to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 22 March 1999, Doc APLC/MSP.1/1993/L.3.

[36] 2056 UNTS 211.

[37] Final Document of the Third Review Conference of the Conventional Weapons Convention, UN Doc CCW/CONF.III/11 (Part I) para 19.

[38] Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, Doc CCM/77, http://www.clustermunitionsdublin.ie/pdf/ENGLISHfinaltext.pdf.

Another method for overcoming consensus requirements is to bring the adoption of a treaty text to the attention of the **UN General Assembly**, which operates on such matters on the basis of simple majority. **24**

> In 1996 India blocked the adoption of the 1996 Comprehensive Nuclear Test-Ban Treaty[39] (CTBT) in the UN Disarmament Committee, which operates on the basis of consensus. Subsequently, the matter was taken to the UN General Assembly where the treaty was adopted by a vote of 158 to three (Bhutan, India and Libya), with five abstentions.[40]

If no rules of procedure have been adopted by an international conference, Art 9 para 2 contains the residual rule for the adoption of the treaty. Departing from the unanimity rule that prevailed in the nineteenth century, the Convention embodies the two-thirds majority requirement that has hitherto been the practice of the ILO since 1920 and the UN since 1945.[41] The adoption of a treaty thus requires the positive vote of two-thirds of the participating States "**present and voting**". That means only the votes of those delegations are counted that cast an affirmative or negative vote. Delegations that are absent or abstain are considered as not voting, countering the risk of non-adoption of a treaty by recourse to 'abstentionism'.[42] **25**

III. Legal Effects of Adoption

In adopting the text of a treaty, a State is only concerned with drawing up a document setting out the provisions of the proposed treaty. Initialling or casting a vote at this stage does **not** constitute in any sense an expression of the State's **consent to be bound** by it.[43] Nor is such vote an expression of a *bona fide* wish to bring about such consent. **26**

Moreover, adoption of a text does **not** make it **unalterable**.[44] There is no wording in Art 9, which supports this contention – rather, in line with the text of Art 10 authentication marks the point in time where a particular text in all its language versions becomes definitive. Only when authentication and adoption are merged, is it correct to assign any such legal effect to adoption. **27**

Finally, there is no legal rule according to which a treaty must be referred to with respect to its **date of adoption**. Such references are simply a matter of diplomatic usage. **28**

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[39] 35 ILM 1439

[40] *Aust* 88.

[41] *Reuter* 64.

[42] *M Kamto* in *Corten/Klein* Art 9 MN 26.

[43] Final Draft, Commentary to Draft Art 8, 194 para 1.

[44] *M Kamto* in *Corten/Klein* Art 9 MN 7, considering that adoption of a text is the "établissement definitive, *ne varietur*, du texte du traité", is therefore imprecise. He is directly contradicted by his co-commentator *Thouvenin*, who uses almost the same wording with respect to authentication (*J-M Thouvenin* in *Corten/Klein* Art 10 MN 1).

The UN Convention on the Rights of the Child received its first signatures only in 1990, but is nevertheless referred to as the 'Convention of 1989', referring to its date of adoption by the UN General Assembly on 20 November 1989.[45]

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E Suy Consensus (1992) 1 EPIL 759–761.

[45]United Nations Convention on the Rights of the Child, UNGA Res 44/25, 20 November 1989, UN Doc A/44/49.

Article 10
Authentication of the text

The text of a treaty is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or
(b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Contents

A. Purpose and Function

International negotiations may sometimes be conducted under time pressure and/or in several languages. It is therefore important for all negotiating States to be sure of the **final outcome of the negotiations**. While Art 9 settles the procedure on how to adopt the final text, Art 10 deals with its authentication as a distinct element in the treaty-making process. Both adoption and authentication may occur at the same time, but not necessarily so. For example, signature or initialling of a text may be deemed both adoption and authentication in a bilateral context, whereas separate acts may be needed in a multilateral context. Moreover, a treaty may be adopted only in one language, but authenticated in several languages.[1] **1**

> On 20 December 1965, the General Assembly adopted and opened for signature the UN Convention on the Elimination of All Forms of Racial Discrimination.[2] However, States could only put their first signatures on the text as of 7 March 1966 after the UN Secretariat had circulated certified authentic copies of the text in all authentic languages to the UN Member States in accordance with Art 25 para 2 of the Convention.

Thus, Art 10 has the purpose of clarifying the means by which the text of a treaty is to be regarded as authentic and **definitive** for all negotiating Parties. That version of the text is the one on which subsequent consent to be bound is to be expressed and, as the case may be, the one on which parliamentary approval at the national level might be sought. **2**

[1] Final Draft, Commentary to Art 9, 195 para 2.

[2] UNGA Res 2106 (XX), 20 December 1965, UN Doc A/6014 para 1.

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B. Historical Background and Negotiating History

3 Historically, authentication was not regarded as a distinct step in the treaty-making procedure. For that reason, for example, the Harvard Draft of 1935 did not contain any reference or article thereto.[3] Rather, both for treaties concluded by signature and for treaties subject to ratification, signature embodied the necessary authenticity.[4] Nevertheless, the ILC considered it useful to draft a separate article on authentication, in particular in order to address new ways of multilateral treaty making in international organizations. Against that background, and based on a proposal from SR *Waldock* in his first report,[5] the ILC adopted **Draft Art 7 in 1962**.[6] The Commission identified four ways of authenticating: initialling, incorporation of the text in the final act of the conference in which it was adopted, incorporation of the text in a resolution of an international organization in which it was adopted (Draft Art 7 para 1) or signature (Draft Art 7 para 2). The ILC also considered that the text will become definitive on authentication (Draft Art 7 para 3), unless the negotiating States agree on a correction.

4 Upon some critical comments from three governments,[7] the Special Rapporteur defended the draft in substance, but did away with its separation into three paragraphs.[8] The ILC refined the wording of Draft Art 7 in 1965.[9] The final **ILC Draft Art 9 of 1966**[10] dropped the reference to authentication in an international organization, as this matter is covered by the general provision in Art 5 VCLT regarding the established rules of international organizations.[11] Draft Art 9 later became Art 10 VCLT without any changes in the diplomatic conference.

5 Given the dearth of doctrinal reflection on authentication prior to *Waldock* introducing it as a distinct step in treaty making and the abovementioned cold reaction by States, it appears difficult to affirm the **customary law** nature of the provision on the one hand. On the other hand, one cannot identify any progressive development of the law either, given that it builds on certain practices that already existed in 1969.[12] On balance, Art 10 thus seems to reflect a refinement in understanding the practice of States, which may not have been supported by their *opinio iuris* on the existence of authentication as a separate legal concept at the

[3](1935) 29 AJIL Supp 657 *et seq*.

[4]*S Bastid* Les traités dans la vie internationale – conclusion et effets (1985) 38.

[5]*Waldock* I 42 *et seq*.

[6][1962-II] YbILC 161–180.

[7]The United States questioned whether the article is necessary [1966-II] YbILC 347; Sweden found that it gave more procedural advice than stating a rule of law [1966-II] YbILC 337; and Japan submitted that it should be omitted [1966-II] YbILC 302.

[8]*Waldock* IV 26.

[9][1965-I] YbILC 256 para 103.

[10][1966-I/2] YbILC 292, 326.

[11]Final Draft, Commentary to Art 9, 195 para 1.

[12]*J-M Thouvenin* in *Corten/Klein* Art 10 MN 8.

time. Nowadays, due to its uncontroversial substance, authentication forms part of customary law on the law of treaties.[13]

C. Elements of Article 10

Authentication is done by a **procedure** (Art 10 lit a) or an **act** (Art 10 lit b). Both identify and certify the text as the correct, definitive and authentic text of the treaty.[14] **6**

I. Authentication by Procedure (lit a)

Art 10 lit a leaves it to the negotiating States to agree upon a **procedure on authentication**. In particular, in international conferences involving a huge number of participants, it has become common to authenticate the text by accepting the Final Act to which the authentic text (in all authentic language versions) is attached. Authentication of a treaty text adopted in an international organization (which falls under Art 5 VCLT) can be done by voting for a decision or resolution prepared by an organ of the organization, such as an assembly of the Member States,[15] or by an act of a duly authorized authority of the organization, such as the president of the assembly or the chief officer.[16] **7**

> The ILO Constitution provides that the Conference, the plenary organ of the ILO, may adopt conventions by a two-thirds majority vote. According to Art 19 para 4 ILO Constitution, two copies of the convention or recommendation shall be authenticated by the signatures of the President of the Conference and of the ILO Director-General. Of these copies, one shall be deposited in the archives of the International Labour Office and the other with the UN Secretary-General. The Director-General will communicate a certified copy of the convention or recommendation to each of the members to trigger the process of acceptance under Art 19 para 5 ILO Constitution. A similar procedure exists under Art XIV para 7 FAO Constitution.

II. Authentication by Act (lit b)

The traditional way of **authenticating a text by an act** in a bilateral situation or in a restricted multilateral setting is referred to in Art 10 lit b. In such scenarios, authentication is usually done by initialling, signing or signing *ad referendum*. **8**

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[13] *Villiger* Art 10 MN 8.

[14] Final Draft, Commentary to Art 9, 195 para 4.

[15] *WM Reisman/MH Arsanjani* What Is the Current Value of Signing a Treaty? in *S Breitenmoser et al*. (eds) Festschrift Wildhaber (2007) 1491, 1495–1496, noting that the adoption of conventions by the UN General Assembly has substituted signing as a means of authentication at UN level.

[16] *Aust* 90.

9 **Initialling** of a text means that each chief negotiator puts his or her initials at the bottom of each page of the authenticated text. Importantly, initialling can be reversed at any given time thereafter. In bilateral or regional practice, initialling is therefore often accompanied by an agreement that a legal-linguistic review (sometimes referred to as '*toilettage juridique*') will be carried out to agree on a final authentic version. In the course of this technical revision process, all sides may agree on changes to the original text.

> In 2004–2005, the European Community, Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the former Yugoslav Republic of Macedonia, Serbia and Montenegro, UNMIK (for Kosovo under Security Council Resolution 1244), Romania and Turkey negotiated the Treaty Establishing an Energy Community in South Eastern Europe.[17] The negotiators adopted the text by initialling it in May 2005 and asked the European Commission to carry out a legal-linguistic review, upon which the authentic version was agreed by the negotiating Parties in electronic form. That version was then submitted for signature by the Ministers meeting in Athens on 25 October 2005.[18] Thereafter, on 25 November 2005, the Secretary-General of the EU Council sent a true certified copy of the original deposited in the archives of the General Secretariat of the EU Council to the Signatories.

10 **Signature** of a text can be definitive or *ad referendum*, meaning that it must be subsequently confirmed to be valid. While the legal consequences of such acts can be far-reaching and controversial (→ Arts 11 and 18), such acts entail an acknowledgement of the signatory that the signed text is authentic and not open to subsequent changes.

11 Finally, Art 10 lit b recalls that States may initial or sign either the text itself or the **Final Act** to which the text is attached. Final Acts are sometimes used to officially record the summary of a diplomatic conference. Along with the text of the treaty, such acts may contain common or unilateral declarations of the negotiating States or an agreement on how to prepare the entry into force of the convention (for example, by setting up a preparatory committee). States will usually accept the Final Act by either signing it or adopting it by vote or consensus. In both cases, the convention attached to the Final Act text becomes authentic under Art 10.

12 Occasionally, States may also wish to distinguish between authenticating a multilateral Convention itself and adopting a separate Final Act.

> At the end of the UN Conference on the Law of the Sea, delegations established two distinct documents, namely the Convention and the Final Act. The Final Act therefore only contained a summary of the proceedings and four attached declarations. That allowed certain delegations in the conference of Montego Bay of 10 December 1982 to sign the Final Act, but not the Convention. Nevertheless, the adoption of the Convention by a majority vote allowed its uncontested authentication.[19]

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[17] For more details on the negotiating history of this treaty, see *F Hoffmeister* Die Beziehungen der Europäischen Union zu den Staaten des Westbalkans in *S Kadelbach* (ed) Die Außenbeziehungen der Europäischen Union (2006) 132–138.

[18] The treaty is annexed to the decision of the EU Council of 29 May 2006 on the conclusion by the EC of the Energy Community Treaty [2006] OJ L 198/15.

[19] *Bastid* (n 4) 60–61.

III. Legal Effect of Authentication

Authentication makes the **text** of a treaty definitive. It cannot be changed anymore unless all Parties agree to the correction of it. In particular for multilateral treaties, the risk of errors slipping into a text is considerable, however. Therefore, specific rules on correction have been laid down in Art 79 (→ Art 79). **13**

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Article 11

Means of expressing consent to be bound by a treaty

The consent of a States to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Contents

A. Purpose and Function

Art 11 introduces a central subject of the law of treaties, namely the consent to be bound. It recalls the **freedom of States** under international law to conclude treaties or not. That flows from their sovereignty, as underlined in the *'Wimbledon'* judgement of the PCIJ.[1] Only if they express their consent to be bound, can they be subject to a treaty. In return, treaties to which they have not consented cannot create rights and obligations for them (Art 34). Exceptionally, consent to be bound is irrelevant for the conclusion of a treaty, namely when the latter violates a norm of *ius cogens* (Art 53). **1**

However, Art 11 does not attempt to provide further elements on the precise **nature of the consent to be bound**. Rather, it works on the assumption that this notion is **inherent in the term 'treaty'**, which necessitates two corresponding expressions of will to take on legal rights and obligations by the participating States. This matter is dealt with in Art 2 para 1 lit a (→ Art 2 MN 3 *et seq*). **2**

Against that background, the main purpose of Art 11 is to recall the traditional **flexibility** of international law **on the means of how to express consent**. Since States practice has been very diverse over the centuries, there is no prescribed form. While Art 11 enumerates certain common ways of expressing consent to be bound, it also adds that States may employ any other means agreed upon. There is therefore **3**

[1] PCIJ *SS 'Wimbledon'* PCIJ Ser A No 1, 25 (1923). When referring to Art 380 Treaty of Versailles, according to which the Kiel Canal was to be maintained free and open to all vessels of commerce and of war for all nations at peace with Germany on terms of entire equality, the Court said: "No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the States, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagement is an attribute of States sovereignty."

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room for modern ways of expressing consent, which do not fall within the traditional categories of signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession.

4 The order of presentation does **not** carry a **preference** for any of such means. As *Reuter* explains, "aucune des ces moyens ne possède en lui-même de vertu magique: s'ils ont des effets de droit, c'est uniquement à raison de la signification que leur attachent les intéressés".[2] Accordingly, there is no hierarchy between the means mentioned in Art 11.[3]

> In the *Land and Maritime Boundary (Cameroon v Nigeria)* case, the ICJ recalled this principle by saying: "Thus while in international practice a two-step procedure consisting of signature and ratification is frequently provided for in provisions regarding entry into force of a treaty, there are also cases where a treaty enters into force immediately upon signature. *Both customary international law and the Vienna Convention on the Law of Treaties leave it completely up to States which procedure they want to follow*."[4]

5 Finally, Art 11 does **not** establish any **residuary rule** in favour of signature or ratification for cases where the treaty or the circumstances of its conclusion do not reveal the intentions of the parties regarding how to bring about entry into force of a treaty. It thereby protects the **procedural autonomy** of States.

B. Historical Background and Negotiating History

6 In ancient times, treaty-making power was vested in the head of State. As described elsewhere (→ Art 7 MN 3), he or she could also issue full powers to designate representatives to this effect. Treaties signed by those having full powers could then bind the State. However, already in the seventeenth and eighteenth centuries, a practice developed whereby treaties signed by a plenipotentiary were made subject to subsequent ratification by the sovereign itself. This two-step procedure gained even more importance in the nineteenth century when parliaments in a number of States asserted important rights in the treaty-making process. It could therefore happen that ratification on the international level required the previous approval of the lawmakers in those States at domestic level (→ Art 14 MN 5). In the first half of the twentieth century, there was considerable uncertainty as to which of the two established means of treaty-making (signature or signature followed by ratification) would prevail in the absence of an express provision to that effect in the treaty. Could it be assumed in such a situation that **signature alone embodies the consent to be bound or do treaties generally require ratification**?

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[2] *Reuter* 67 para 92.

[3] *A Bolintineanu* Expression of Consent to Be Bound by a Treaty in the Light of the 1969 Vienna Convention (1974) 68 AJIL 672, 673.

[4] ICJ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening)* [2002] ICJ Rep 303, para 264 (emphasis added).

On the one hand, in the *Territorial Jurisdiction of the International Commission of the River Oder* judgement of 1926, the PCIJ leaned **in favour of ratification**, saying: "Amongst the ordinary rules of international law is the rule that conventions, save in certain exceptional cases, are binding only by virtue of ratification."[5] **7**

The idea was also incorporated in Art 5 of the 1928 Havana Convention on the Law of Treaties signed by a few Latin American States, and taken up by the Harvard Research in 1935. The proposed Draft Convention's Art 7 read[6]: **8**

> Article 7. When Ratification is necessary
>
> The ratification of a treaty by a State is a condition precedent to its coming into force so as to bind the State
>
> (a) when the treaty so stipulates; or
> (b) when the treaty provides for ratification by that State and does not provide for its coming into force prior to such ratification; or
> (c) when ratification was made a condition in the full powers of the State's representative who negotiated or signed a treaty; or
> (d) when the form or nature of the treaty or the attendant circumstances do not indicate an intention to dispense with the necessity for ratification.

In particular, the commentary to Draft Art 7 lit d made clear that Harvard researchers considered that ratification, even though not expressly provided for, is always presumed necessary unless there is some definite indication of an intention to the contrary.[7] This line of thinking was shared by *Dehousse* holding that international law had produced a rule on the necessity of ratification.[8] In further support, *McNair* argued that the time span between signature and ratification would give the government the necessary opportunity to study the advantages and disadvantages of the proposed treaty as a whole in a manner more detached, more leisurely, and more comprehensive than is usually open to their representatives while negotiating the treaty.[9] **9**

On the other hand, there was also a strong doctrinal position to the contrary **leaning in favour of signature**. *Fitzmaurice*,[10] *Blix* after having made a survey on State practice up to the 1950s,[11] and *Frankowska* in view of treaty practice in the 1960s,[12] argued that in the practice of States there was a newer tendency towards the conclusion of agreements in simplified form (*eg* exchanges of notes). **10**

[5] PCIJ *Territorial Jurisdiction of the International Commission of the River Oder* PCIJ Ser A No 23, 20 (1929).

[6] Harvard Draft 756.

[7] *Ibid* 763.

[8] *F Dehousse* La ratification des traités (1935) 83–107.

[9] *McNair* 139.

[10] *G Fitzmaurice* Do Treaties Need Ratification? (1934) 15 BYIL 113, 129.

[11] *H Blix* The Requirement of Ratification (1953) 30 BYIL 352, 380: "it would appear [. . .] that the following rule emerges, namely that treaties enter into force in accordance with the parties' express or clearly implied intentions, or, in case of doubt, by signature."

[12] *M Frankowska* De la prétendue présomption en faveur de la ratification (1969) 73 RGDIP 62, 78–81.

Such practice evidences the intention of States to bring into force treaties quickly even if they do not expressly state in the treaty that it enters into force upon signature. Hence, in their view, there is no need for ratification unless the treaty expressly so provides or it is otherwise inferred.

11 Faced with this sharp controversy, the **ILC was equally split**. The residual rule in favour of ratification, as introduced in Art 12 para 1 of the 1962 Draft,[13] was abolished in the Final Draft due to divergent views within the Commission.[14] At the Vienna Conference, the debate remained equally inconclusive. Sweden, Czechoslovakia and Poland withdrew their proposal for a residual rule in favour for signature, and the counter-proposal in favour of ratification from a number of Latin American States was defeated by a vote of 25 in favour but 53 against.[15] Thus, the VCLT, as adopted, does not establish any residual rule at all.[16]

12 In contrast, the elaboration of Art 11, as adopted, did not spark any controversy. While the ILC had not thought it necessary to put forward such a general rule,[17] Poland and the United States introduced a Draft Art 9 *bis* at the Conference.[18] Together with a Belgian amendment for a new Art 12 *bis*,[19] it was referred to the Drafting Committee. The article was adopted in the plenary after virtually no debate with 100 'yes' votes and three abstentions. It reflects **customary law**.[20]

C. Elements of Article 11

I. Signature, Exchange of Instruments Constituting a Treaty, Ratification, Acceptance, Approval or Accession

13 The six explicitly mentioned means of expressing consent are further elaborated in the subsequent articles of the Convention. One may therefore refer to the commentaries on signature (→ Art 12), exchange of instruments constituting a treaty (→ Art 13), ratification (→ Art 14) and acceptance, approval or accession (→ Art 15). They still constitute the most usual ways for States to express their consent to be bound.

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[13] [1962-II] YbILC 157, 180 *et seq*.

[14] Final Draft, Commentary to Draft Art 11, 204 para 7.

[15] For an account of the discussions on the residual rule, see *Bolintineanu* (n 3) 676–677.

[16] *Sinclair* 41.

[17] *Ibid* 39.

[18] UN Doc A/CONF.39/C.1/L.88 and Add.1, UNCLOT III 124. The text of the proposed Art 9 *bis* later became Art 11 VCLT.

[19] UNCLOT III 267. Belgium's proposed Art 12 *bis* on other means of expressing consent to be bound by a treaty stated: "in addition to the cases dealt with in articles 10, 11 and 12, the consent to be bound by a treaty may be expressed by any other method agreed upon between the contracting States".

[20] *Villiger* Art 11 MN 13.

II. Other Means Agreed Between the Parties

Art 11 *in fine* recalls that the parties can also agree on other means of expressing their consent to be bound. Indeed, modern practice has shown a variety of new forms, paying tribute to the negotiators and their legal advisors. Such means are often conceived to overcome delays on entry into force or to mitigate absolute insistence on unanimous consent.[21] While a complete survey is beyond the scope of this commentary, a few categories can be cited by way of example. **14**

1. Bilateral Practice

In a bilateral context, States may express their consent to be bound by the **proclamation of a treaty**. For example, Art X of the 1946 Trade Agreement between the Philippines and the United States provided: **15**

> This Agreement shall then be proclaimed by the President of the United States and by the President of the Philippines, and shall enter into force on the day following the date of such proclamations, or, if they are issued on different days, on the day following the latter in date.[22]

Another possibility is the **publication of a treaty** in the respective national gazette. For example, Art 5 of the 1949 agreement between Belgium and Luxembourg concerning the reciprocal communication free of charge of copies of civil status certificates and nationality records said: **16**

> This Arrangement is not subject to ratification. It shall come into force when each of the two Parties has approved and published it in accordance with its domestic law.[23]

More importantly, more than 40 bilateral British extradition treaties during the period 1840–1932 contained a clause according to which the treaty went into force ten days after its publication in conformity with the law of the contracting parties.[24] **17**

States have also developed the practice to conclude treaties by **mutual notification** that their respective domestic requirements have been fulfilled. Such final treaty clauses allow each party to follow its own domestic procedure, but at the same time replacing the exchange of instruments of ratification by two simple notifications.[25] **18**

Interestingly, States may also choose to express their consent to be bound by a **joint public declaration** not bearing any handwritten graphs. As the ICJ held in **19**

[21] *M Fitzmaurice* Expression of Consent to be Bound by a Treaty as Developed in Certain Environmental Treaties in *J Klabbers*/*R Lefeber* (eds) Festschrift Vierdag (1998) 59, 64.

[22] 1946 Trade Agreement between the United States and the Philippines 43 UNTS 136, 156. A similar clause was included in Art XVIII of the 1942 US-Mexican trade agreement 13 UNTS 231, 248.

[23] 47 UNTS 5, 7.

[24] *I Detter* Essays on the Law of Treaties (1967) 29.

[25] *Aust* 80.

the *Aegean Sea Continental Shelf* case, the denomination of the instrument as 'communiqué de presse' does not prevent it from being a treaty, if the corresponding will to take on legal obligations can be inferred otherwise from the text and the circumstances.[26]

20 **Oral expressions** of consent to be bound are equally acceptable. Although such agreements fall outside the scope of the Convention according to Art 3, they are nevertheless valid treaties under customary international law.

> In May 1991, Finland seized the ICJ in respect of a dispute concerning a Danish project to build a bridge over the main navigable channel of the Great Belt strait. As the bridge would have maximum height of 65 m above sea level, Finland feared that the passage of oil rigs and drill ships would be hampered, thereby causing damage to Finland's international connections. After both sides had filed their submissions to the Court and only eleven days before the oral hearings, the Prime Ministers of Denmark and Finland agreed on 3 September 1992, on telephone, to settle the case.[27] The Danish side agreed to pay a sum of 90 million Danish kroner while the Finnish side agreed to withdraw its application.[28] The Court discontinued the case accordingly.[29]

21 Finally, treaties can also be concluded by the **use of signs**. Those exceptional means may, for example, be employed by military commanders to conclude cease-fire agreements.[30]

2. Multilateral Practice

22 Multilateral practice has evenly contributed to a certain decline of form. First, parties may agree that **initialling a text** is not only a preparatory act in treaty-making or may be elevated to signature (→ Art 12 para 2 lit a), but may actually express consent to be bound. Such was the case with the Agreement in 1995 ending the war in Bosnia and Herzegovina. Next to initialling the General Framework Agreement and its Annexes, the Parties concluded on 21 November 1991 in Dayton (Ohio) an 'Agreement on Initialling the General Framework Agreement' which contained the following interesting clause:

> In this agreement, which was signed at Dayton, Bosnia and Herzegovina, Croatia, and the Federal Republic of Yugoslavia agree that the negotiations have been completed. They, and

[26] ICJ *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 3, para 96.

[27] *M Koskenniemi* Introductory Note to the ICJ Order to Discontinue the Proceedings in Case Concerning Passage through the Great Belt (Finland v Denmark) (1993) 32 ILM, 101, 103.

[28] Press Release No 192 of the Finnish Ministry for Foreign Affairs, 4 September 1992, reprinted in (1992) 3 FinnYIL 610.

[29] ICJ *Passage through the Great Belt (Finland v Denmark)* (Order of 10 September 1992) [1992] ICJ Rep 348.

[30] *Detter* (n 24) 26: "No international lawyer would deny that an agreement on armistice or on a brief truce can be concluded by displaying a white flag in war with a following act of acceptance of the other party." Similarly *J Barberis* Le concept de traité international et ses limites (1984) 30 AFDI 239, 250.

> the Entities they represent, commit themselves to sign the General Framework Agreement and its Annexes in Paris.
>
> They also agree that the initialling of the General Framework Agreement and its Annexes in Dayton expresses their consent to be bound by these agreements.[31]

This example brought about legal security that all the provisions of the agreement negotiated by the parties are covered by party consent. Nevertheless, according to Art XI General Framework Agreement, the agreement would only enter into force upon signature. Hence, it still gave room for another high-level ceremony of signing the Agreement in Paris on 14 December 1995. **23**

Second, States may express their consent to be bound by taking **decisions in an inter-governmental context**. One example is the resolution of the signatory States to the Comprehensive Nuclear Test-Ban Treaty of 1996, which brought into force the Preparatory Commission with immediate effect.[32] Such practice is also common in the European Union, where representatives of the Member States, meeting in the Council, take decisions on matters which do not fall under Union competence. Occasionally, such decisions can be seen as self-standing international agreements between the Member States or as agreements regarding the interpretation or application of another treaty within the meaning of Art 31 para 3 lit a VCLT. **24**

> For example, in December 1992, faced with a negative referendum in Denmark on the Maastricht Treaty, the Edinburgh European Council clarified certain treaty matters. In Annex B of the Council Conclusions, a 'Decision of the Heads of State and Government, Meeting within the European Council, Concerning Certain Problems Raised by Denmark on the Treaty on European Union' was taken.[33] In view of the ambiguity of the text with respect to its own legal nature, the United Kingdom and Denmark registered this document as an international treaty,[34] whereas other Member States chose not to do so. In return, the European Council of Brussels in June 2009 clarified that the decision taken after the negative Irish referendum on the Lisbon Treaty was "legally binding".[35] Hence, the attached decision of the heads of State and government of the 27 EU Member States, meeting within the European Council, can be regarded as an international agreement concluded in simplified form.

Third, – and this echoes the wording of the Belgian amendment for a Draft Art 12 *bis*, which had referred to other "methods" rather than "means" – **treaty-making under an institutionalized treaty regime** can lead to a variety of possibilities for States to express consent to be bound. An interesting phenomenon in this regard is the lawmaking by 'Conferences of the Parties' or 'Meetings of the Parties' **25**

[31] http://www.state.gov/p/eur/rls/or/dayton/52599.htm (last visited 6 January 2011).

[32] *Aust* 113.

[33] European Council – Presidency Conclusions (Edinburgh, 11–12 December 1992), SN 456/92 Part A. Brussels: Council of the European Communities, December 1992, 6.

[34] *Aust* 24

[35] European Council - Presidency Conclusions (Brussels, 18–19 June 2009), para 5 (iii), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/108622.pdf.

according to certain multilateral environmental agreements.[36] In those plenary sessions, the parties may take decisions which hitherto have legal effects on them, such as the adoption of non-compliance procedures.[37]

26 Fourth, **rule-making under the auspices of an international organization** is sometimes at the borderline between treaty-making in simplified form by the Member States of the organization or legislation by the organization. This is particularly true for the so-called opt-out procedures in the WHO,[38] ICAO,[39] or certain fisheries organizations, where a new rule is adopted by majority in the organization, but only becomes binding on those Member States which have not formally objected to it. While the adoption mechanism through an organ of the organization speaks in favour of law-making by the organization, one may also regard the 'non-objection' by the Member State as their tacit agreement that a new treaty becomes binding on them. In that perspective, the opt-out procedure can be seen as falling under Art 11 VCLT[40] or as 'quasi-legislation' of the organization.[41]

> The non-objection procedure can also be used in the final clauses of a treaty. For example, Art 2 of the Additional Protocols of three conventions of the Council of Europe provided for their entry into force upon acceptance by all parties to the original Convention or after the expiry of two years provided that no party has expressed an objection against entry into force.[42] As no such objection was recorded, these Protocols entered into force upon the express or tacit acceptance of the parties.[43]

27 In return, where such subsequent opt-out is missing so that States get bound by legal acts that have been adopted by majority-voting (as *eg* in the adjustment

[36]For an overview, see *R Churchill/G Ulfstein* Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law (2000) 94 AJIL 623–659 and *C Redgwell* Multilateral Environmental Treaty-Making in *V Gowlland-Debbas* (ed) Multilateral Treaty-Making (2000) 89–110.

[37]*M Fitzmaurice* Consent to Be Bound – Anything New Under the Sun? (2005) 74 Nordic JIL 483, 488.

[38]Art 22 of the 1945 Constitution of the World Health Organization 14 UNTS 186.

[39]Art 54 para 1, Art 90 lit a and Art 38 of the 1944 Chicago Convention 15 UNTS 295. See generally *T Buergenthal* Law-Making in the International Civil Aviation Organization (1969).

[40]*Fitzmaurice* (n 37) 490.

[41]*J Sommer* Environmental Law-Making by International Organisations (1996) 56 ZaöRV 628, 635.

[42]Art 2 of the 1983 Additional Protocol to the European Agreement on the Exchange of Therapeutical Substances of Human Origin ETS 109; Art 2 of the 1983 Additional Protocol to the European Agreement on the Temporary Importation, Free of Duty, of Medical, Surgical and Laboratory Equipment for Use on Free Loan in Hospitals and Other Medical Institutions for Purposes of Diagnosis or Therapy ETS 110; Art 2 of the 1983 Additional Protocol to the European Agreement on the Exchanges of Blood-Grouping Re-agents ETS 111.

[43]For an account of the discussions preceding the adoption of Additional Protocols, see *P-H Imbert* Le consentement des États en droit international – réflexions à partir d'un cas pratique concernant la participation de la CEE aux traités du Conseil de l'Europe (1985) 89 RGDIP 353, 359–374.

procedure of MEAs,[44] as amendments to certain IMO conventions[45]), we face the situation of **law-making by an international organization**. For such situations, the rules of the organization are applicable according to Art 5 VCLT, and there is nothing new or unusual in the procedure of consent to be bound in it.[46]

Fifth, **compliance** with certain conventional requirements to which a State is not a party is generally not a means of expressing consent to be bound. Such compliance may be rooted in political or economic considerations, but does not necessarily demonstrate that a State considers itself to be bound by the rule. **28**

> Therefore, the fact that ships flying the flag of States which are not a party to the 1973 IMO Convention on the Prevention of Pollution from Ships (MARPOL) comply with MARPOL requirements when they are under the jurisdiction of parties to it, is inconclusive. Absent any expression of consent to be bound by the government, practices of ship-owners who may prefer to comply on a voluntary basis cannot be cited as authority that the obligation of MARPOL States under Art 5 para 4 of the Convention to apply the requirements to non-parties has given rise to an exception of the *pacta tertiis nec nocent nec prosunt* rule.[47]

However, the situation may be different where a State has signed a convention, which is subject to ratification.[48] Here, compliance with the convention may exceptionally amount to tacit ratification, a matter which is dealt with under Art 14 (→ Art 14). **29**

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M Frankowska De la prétendue présomption en faveur de la ratification (1969) 73 RGDIP 62–88.

[44]See for example Art 2 para 9 of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (1989) 26 ILM 1550.

[45]See for example Art XIII lit b of the 1974 International Convention for the Safety of Life at Sea (SOLAS) 1184 UNTS 2, allowing the approval of amendments by majority, which then become binding on all SOLAS parties.

[46]*Sommer* (n 41) 653 characterizing the adjustment procedure under the Montreal Protocol as vesting legislative power into the Conference of Parties, which in her view is a "treaty-management organisation" (*ibid* 631). However, see *Fitzmaurice* (n 37) 502, finding the mechanism to adopt amendments by majority voting with legal effect on the dissenters "new and unusual".

[47]However, see *Fitzmaurice* (n 21) 79 for the opposite proposition.

[48]*S Szurek* in *Corten*/*Klein* Art 11 MN 21–22.

P-H Imbert Le consentement des États en droit international – réflexions à partir d'un cas pratique concernant la participation de la CEE aux traités du Conseil de l'Europe (1985) 89 RGDIP 353–382.
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Article 12

Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(a) the treaty provides that signature shall have that effect;
(b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or
(c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(a) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;
(b) the signature ad referendum of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

Contents

A. Purpose and Function

Art 12 **enumerates several cases where signature expresses the consent of a State to be bound by a treaty**. All these cases have in common that they refer to the intention of the States involved. Art 12 thereby enshrines the self-evident rule that signature expresses consent to be bound if the States have intended to give signature that effect. **1**

However, Art 12 does not give an indication on the legal value of signature if the intention of States on that matter has not been clearly expressed. Rather, it remains silent on the salient question whether such treaties would then require ratification to become effective or not. Hence, Art 12 is **not in favour of a residual rule for signature** (→ Art 11 MN 11–12).[1] **2**

[1] *C van Assche* in *Corten/Klein* Art 12 MN 34.

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3 Francophone literature still links Art 12 with the notion of **treaties in simplified form**.[2] This view proceeds from the premise that treaties subject to ratification are concluded in solemn form, whereas treaties which enter into force upon signature, are not. However, Art 12 does not indicate that a specific form of treaty speaks in favour of its entry into force by signature or not. It is perfectly possible that signed minutes are made subject to ratification, whereas a treaty signed by heads of States and bearing all emblems of solemnity enters into force upon signature. Moreover, where the category of treaty in simplified form (or executive agreements) is still upheld, many more criteria are used than just the absence of ratification.[3] Rather than embodying any theoretical conception on different categories of treaties, Art 12 serves only the purpose of recalling useful elements of inquiry when analyzing the question whether States actually expressed consent to be bound by signature or not. Therefore, its normative function is limited.

B. Historical Background and Negotiating History

4 In the late nineteenth century, more and more international practices emerged that fell short of the formal requirements of treaty-making in solemn form. States exchanged notes or letters, they agreed on minutes or made joint declarations. All of these documents could, depending on the circumstances, embody corresponding consent to be bound and hence constitute a treaty.

5 Against that background, in particular French doctrine proposed distinguishing treaties according to their form.[4] The main idea was to link agreements in simplified form to the sphere of the executive, and thereby dispensing them from the requirement of ratification, which still prevailed at the beginning of the twentieth century. In this conception, ordinary treaties would require ratification,[5] whereas agreements in simplified form could be concluded by signature or another simple means only.[6]

6 The ILC was originally receptive to the idea and included in the 1962 Draft an Art 1 para 1 lit b, according to which a "treaty in simplified form means a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument concluded by any similar

[2] *S Bastid* Les traités dans la vie internationale – conclusion et effets (1985) 45–47, who regards Art 12 VCLT as a regime for simplified treaties or *C van Assche* in *Corten/Klein* Art 11 MN 2 who, inversely, qualifies treaties concluded in conformity with Art 12 as treaties in simplified form.

[3] *L Wildhaber* Executive Agreements (1999) 2 EPIL 312, 314–315 looking at name and form, object, absence of ratification, absence of full powers, lesser hierarchical status in municipal law, absence of participation of head of State, and absence of legislative approval.

[4] *J Basdevant* La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités (1926) 15 RdC 539, 615–626; *C Rousseau* Principes généraux de droit international public (1944) 253 *et seq*.

[5] *Basdevant* (n 4) 574.

[6] *C Chayet* Les accords en forme simplifiée (1957) 3 AFDI 3, 4.

procedure".[7] For this kind of treaty, no full powers were required (Draft Art 4) and a residuary rule in favour of signature would apply (Draft Art 12). However, in view of critical governmental comments, this concept was later abandoned in the 1966 ILC Draft, a decision which the Vienna Conference did not touch. The Convention therefore does not establish different rules for treaties in simplified form, which was applauded foremost by Anglo-American doctrine.[8]

7 Rather, the Convention designed common rules for all sorts of treaties. The 1962 ILC Draft[9] contained a Draft Art 10 on signature, initialling and signature *ad referendum* and in Draft Art 11 on the legal effects of signature, combined with a residuary rule in favour of ratification. With a view to simplifying the matter, the ILC then merged the articles, proposing a single Draft Art 10 in the final 1966 draft.[10] At the Vienna Conference, much discussion centred on the residual rule, which had disappeared in the 1966 ILC Draft Art 10. With respect to the text of what became Art 12 VCLT, only two points seem noteworthy.

8 First, a group of Latin American States tried to incorporate a rule in the first paragraph, according to which consent to be bound is expressed by signature also "when in conformity with the internal law of the State a treaty is an administrative or executive agreement".[11] As this proposal was rejected by 60 votes to 10 with 16 abstentions, it can be concluded that the Convention did away with the idea to distinguish, at the level of international law, between certain categories of treaties known under municipal law. [12]

9 Second, the Netherlands wished to delete the second alternative mentioned in Art 12 para 1 lit c, namely the possibility that a State may express its views on the legal significance during negotiations. As the majority at the Conference did not see any reason why a State was prevented from doing so, the amendment was equally voted down. Accordingly, Art 12 (then Art 10) was adopted virtually unchanged from the 1966 ILC Draft.[13] While some details of expressing consent to be bound by signature constituted thus progressive development of the law at the time of adoption, the entire Art 12 can be considered today as reflecting customary law.[14]

[7] [1962-II] YbILC 161.

[8] *F Hamzeh* Agreements in Simplified Form – Modern Perspective (1968–1969) 43 BYIL 179, 188; *A Bolintineanu* Expression of Consent to Be Bound by a Treaty in the Light of the 1969 Vienna Convention (1974) 68 AJIL 672, 678.

[9] [1962-II] YbILC 169 *et seq*.

[10] Final Draft, Commentary to Art 10, 196 para 1.

[11] UN Doc A/CONF.39/C.1/L.100, UNCLOT III 126 para 119.

[12] *Bolintineanu* (n 8) 678.

[13] *Villiger* Art 12 MN 3.

[14] *Villiger* Art 12 MN 27.

C. Elements of Article 12

I. Acts Constituting Signature

10 Signature occurs when a representative writes down his or her **name**. In this respect, it does not matter whether the first name or a title is included or not. It is not decisive whether the script is readable or not. If parties attach importance to the possibility of identifying the person who signed they can add the name in print beneath the actual signature.

11 An important question is whether signature needs to be made in **handwriting**.[15] While this has been the common way of signing, modern technology also allows signature by electronic means. If and insofar as an electronic signature serves the function of producing authenticity, nothing speaks against the proposition that States may agree to resort to such means as well. That view is further supported by Art 12 para 2 lit a, which enshrines another case of where a handwritten signature can be substituted if both sides so agree.

12 Art 12 para 2 lit a describes the somewhat surprising case that **initialling can constitute signature**. The question can be asked why the parties did not resort to signing in the first place, when they are in agreement that such should be the legal consequence of the act. The answer can be found in diplomatic practice to which the Japanese government drew the ILC's attention.[16] Sometimes, a head of State, prime minister or foreign minister prefers to write his or her initials rather than his or her full name on the document. In view of such practice, the ILC noted that such initialling "is not infrequently intended as the equivalent of full signature".[17] However, as the text makes clear, extravagant behaviour by a representative of one side is not sufficient. Initialling can only be elevated to the level of signature if the other side so agrees. Whether this has been the case or not, can be examined in analogy to the criteria under Art 12 para 1.[18] Hence, a treaty text itself can say so[19] or such an intention might be otherwise implied. For the latter scenario, an important factor will simply be whether the initials appear on each side at the margins (which speaks for an act of authentication under Art 10 only) or at the final block of the text reserved for signature (which speaks for an elevation to signature).

13 Finally, Art 12 para 2 lit b recalls that a **signature *ad referendum*** constitutes a full signature upon subsequent confirmation. This case relates to the practice of representatives to put their name on a document, followed by the words

[15] For this view *Villiger* Art 12 MN 5.

[16] *Waldock* IV 34 (comments of Japan).

[17] Final Draft, Commentary to Art 10, 196 para 4.

[18] *C van Assche* in *Corten/Klein* Art 12 MN 38.

[19] *Elias* 52 who cites the 1954 Memorandum between the United Kingdom, the United States, Italy and Yugoslavia on Trieste 235 UNTS 99, 101, stipulating that the Italian civilian administration of the city will begin when the Memorandum will be initialled.

'*ad referendum*' or 'subject to confirmation'.[20] The subsequent confirmation has retro-active effect.[21] It must therefore be distinguished from 'signature subject to ratification', where the subsequent ratification relates to the treaty and not to the signature, and therefore expresses the consent to be bound *ex nunc*. Nevertheless, it is not excluded that a State may determine a different date when giving confirmation of the signature *ad referendum*, provided that the other States do not object.

> In practice, States sometimes do not follow the fine distinction between signature *ad referendum* and signature subject to ratification. It therefore may occur that a State representative signs a multilateral convention *ad referendum* although the convention does not contain a corresponding final clause. In such cases, the UN Secretary-General assumes that the signature was made subject to ratification.[22]

II. The Legal Effect of Signature

1. Treaty Clauses

14 Art 12 para 1 lit a recalls the usual case where a final clause in a treaty resolves the question as to the legal effect of signature. Such clauses can expressly or implicitly state that signature constitutes consent to be bound. The most direct, though rare, variation directly mentions the relationship between signature and consent to be bound:

> Signature of this Treaty shall constitute consent to be bound.

15 More common formulations relate signature with the entry into force of the treaty:

> This Treaty shall enter into force upon signature.

Such clauses make clear by implication that signature constitutes the consent to be bound since only a corresponding will to that effect can bring a treaty into force.[23] Also final clauses which provide for entry into force on some specified date, without mentioning the need for prior ratification, carry the implication that the signature given before that date constitutes the consent to be bound. [24] Finally, a most uncommon implication to that effect was Art 5 of the 1994 UNCLOS

[20] *Aust* 98.

[21] Final Draft, Commentary to Art 10, 196 para 5. See also Art 10 para 2 lit c of the 1962 ILC Draft [1962-II] YbILC 170: "Signature *ad referendum*, when confirmed, shall have the same effect as if it had been a full signature on the date when, and at the place where, the signature ad referendum was affixed to the treaty."

[22] 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, para 112.

[23] *Aust* 76.

[24] *H Blix* The Requirement of Ratification (1953) 30 BYIL 352, 359.

Implementation Agreement.[25] According to that provision signature would express consent to be bound if a State signed the agreement, and would not notify the depositary within 12 months that it had not availed itself of this simplified procedure.

2. Intention Otherwise Established by the Negotiating States

16 As Art 12 para 1 lit b acknowledges, there may be also **other means** to establish the intention of the negotiating States (Art 2 para 1 lit e) that signature should express their consent to be bound. Usually, elements from the **negotiating history** can provide clarity on the matter. It can thus be relevant to look at unequivocal correspondence between the parties before and during the negotiations.[26]

17 Certain inferences can also be drawn from the **urgency** surrounding the conclusion of the treaty[27]: if negotiations have been set up to resolve an urgent matter, such as a ceasefire, trade concessions or traffic rights, the intention of the parties will most likely have been to bring such arrangements into force quickly.

> On 30 September 1938, the German, French, UK and Italian heads of State or government (*Hitler*, *Daladier*, *Chamberlain* and *Mussolini*) signed a declaration in Munich regarding the cessation of Sudetenland located in Czechoslovakia to Germany. The eight treaty points did not contain any final clause. However, as the purpose of the treaty was to resolve an acute diplomatic crisis, and as point 1 of the treaty called for the evacuation of the Sudetenland to begin on 1 October 1938, the intention of the parties to bring the treaty into force by signature could be safely implied.[28]

18 Also the fact that both countries have **published** the agreement without ratification may indicate that they intended the entry into force by signature.

> In the *Land and Maritime Boundary (Cameroon v Nigeria)* case, Nigeria argued that the 1913 Anglo-German Agreement on the acquisition of the Bakassi Peninsula by Germany was invalid because it had never been approved by the German Parliament, as constitutionally required at the time. The Court disagreed by referring to the contemporary view of the German government that the treaty was about 'rectification' of a *de facto* situation, which did not trigger any ratification requirement. The Court also noted that, moreover, the treaty had been published in both countries. It therefore found Nigeria's argument about non-ratification by the German Parliament "irrelevant".[29] It appears that the circumstances convinced the Court that the parties had agreed to bring the 1913 agreement into force by signature, and that no violation of domestic requirements of fundamental importance had occurred, which in any event had never been invoked by Germany itself.

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[25] 1994 Agreement Relating to the Implementation of Part XI of UNCLOS.

[26] *Villiger* Art 12 MN 10.

[27] *Blix* (n 23) 378.

[28] This is without prejudice to the question of whether the acceptance of the Czechoslovak government of the Munich Agreement on the following day had been valid or, having been given under distress and lacking approval of the national parliament, was void *ab initio* or at least voidable. For that discussion see *L Wildhaber* Treaty-Making power and Constitution (1971) 161–163.

[29] ICJ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening)* [2002] ICJ Rep 303, para 197.

Art 12 para 1 lit b assumes that there is a convergence of intention between the negotiating States that signature expresses consent to be bound. Difficult cases may, however, arise **where one party considered that signature was sufficient for making a treaty, whereas the other party might have had no such intention**. In such cases, the objective intention of both sides as laid down in the text will be of utmost importance. **19**

For example, in the *Qatar v Bahrain* case, the foreign ministers of Qatar and Bahrain had signed minutes on 25 December 1991 on the further treatment of their territorial and maritime dispute. Bahrain argued before the ICJ that the foreign minister had not thought, at the time of signing the minutes, that he was committing Bahrain to a legally binding agreement to bring the matter to the Court.[30] The Court rejected that argument holding that the signed text recorded commitments which created rights and obligations in international law for the parties. Having signed such a text, the Bahraini foreign minister would not be in a position to say subsequently that he intended to take on only political commitments.[31]

Equally, there may be a persisting divergence between the negotiating parties as to whether a treaty actually required ratification or not. In such a case, it cannot be assumed that a treaty has been concluded by signature alone, unless a court decides that consent to be bound had indeed been expressed by all negotiating parties. Exceptionally, the **Security Council can also remove such uncertainties** by adopting a resolution under Chapter VII, which makes a certain treaty arrangement binding for the parties in the interest of preserving international peace and security. **20**

The boundary treaty between Iraq and Kuwait of 4 October 1963, drawn up in the form of agreed minutes, had been signed by Iraq, but never ratified. It did not contain any final clause. Kuwait registered it with the UN Secretary-General in 1964,[32] but Iraq disputed that it was bound by the treaty lacking ratification. After the failed invasion of Kuwait by Iraq, the UN Security Council adopted Resolution 687 (1991) in which it demanded that both States respect the inviolability of the international boundary and the allocation of islands as set out between them in the 1963 Baghdad treaty. It thereby either determined that the treaty had been in force by signature all along *ex tunc* or made it binding upon Iraq *ex nunc*.

This example also demonstrates that **registering a text as a treaty with the UN Secretary-General** must be treated with caution.[33] In particular in cases where the parties have not regulated the possibility of a common notification, it cannot be ruled out that one side notifies the text to give more weight to its view that a treaty has been entered into by signature alone. If the other side disagrees therewith, the unilateral act of registration does not serve any purpose in discerning the common intentions of the parties as required by Art 12 para 1 lit b. **21**

[30]ICJ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 112, para 26.

[31]*Ibid* para 27 with discussion by *J Klabbers* Qatar v Bahrain: the Concept of Treaty in International Law (1995) 33 AVR 361, 366–374.

[32]1963 Iraq-Kuwait Agreed Minutes 485 UNTS 321, 327.

[33]However, see *C van Assche* in *Corten/Klein* Art 12 MN 22 giving weight to the publication of a text in the UN Treaty Service by the UN Secretary-General without enquiring whether this reflects the common will of the parties.

22 Finally, the **nature of a treaty** is generally inconclusive for establishing whether the parties expressed consent to be bound by signature or required ratification.[34] There is no rule or custom according to which 'political' or 'important' treaties are made subject to ratification, whereas 'technical' or 'unimportant' treaties are not. This is so because States may differ in their views on which treaties belong in which category and because there are ample examples where they have still agreed to conclude certain treaties, which were certainly 'political' or 'important' to all of them by signature only, as the examples given in this section and many others[35] demonstrate.

3. Unilaterally Established Intention

23 Finally, Art 12 para 1 lit c refers to the case where the **intention of a State to be bound by signature emanates from the full powers or was expressed during negotiations**. In contrast to the two previous cases, this provision does not relate to the common will of the negotiating States, but to the unilateral expression of consent by one State. The reason behind this is to accommodate possible differences in the domestic requirements of participating States. While some States may be constitutionally bound to express consent to be bound only after domestic ratification, others may be at liberty to do so by signature. Hence, Art 12 para 1 lit c makes it clear that both options can be combined with respect to the same treaty.[36]

> For example, Art XII of the 1948 Economic Cooperation Agreement between Denmark and the United States provides: "This agreement shall be subject to ratification in Denmark. It shall come into force on the day on which notice of such ratification is given to the government of the United States of America."[37]

4. No Discernable Intention

24 As mentioned above, Art 12 does **not contain any residual rule for situations where the intention of parties is not discernable**. However, in practical terms, this gap does not seem to pose many problems.[38] Only a minor percentage of treaties are concluded without a final clause on entry into force and no disputes on them have been recorded.[39] Moreover, there is agreement that the intentions of the negotiating States are decisive, either openly expressed or implied. In such a situation, account can be taken of the different treaty-making traditions of States

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[34] *C van Assche* in *Corten/Klein* Art 12 MN 24.

[35] *Wildhaber* (n 3) 314 notes that there is a sizeable number of executive agreements that have dealt with matters of high political importance.

[36] Final Draft, Commentary to Art 10, 196 para 3.

[37] 22 UNTS 217. For more examples see *Blix* (n 23) 357 n 6 with further references.

[38] *Elias* 24.

[39] *M Frankowska* De la prétendue présomption en faveur de la ratification (1969) 73 RGDIP 62, 78–79.

from different regions. Since the Convention fully respects the procedural autonomy of States, nothing speaks against the proposition that signature '*tout court*' can be a sufficient means of expressing consent for one group of States *inter se*, whereas another group of States may assume that in the absence of a contrary indication their signature must necessarily be complemented by subsequent ratification to express consent to be bound. [40]

Only where representatives from States belonging to **different traditions** make **25**
their signature to a treaty without specifying their intentions, can there be room for disagreement. In such scenario, it would seem that a State representative who does not wish that his or her signature is taken for consent to be bound, should make this intention clear to his or her counterparts, *eg* by signing 'subject to ratification'. If he or she does not, it seems that those States who are used to accord significance to signature as a means to express consent to be bound can plead that their general expectation on this point had not been effectively challenged. Such treaty would then enter into force upon signature.

III. Unsigning

According to Art 18 lit a, signature of a treaty which is subject to ratification **26**
produces the *bona fide* obligation of the signatory to refrain from acts, which would defeat the object and purpose of the treaty pending its entry into force. Although the exact scope of the provision is difficult to identify (→ Art 18 MN 30 *et seq*)[41] and there is little State practice[42] or jurisprudence,[43] States have sometimes expressed a will to **distance themselves from their previous signature** in order to bring an end to such obligations. This phenomenon is indirectly dealt with by Art 18 lit a as the latter provision expressly provides that the mentioned obligation only exists for a signatory "until it shall have made its intention clear not to become a party to the treaty". In colloquial terms, this has been labelled as 'unsigning'.

The most prominent example is the declaration of US President *George W Bush* with respect to the signature of his predecessor, President *Clinton*, on the Rome Statute Establishing the International Criminal Court (1998).[44] On 6 May 2002, he notified to UN Secretary-General *Annan* that the United States did not intend to become a parties to the Statute. Accordingly, *Bush* wrote: "the United States has no legal obligations arising from its signature on

[40] *Bolintineanu* (n 8) 675, arguing that the variety of State practice does not allow the stipulation of a residuary rule for either signature or ratification.

[41] *W Morvay* The Obligation of a State Not to Frustrate the Object of a Treaty Prior to its Entry into Force (1967) 27 ZaöRV 451–462.

[42] See the examples given by *J Klabbers* How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Towards Manifest Intent (2001) 34 Vanderbilt JTL 281, 284–285; *ET Swaine* Unsigning (2003) 55 Stanford LR 2061, 2080–2081.

[43] See ECJ (CFI) *Opel Austria v Council* T-115/94 [1997] ECR-II 39.

[44] *CA Bradley* US Announces Intent Not to Ratify International Criminal Court Treaty [2002] ASIL Insight No 87.

December 31, 2000."[45] Apart from considerations of domestic policy, this move apparently was also motivated by the US agenda of pursuing so-called Art 98 para 2 agreements to further ensure the exemption of US personnel from ICC jurisdiction, an agenda arguably inconsistent with the object and purpose of the Rome Statute when going beyond the scope of ordinary status-of-force agreements.[46]

27 As Art 18 lit a does not prescribe a particular procedure for 'unsigning', there cannot be any doubt on the legality of such declarations.[47] Nevertheless, the **legal consequence** thereof is less clear.

28 First, a declaration of this kind **does not remove the signature** as such. While it relieves the State from its obligation to refrain from acts that would defeat the treaty's object and purpose, the State remains a signatory to the treaty.

29 Second, the question must be asked whether a State can only 'unsign' obligations arising out of its signature, but still exercise rights flowing from the 'provisional status' as a signatory as held by the ICJ.[48] Those provisional rights of signatories can be sometimes quite considerable, such as participating as an observer in meetings of the parties or being included in decisions to accept accession of others. As they can be seen as a *quid pro quo* of the *bona fide* obligation not to frustrate the treaty's object and purpose, there are hence good reasons to suggest that 'unsigning' of a treaty also **removes the provisional rights of the signatory** if the other parties to the treaty so demand.

30 Third, nothing prevents a State from reinstating the *status quo ante* and to withdraw its 'unsigning' statement. It could thus still ratify the agreement as a signatory, if it so decided (rather than accede to it as a non-signatory).

After the election of President *Obama*, an independent task force convened by the American Society of International Law recommended to the new administration to engage in a policy of positive engagement with the ICC. To that effect, the President should indicate that the letter of 6 May 2002 to the UN Secretary-General no longer represents US policy

[45] *Cf* letter of 6 May 2002 of the US Under Secretary of State for Arms Control and International Security to the UN Secretary-General, 2009 Multilateral Treaties Deposited with the Secretary General, UN Doc ST/LEG/SER.E/21 Vol II 192 note 8 (ch XVIII.10).

[46] See EU Guiding Principles Concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court (2003) 42 ILM 240. These guidelines call into question the US practice to include all US nationals into the scope of an Art 98 agreement, arguing that the scope of such agreements be limited to government representatives on official business. Moreover, the EU criticized the fact that the agreements contained a reciprocal promise to prevent the surrender of nationals of an ICC States Parties. For a background of the EU reaction, see *F Hoffmeister* The Contribution of EU Practice to International Law in *M Cremona (ed)* Developments in EU External Relations Law (2008) 37–107.

[47] *Swaine* (n 42) 2061, 2083.

[48] ICJ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 28.

"and the United States embraces its Signatory rights and responsibilities".[49] The task force also mentioned the possibility of the United States to ratify the Statute, but fell short of recommending this step.[50]

IV. Undesired Signature

Another topic, on which the **Convention is silent**, is undesired signatures. For instance, certain conventions of a regional nature may be restricted. For example, Art 59 para 1 cl 1 of the 1950 European Convention on Human Rights provides: **31**

> The Convention shall be open to the signature of Members of the Council of Europe.

It is hence clear that any third State or international organization has been prevented from signing the Convention, even if it so wishes. To date, the practice of drawing up restricted conventions does not appear to have been challenged by the excluded entities. However, the issue would become an issue under international treaty law if so-called status treaties would be equally restrictive and not at least allow for accession of every State that manifests its interest in becoming a member to the treaty regime (→ Art 15 MN 15).[51]

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[49] ASIL Independent Task Force, US Policy toward the International Criminal Court: Furthering Positive Engagement, Report of March 2009, 17.
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Article 13

Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(a) the instruments provide that their exchange shall have that effect; or
(b) it is otherwise established that those States were agreed that the exchange of instruments should have that effect.

Contents

A. Purpose and Function

Art 13 takes account of the growing tendency of States in the twentieth century to conclude treaties by an exchange of letters, notes, *notes verbales* or other less solemn forms (→ Art 11). The provision follows the structure of Art 12 (→ Art 12) in emphasizing that the intention of the negotiating parties to express consent to be bound prevails over the actual form. In parallel to Art 12 para 1 lit a and b, it sets out the two options for States to make sure that the exchange of instruments between them has the desired result. However, lacking any parallel to Art 12 para 1 lit c, it does not allow a unilateral determination by one negotiating State that the exchange of instruments constituted a treaty. Hence, Art 13 stresses the **requirement of mutual consent to conclude a treaty by exchange of instruments**. **1**

Following the fundamental decision of the ILC and the Vienna Conference not to lay down any residual rule, Art 13 does not regulate what happens in the absence of such discernable consent. There is hence **no presumption** that the simple fact that two States have exchanged instruments speaks *per se* in favour of their mutual consent to create a legal relationship thereby.[1] **2**

B. Historical Background and Negotiating History

Already Judge *Huber*, sitting as rapporteur in the *Residence at Rio Martin* arbitration case, held that an exchange of letters between the Moroccan government and the British agent at Tangier of 1896 had created a legal obligation for the Moroccan **3**

[1] *C van Assche* in *Corten/Klein* Art 13 MN 54–55.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
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government *vis-à-vis* the British government (namely to transfer to a house at Tetuan the rights that Great Britain had exercised over a house at Martin, which had been demolished by Spanish troops in the meantime).[2] Also, the **PCIJ** included the exchange of notes into its list of possible forms how to express consent to be bound. Faced with the question of whether the Austrian–German Protocol of 1931 establishing a customs union between the two countries was compatible with Art 88 Peace Treaty of St-Germain and a 1922 Protocol signed by several European States and Austria it held with respect to the latter instrument:

> From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols *or exchange of notes*.[3]

4 Nevertheless, the **Harvard Draft of 1935** still preferred to exclude the exchange of notes from its draft when it restricted the definition of the term "treaty" to "formal instruments of agreement".[4] This echoed the predominant sentiment that the ancient rules for treaty making may not be apt or were simply not be applied by States when exchanging notes.

5 As the **practice of concluding treaties by exchange of instruments increased after World War II** to make up a percentage of around 30% of all treaties registered[5] or an even higher percentage in the practice of certain States,[6] the ILC mentioned that practice in the codification project. Art 1 para 1 lit b of the 1962 ILC Draft proposed distinguishing between formal treaties and "treaties in simplified form", among which the exchange of notes, exchange of letters or other instruments concluded by any similar procedure[7] was enumerated. However, as the 1966 Draft did away with this distinction, the reference to this particular form of treaty making disappeared from the draft as well. During the Vienna Conference, Poland tabled an amendment[8] on the basis of which the Drafting Committee came up with a formulation that later became Art 13 VCLT.[9] In view of the large preceding practice, Art 13 **codified customary law**.[10]

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[2] *Residence at Rio Martin Case (United Kingdom v Spain)* 2 ILR 19, 20 (1924).

[3] PCIJ *Customs Régime between Germany and Austria (Protocol of March 19th, 1931)* PCIJ Ser A/B No 41, 37, 47 (1931) (emphasis added).

[4] (1935) 29 AJIL Supp 657, 698.

[5] *H Blix* The Requirement of Ratification (1953) 30 BYIL 352, 362.

[6] *C Chayet* Les accords en forme simplifiée (1957) 3 AFDI 3, 7 notes that around 50% of international agreements concluded by France in the 1950s were concluded by exchange of notes or letters.

[7] (1962-II) YbILC 161.

[8] A/CONF.39/C.1/L.89, UNCLOT III, 127 para 127.

[9] *Villiger* Art 13 MN 2.

[10] *C van Assche* in *Corten/Klein* Art 13 MN 22.

C. Elements of Article 13

I. Exchange of Instruments

The notion '**instruments**' is deliberately vague and open. In *Qatar v Bahrain*, the ICJ recorded that an exchange of letters between the parties of 1987 belongs to that category.[11] Other instruments covered are notes, *notes verbales*, telegrams,[12] communications or correspondence.[13] It follows that there is maximum flexibility for the parties on which sorts of communications to use for embodying their consent to be bound. The only minimum requirement is that they are done in written form.[14] **6**

An **exchange** of instruments is usually done as follows: the first party writes a note to the other party, setting out the content of the agreement. The other party replies in the affirmative, usually by reproducing in full the original letter and expressing its consent thereto. Consequently, each party possesses the original letter of the other party and will have kept a copy of its own letter. For longer texts, the reply may also dispense with the full reproduction of the original instrument. **7**

Just as there is no formal requirement for the instrument itself, parties are equally **not obliged to sign or initial** them. Unsigned *notes verbales* can be sufficient if properly exchanged and accepted by both sides.[15] **8**

The agreement **is concluded through the act of exchange**.[16] If there is no clear indication on the date of conclusion, it can be assumed that the date of the later instrument is decisive.[17] However, if there is occasionally a further time span lapsing after expedition of the second instrument, only the day of receipt of the second instrument by the States, which had issued the first instrument will mark the date of conclusion.[18] **9**

The date of conclusion will normally also coincide with the **entry into force** of the agreement. Nevertheless, it goes without saying that States are free to determine a different date of entry into force in the exchange of instruments. **10**

[11] ICJ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 112, para 22.

[12] See Paris Court of Appeals (France) *Banque de l'Union Parisienne v Jadoun* (1933–1934) ILR 78–80 (1933), confirming that an exchange of telegrams between the French and the Soviet government constituted an international agreement.

[13] *JL Weinstein* Exchange of Notes (1952) 29 BYIL 205 with further examples.

[14] *Villiger* Art 13 MN 2.

[15] *Weinstein* (n 13) 206; *C van Assche* in *Corten/Klein* Art 13 MN 32–33.

[16] *C van Assche* in *Corten/Klein* Art 13 MN 24.

[17] *Weinstein* (n 13) 210; *Blix* (n 5) 364.

[18] *C van Assche* in *Corten/Klein* Art 13 MN 65–67.

II. Legal Effect

11 Art 13 lit a recalls that the **instruments themselves can provide for their legal effect**. That conforms to widespread States practice.[19] Also, treaties with international organizations can foresee their conclusion through an exchange of notes.[20] If an exchange of letters, exceptionally, provides for its subsequent ratification or approval,[21] the parties made clear that the exchange itself did not express their consent to be bound.

12 According to Art 13 lit b, it can also be **otherwise established** that the exchange of instruments shall express the consent of States to be bound. Again, it would be important to analyze the wording, context, object and purpose and the negotiating history of the instruments at hand.[22] In all cases, a common intention of the States concerned must be discernable.

13 Such intention can often be derived from the common will of parties to react to a certain **urgency**, *eg* by exchanging notes on the immediate application of the treaty, pending its entry into force.

> Bilateral air transport agreements are often accompanied by an exchange of letters providing for their immediate application in order to overcome the time span due to ratification. The exchange of notes or letters is therefore a common tool for declaring provisional application within the meaning of Art 25.[23]

14 No indicator for a common intention to be bound by an exchange of instruments is the **nature or the object of the treaty**. Just as treaties subject to ratification or treaties concluded by signature, an exchange of instruments can relate to a wide array of subject matters, including some of great political importance.[24] Therefore, the nature or object of the text neither speaks in favour nor against the proposition that parties have expressed consent to be bound by a certain diplomatic exchange.

15 As one among different options of expressing consent to be bound (→ Art 11 MN 3), the exchange of instruments has equal legal force to treaties concluded in the

[19] The UK standard formula reads: first letter: "I have the honour to propose that this Note and your reply in that sense shall constitute an Agreement between our two Governments"; second letter: "Your Excellency's note and this reply shall constitute an Agreement", *Aust* 445. The French model was to say in the first letter, "Si les propositions qui précèdent rencontrent l'agrément du Gouvernement de [. . .] un échange de lettres pourrait constater l'accord ainsi réalisé", whereas the response would express acceptance thereof, *Chayet* (n 6) 6–7.

[20] See § 28 of the 1947 UN Headquarters Agreement with the United States 11 UNTS 61.

[21] *Weinstein* (n 13) 206 n 8.

[22] *C van Assche* in *Corten/Klein* Art 13 MN 46.

[23] *F Hamzeh* Agreements in Simplified Form – Modern Perspective (1968–1969) 43 BYIL 179, 180.

[24] *Weinstein* (n 13) 211–212.

most solemn manner.[25] It follows that all such treaties are on the same legal level irrespective of their form.[26] This may at times become important when applying conflict rules between treaties.

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[25] *Chayet* (n 6) 5.
[26] *Hamzeh* (n 23) 185–186.

Article 14

Consent to be bound by a treaty expressed by ratification, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(a) the treaty provides for such consent to be expressed by means of ratification;
(b) it is otherwise established that the negotiating States were agreed that ratification should be required;
(c) the representative of the State has signed the treaty subject to ratification; or
(d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Contents

A. Purpose and Function

Art 14 para 1 deals with the **two-step procedure of treaty making, namely signature followed by ratification**. It enumerates the situations in which such means express the consent to be bound. Art 14 para 1 codifies the self-evident rule that ratification expresses the consent of a States to be bound by a treaty, **if the States so desire**. Its main function is therefore to provide for a list how such intentions may materialize in practice. However, Art 14 is silent on the question whether ratification is required to bring a treaty into force where the intentions of **1**

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States are neither expressed nor clearly implied. There is hence **no subsidiary rule in favour of ratification**. Just as the corresponding silence in Art 12 on signature, this reflects the deliberate decision of the negotiators of the Convention to leave this question open (→ Art 11 MN 11).

2 The second paragraph of Art 14 assimilates **acceptance** or **approval** to ratification. However, in contrast to ratification, an act of acceptance or approval does not necessarily have to follow a previous signature. These modes of expressing consent may also occur as a substitute for accession (→ Art 15).[1] Nevertheless, Art 14 para 2 deals with them mainly as a proxy to ratification with the consequence that the indicators enumerated under Art 14 para 1 are also valid for the inquiry into whether States had the intention to express consent to be bound by acceptance or approval.

B. Historical Background and Negotiating History

3 As mentioned elsewhere (→ Art 11 MN 6), the seventeenth century witnessed an important development of treaty making. In order to protect the rights of the Sovereign a practice developed whereby treaties signed by a plenipotentiary were made subject to subsequent ratification by the Sovereign itself. As the full powers contained a promise to ratify, this step was often a mere formality to verify whether the plenipotentiary had acted within his or her powers: if so, the Sovereign was obliged to ratify the signature given by his or her plenipotentiary.[2] Once subsequent ratification was indeed given by the Sovereign, the treaty became binding as from the date of signature.[3]

4 By the end of the eighteenth century, this pattern changed. Despite traditional promises on ratification, heads of State felt at liberty to refuse ratification even if their agents had not exceeded full powers or instructions.[4] Moreover, writers started advancing the idea that solely the Sovereign could express final and decisive consent to be bound.[5] Accordingly, the entry into force of a treaty was delayed. Only at the moment when the head of State actually ratified the treaty, and after exchange of instruments of ratification had taken place, did a State become bound by a treaty.[6]

5 This two-step procedure gained even more importance in the nineteenth century. In many European and American States, parliaments asserted important rights in the treaty-making process under domestic law. By way of example, one may cite the US Constitution of 1787, according to which the ratification of treaties

[1] *R Ben Achour/I Frikha/M Snoussi* in *Corten/Klein* Art 14 MN 19.

[2] *H Grotius* De jure belli ac pacis Vol II, xi, para 12.

[3] *MJ Jones* Full Powers and Ratification (1946) 65–68.

[4] *H Blix* The requirement of ratification (1953) 30 BYIL 352, 355.

[5] *C van Bynkershoek* Quaestionum juris publici libri duo (1737, reprinted in 1930) Vol II, chapter VII.

[6] *J Basdevant* La Conclusion et la rédaction des traités et des instruments autres que les traités (1926) 5 RdC 539, 575 *et seq*.

needs advice and consent of a two-thirds majority in the Senate,[7] the (short-lived) French Constitutions of 1791 and 1793,[8] or the 1831 Belgian Constitution giving the Parliament a right to authorize ratification of certain important treaties.[9] The Belgian model was later imitated by a number of other European constitutions in the second half of the nineteenth century.[10] Depending on the constitutional system, the executive was hitherto under an obligation not to engage in new treaty obligations of a certain importance without the prior consent of the legislature. Such domestic requirements were then regarded as 'internal ratification' of a treaty. Practically, a treaty would then have to undergo three steps before entering into force: signature by the executive, internal approval by the parliament, and international ratification by the executive. Practice was, however, not coherent with respect to the effect of international ratification. Whereas domestic jurisprudence in the United States still held in the nineteenth century that it had retroactive effect,[11] judicial opinion in Europe thought that international treaties would only become effective on the date of their ratification unless otherwise provided.[12]

In the twentieth century, the importance of ratification was further consolidated by international jurisprudence. In the *Mavrommatis Palestine Concessions* case, Greece had filed its claim against the United Kingdom before the PCIJ on 13 May 1924. As a basis of the Court's jurisdiction, Greece relied on Arts 26 and 11 of the 1922 Palestine Mandate and alleged the breach of a number of provisions of Protocol XII to the Treaty of Peace of Lausanne that were indirectly referred to in Art 11 of the Mandate. The Lausanne Treaty had been signed on 24 July 1923, but only entered into force on 6 August 1924. The Court found that its jurisdiction is established under Arts 26 and 11 of the Palestine Mandate.[13] With respect to the United Kingdom's objection that the Court could not apply Art 11 of the Mandate as the referred provisions in Protocol XII had not become effective on the date of Greece's application, the PCIJ observed: **6**

[7]Art II Sec 2 para 2 US Constitution of 1787. See *MJ Glennon* The Senate's Role in Treaty ratification (1983) 77 AJIL 257–280.

[8]Title III Chapter III Sec I Art 3 and Title III, Chapter IV, Section III, Art 3 of the French Constitution of 1791; Art 55 para 7 of the French constitution 1793.

[9]Art 68 of the Belgian Constitution of 1831.

[10]*L Wildhaber* Treaty-making Power and Constitution (1971) 13 cites the Sardinian/Italian Constitutional Statute of 1848, the Prussian Constitutional Document of 1850, the Greek Constitutions of 1844 and 1964, the Austrian Basic Laws of 1867, the Luxemburg Constitution of 1868, the Constitution of the German Empire of 1871, the French Constitutional Law of 1875 and the Dutch Constitution of 1887.

[11]See case law cited in *M Jones* The retroactive effect of the Ratification of Treaties (1935) 29 AJIL 51, 52–59 starting with US Circuit Court for the 3rd Circuit (United States) *Hylton's Lessee v Brown* 12 FCas 1123, 1 WashCC 298, 343 No 6981 and 12 F.Cas 1129, 1 Wash C.C. 343 No 6982 (both 1806).

[12]*Jones* (n 11) 64 with further references.

[13]PCIJ *The Mavrommatis Palestine Concessions* PCIJ Ser A No 2, 29 (1924).

> "[I]t must be considered whether the validity of the institution of proceedings can be disputed on the ground that the application was filed before Protocol XII had become applicable. That is not the case. *Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Art 11 was not yet effective*, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument could not be advanced."[14]

7 With the formula "even assuming", the PCIJ considered the proposition that ratification does not have retroactive effect as a reasonable hypothesis. Rather than questioning this rule, it advanced other procedural reasons in favour of its jurisdiction. Judge *Moore* disagreed with that pragmatic approach and argued that the Court would not have the mission of enforcing non-ratified treaties. In his dissenting opinion, he observed that the doctrine that governments are bound to ratify whatever their plenipotentiaries, acting within the limits of their instructions, may sign, and that treaties may therefore be regarded as legally operative and enforceable before they have been ratified, was "obsolete and lingers only as an echo of the past".[15] Equally, **Art 8 of the 1935 Harvard Draft** stated in bold terms that the signature of a treaty on behalf of a State does not create for that State an obligation to ratify the treaty.[16] In sum, international law, as it stood in the early twentieth century, had produced the rule on the "freedom to refuse ratification".[17]

8 Based on a draft presented by SR *Waldock*,[18] the 1962 ILC Draft contained Draft Art 12 on ratification and Draft Art 14 on acceptance. [19] As Draft Art 12 had included a residuary rule in favour of ratification, a considerable number of government comments in the Sixth Committee were critical. The ILC therefore abolished that concept in the revised draft of 1965. The new Draft Art 11 also combined ratification, acceptance and approval into one text.[20] This text remained virtually[21] unchanged in the **1966 ILC Draft**.[22] As various amendments brought forward during the Vienna Conference for a residuary rule either in favour of signature or ratification did not find the necessary majority (→ Art 11 MN 11), Draft Art 11 was unanimously adopted by the delegations as Art 14 VCLT. Today, this controversy has lost much of its vigilance. Indeed, the principle enshrined in Art 14 that States

[14] *Ibid* 34 (emphasis added).

[15] PCIJ *The Mavrommatis Palestine Concessions* (dissenting opinion *Moore*) PCIJ Ser A No 2, 54, 57 (1924).

[16] (1935) 29 AJIL Supp 657, 769.

[17] *F Dehousse* La ratification des traités (1935) 107–117.

[18] *Waldock* I 48 *et seq*.

[19] [1962-II] YbILC 157, 171 *et seq*.

[20] [1965-I] YbILC 258.

[21] The only change between the 1965 and the 1966 Draft related to Draft Art 11 lit b. The old formula "when it appears from the circumstances of the conclusion of the treaty that the States concerned were agreed that ratification should be required" was replaced by "when it is otherwise established that the negotiating States were agreed that ratification should be required".

[22] Final Draft, Text of Art 11, 197.

are free how to establish that ratification may be required for expressing their consent to be bound, is nowadays firmly rooted in **customary international law**.[23]

C. Elements of Article 14

I. The Acts

1. Ratification

According to Art 2 para 1 lit b ratification means "the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty". Ratification is thus a **unilateral act governed by international law**, which is completed with the exchange or deposit of the instruments of ratification at international level (→ Art 16). The ICJ in the *Ambatielos* case underlined this point as follows: **9**

> The ratification of a treaty which provides for ratification, as does the Treaty of 1926, is an indispensable condition for bringing it into operation. It is not, therefore, a mere formal act, but an act of vital importance.[24]

Art 14 does not prescribe any **formalities** on the instrument of ratification. That is left to the internal order of each State.[25] Traditionally, instruments of ratification are signed by the head of State or a government representative. There are also systems where the competence to ratify is domestically shared between the head of State and the government.[26] The instruments often use century-old formulations[27] and use **10**

[23] *Villiger* Art 14 MN 19.

[24] ICJ *Ambatielos Case (Greece v United Kingdom)* (Preliminay Objetions) [1952] ICJ Rep 28, 43.

[25] *H Blix* Treaty-making Power (1960) concludes after an extensive survey of State practice (99–293) as follows: "In spite of the effort made to find and analyze as much evidence as possible that might throw light upon the rule of international law which prescribes the criteria of competence to conclude treaties on behalf of a state whose treaty-making power is effectively organized by municipal law, it would be an exaggeration to maintain that any unmistakable conclusion has emerged. Some evidence has been found that support the constitutional theory, other evidence speaks in favour of the head-of-state theory, yet other evidence points clearly to the conclusion that neither of these theories is born out by the practice of states."

[26] See *M Luecke/C Wickremasinghe* Analytical Report in *Council of Europe and British Institute of International and Comparative Law* (ed) Treaty-making – Expression Of Consent to Be Bound by a Treaty (2001) 16–27.

[27] In France, the standard formula reads: "X, Président de la République Française, à tous ceux qui ces présentes lettres verront, salut: Ayant vu et examiné ledit traité, avons approuvé et approuvons en toutes et chacune de ses parties, en vertu des dispositions qui y sont contenues et conformément à l'article 52 de la Constitution [text of the treaty inserted] Déclarons qu'il est accepté, ratifié et confirmé et promettons qu'il sera inviolablement observé. En foi de quoi, Nous avons donné les présentes, revêtues du Sceau de la République." (cited from *S Bastid* Les traités dans la vie internationale – conclusion et effets (1985) 42 n 1).

specific formats[28] or the State seal. Moreover, there is a certain solemnity about the exchange of instruments,[29] possibly underlining the seriousness of the parties' intention to honour the agreement. However, legally, it does not make any difference if an instrument of ratification is issued only by a high State official, uses straight language or ordinary paper and is deposited without any ceremony whatsoever.

11 The Convention is also not concerned with national regulation of domestic requirements preceding ratification. Broadly speaking, **two different traditions** have emerged in the Western world.[30] One tradition is typified by the 'Westminster practice' (United Kingdom, Australia, Canada, Israel), where treaty making is carried out under the royal prerogative without the necessity of parliamentary approval. Here, the executive is held politically accountable through powers of scrutiny, consultation or the right to information. The other tradition is firmly rooted in Continental Europe and the United States where parliamentary approval must be sought for a number of treaties. Some systems require such as a general rule, which is then subject to exceptions listed in the Constitution[31]; other constitutions list the cases in which approval is required.[32] Finally, some European States also foresee popular consultation (referendum) or the participation of federated entities prior to ratifying specific categories of treaties.[33] It appears that in Latin American[34] and Asian practice[35] domestic ratification may also require the approval of a State organ other than the executive. African practice, in turn, seems to have been inspired either by the 'Westminster' or the Continental European approach.

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[28] *C Chayet* Les accords en forme simplifiée (1957) 3 AFDI 3, 10, noting that a French letter of ratification presents itself "sous la forme d'un document constitué par deux doubles feuilles de papier fileté de 35 X 23,5 dont le texte est mi-imprimé mi-manuscrit".

[29] *Blix* (n 4) 353, note 2, making the point that the instruments of ratification are often transmitted in "beautiful leather covers".

[30] *M Luecke/C Wickremasinghe* (n 26) 58.

[31] Cyprus, Luxembourg, the former Yugoslav Republic of Macedonia, Mexico, Netherlands, Romania, Switzerland, Turkey, United States.

[32] Albania, Andorra, Austria, Azerbaijan, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Liechtenstein, Lithuania, Malta, Norway, Poland, Portugal, Russia, Slovakia, Spain, Sweden, Ukraine.

[33] *M Luecke/C Wickremasinghe* (n 26) 70–77.

[34] *Cf* Art 49-I of the Brazilian constitution of 1988 and the practice reported by *G Soares* The Treaty-making Process Under the 1988 Federal Constitution of Brazil in *SA Riesenfeld/FM Abbott* (eds) Parliamentary Participation in the Making and Operation of Treaties: a Comparative Study (1994) 187–204; Art 67, paras 12, 14 and 19 of the Argentine Constitution of 1853, as subsequently amended, and the practice reported by *JM Ruda* The role of the Argentine Congress in the Treaty-Making Process in *ibid* 177–185.

[35] Following the Russian example, all the countries of the Community of Independent States enumerate in their laws on international treaties the categories of treaties which are subject to ratification by the parliaments, *cf WE Butler* The Law of Treaties in Russia and the Commonwealth of Independent States (2000) 95 with further references. In China, certain treaties are subject to approval by the National People's Congress, whereas others are submitted to the State Council only, see *Hungdah Chiu* The People's Republic of China and the law of Treaties (1972) 35.

However, from an **international law point of view, it does not make any difference for treaty interpretation which internal procedure has been used** to bring about ratification. In *Djibouti v France*, the question was debated before the ICJ whether the 1977 Treaty of Friendship and Co-operation between the two States obliged France to execute an international letter rogatory. France denied such obligation, arguing that the treaty did not contain such specific obligations in the field of judicial cooperation. In addition, it claimed that its interpretation of the Treaty was supported by the fact that it was ratified by the President without the need for parliamentary approval, and that, had the treaty involved specific legal obligations, such approval would have been required by Art 53 French Constitution. The Court declined to draw any inference from the internal procedure used in France for ratification for the interpretation of the 1977 treaty, holding 12

> "[T]hat France has ratified the Treaty without finding it necessary to submit it for parliamentary approval does not alter the fact that the Treaty creates legal obligations of the kind just described."[36]

2. Acceptance

Acceptance as a means of expressing consent to be bound goes back to the early twentieth century. The idea behind it is that governments wish to examine a treaty after signature before expressing consent to be bound. However, using the term 'ratification' may trigger domestic requirements of prior parliamentary approval, which might – rightly or wrongly – be inappropriate for certain treaties. In order to **preserve the possibility of a two-step procedure without parliamentary ratification**, the term 'acceptance' has therefore been employed. 13

The main **promoter** of this development was the **United States**. As the domestic requirement of Senate approval for the ratification of treaties proved difficult to fulfill in some cases, the US government sought to conclude treaties below that threshold. Next to terming those as 'executive agreements' it also avoided traditional ratification clauses in favour of clauses mentioning 'acceptance' as an alternative in its bilateral relations. After World War II, the term 'acceptance' also entered into the final clauses of several constitutions of international organizations. 14

> Possibly inspired by the precedent that the United States acceded to the ILO in 1934 by way of 'acceptance' (→ Art 17), Art XXI of the 1945 Constitution of the Food and Agriculture Organization of the United Nations,[37] Art XV of the 1945 UNESCO Convention,[38] as well as Art XX § 2 of the 1945 Articles of Agreement of the International Monetary Fund,[39] and Art XI § 2 of the 1945 Articles of Agreement of the World Bank[40] referred to 'acceptance'

[36] ICJ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177, para 104.

[37] [1946–1947] UNYB 693.

[38] 4 UNTS 275.

[39] 2 UNTS 39.

[40] 2 UNTS 134.

rather than ratification. This flexible wording made it possible for the United States to become members of those organizations without resorting to the cumbersome domestic procedure of ratification. The wording then also became common for conventions drawn up by the UN General Assembly.[41] This is an example where internal practice had an influence on the terminology used in international law.[42]

15 While there might be hence a difference between 'ratification' and 'acceptance' in domestic law, the same is not true under the Convention. As acceptance is subject to the **same legal regime as ratification** under Art 14 para 2, the choice between the two is a matter of terminology rather than substance at the international law plane.[43]

16 Acceptance can occur, whether a prior (non-binding) signature has already been made or not. In both situations, it may embody the consent to be bound.[44] It may therefore serve as a **substitute to ratification** (subsequent to signature) **or accession** (no prior signature).

An example of where acceptance is used instead of accession can be found in Art 79 lit a of the 1946 WHO Constitution.[45] According to this provision States may become parties to the organization by "(i) signature without reservation as to approval; (ii) signature subject to approval followed by acceptance; (iii) acceptance".[46]

17 Finally, it should be noted that acceptance may also be used as a **generic term for consent to be bound**. Such formula is designed to provide contracting parties with the greatest possible flexibility.

Art XIV of the 1994 Marrakesh Agreement[47] establishing the WTO provides: "This Agreement shall be open for acceptance, by signature or otherwise, by the contracting parties to GATT 1947, and the European Communities [. . .]." Parties could therefore choose whether to express their consent to be bound by signature, ratification, approval or acceptance in the classic sense.

3. Approval

18 Approval is another **less traditional means of expressing consent to be bound**. It is used by States when they wish to express their consent to be bound in simple and direct form and exchange it without ceremony. Approval usually does not involve the head of State, but may be expressed by other high representatives such as the

[41] *Yuen-Li Liang* Notes on Legal Questions Concerning the United Nations (1950) 44 AJIL 333, 343–345. Interestingly, however, the Sixth (Legal) Committee voted in 1949 against the use of 'acceptance' in the final clauses of a Draft Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, favouring the old formula of 'ratification' (*ibid* 349–349).

[42] *Bastid* (n 27) 34 and 69.

[43] *Villiger* Art 14 MN 14.

[44] Final Draft, Commentary to Art 11, 198 paras 9–10 .

[45] 14 UNTS 186.

[46] For the negotiating history of this provision, see *Liang* (n 41) 346.

[47] 1869 UNTS 299.

prime minister or the foreign minister. That is in line with the general trend towards expedition and informality.[48] However, unlike the term 'acceptance', the term 'approval'/'approbation' may not stand under domestic law as an executive-friendly alternative, but as an equal to ratification.

> Art 53 para 1 of the 1958 French Constitution provides that certain categories of treaties cannot be ratified or approved without the previous adoption of a law.

19 It may also be noted that approval is the **common method of international organizations** for expressing their consent to be bound when entering into treaties. With one early exception,[49] there does not seem to be a case in which an international organization has ever designated its final approval of a treaty as 'ratification'. This is reflected in the language of Art 14 para 2 VCLT II,[50] where the option of ratification is replaced for international organizations by adopting a "formal act of confirmation". Such act can bear various titles, among which 'approval' is one possibility.

> For example, when the EU Council of Ministers expresses consent to be bound to a treaty concluded under Art 218 para 6 TFEU, it uses the standard formula that "the treaty is hereby approved on behalf of the Union" and empowers a person to notify this approval internationally.[51]

20 Finally, as in the case of acceptance, **approval** can also be used **instead of accession** (*ie* expressing consent to be bound without prior signature).[52]

II. Legal Effect

21 Art 14 paras 1 and 2 specify that instruments of ratification, acceptance or approval are governed by the **same legal regime**. In all three cases, consent to be bound is expressed in the scenarios mentioned under Art 14 para 1 lit a–d. While lit a and b deal with common determinations by all States Parties, the modes referred to in lit c and d mention a unilateral determination of one or several of the negotiating States to opt for ratification, approval or acceptance.

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[48] *Blix* (n 4) 364.

[49] The 1950 Headquarters Agreement between the FAO and Italy was negotiated by the Director-General of FAO and "ratified" by the FAO Council at its 10th Session in 1950 (http://www.fao.org/docrep/x5578E/x5578e03.htm last visited 11 January 2011).

[50] For a reproduction of the discussion in that respect see *R Ben Achour/I Frikha/M Snoussi in Corten/Klein* Art 14 Convention of 1986 MN 2.

[51] See for example Art 1 the Council decision (2011/117/EU) of 18 January 2011 concerning the conclusion of the Agreement between the European Union and Georgia on the facilitation of the issuance of visas ([2011] OJ L 52/33).

[52] Final Draft, Commentary to Art 11, 198 para 12.

1. Treaty Clauses

22 Art 14 para 1 lit a refers to **final clauses** that stipulate that ratification (or acceptance or approval) is required. A classic example only mentioning ratification is Art 110 para 1 UN Charter:

> The present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes.[53]

23 Treaty clauses can also **imply a need for ratification**. For example, Art X of the 1947 Belgian–French Convention Concerning the Nationality of Married Women[54] says:

> The present Convention [. . .] may be denounced from year to year as from the date of the exchange of ratification.

24 When treaty-makers wish to provide more flexibility to the parties, final clauses may **enumerate different options** on an equal footing. For example, Art 35 para 1 of the 1961 European Social Charter[55] provides:

> This Charter shall be open to signature by the members of the Council of Europe. It shall be ratified or approved. Instruments of ratification or approval shall be deposited with the Secretary-General of the Council of Europe.

2. Ratification Requirement 'Otherwise Established'

25 Art 14 para 1 lit b mentions the situation that the agreement of States to require ratification (or acceptance or approval) can be otherwise established. Hence, the **common intention to require ratification** can also be expressed by the negotiating states **during the negotiation**. However, such intentions should clearly flow from the *travaux préparatoires* and should be unequivocal.[56]

26 Accordingly, the **constitutional necessity of ratification** by a negotiating State alone is not a sufficient indicator that a ratification requirement has been established. Rather, as SR *Waldock* explained in response to a Danish proposal,[57] only where there is a joint and regular practice of two States in concluding bilateral treaties, or a well-established practice of one State known to the other, can the existence of such domestic requirements be used as an indicator that a ratification requirement was also agreed at international level.

27 Moreover, caution is required when drawing inferences from the **nature and object** of the nature. While it is true that certain subject-matters, such as political relations or territorial boundaries, may be a good candidate for requiring ratification

[53] 1 UNTS 1.

[54] 36 UNTS 145.

[55] ETS 35.

[56] *Villiger* Art 14 MN 9.

[57] *Waldock* IV 39 (para 7 on Art 12).

because it probably requires domestic approval or political support, it is by no means established practice of States to actually do so (→ Art 12 MN 22).

3. Signature Subject to Ratification

Art 14 para 1 lit c deals with the situation where a representative has signed a treaty "subject to ratification". This suffix evidences the intention of the State that its consent to be bound is not vested in the signature. Rather, only ratification can bring about this result. This method is **useful where some negotiating States wish to bring a treaty into force by signature, whereas others insist on ratification**. In such a scenario, a common treaty clause may stipulate that the treaty enters into force upon receiving a minimum number of signatures or ratifications, thereby speeding up the entry into force of the convention. **28**

> A recent case in point is Protocol 14 *bis* to the ECHR which was opened for signature on 27 May 2009. According to its Art 5 para 1, consent to be bound can be expressed by either signature without reservation as to ratification, acceptance or approval (lit a) or by signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval (lit b). With the signatures of Denmark, Norway and Ireland of May and June 2009, which were not made subject to ratification, the Protocol immediately met the threshold of 3 signatures or ratifications under Art 6 and entered into force in October 2009.[58]

4. Restricted Full Powers

A comparable situation arises where the **full powers of the representative embody the intention of the State that ratification** (or acceptance or approval) **is required** (Art 14 para 1 lit d, 1st alternative). This reflects the practice of States since the eighteenth century of inserting relevant language in the full powers.[59] The effect of those restrictions is that a State will be bound by a treaty only upon ratification (or acceptance or approval), even when the treaty provides that signature constitutes the means of expressing consent for the other negotiating State or States.[60] Rather than the date of signature, the date of ratification (or acceptance or approval) is decisive to establish the consent to be bound.[61] **29**

Finally, Art 14 para 1 lit d, 2nd alternative clarifies that signature must be followed by ratification (or acceptance or approval) if a State has expressed such **intention during the negotiations**. Compared with the two previous cases of unilateral determinations, this is the least transparent way to opt for ratification (or acceptance or approval) as consent to be bound, as it is not laid down in writing. **30**

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[58] ETS 204.

[59] For examples, see *Research in International law under the auspices of the Faculty of the Harvard Law School* (1935) 29 AJIL Supp 657, 761–763.

[60] *A Bolintineanu* Expression of Consent to Be Bound by a Treaty in the Light of the 1969 Vienna Convention (1974) 68 AJIL 672, 685.

[61] *Aust* 104.

On the other hand, the intention must be communicated to other States, and important conferences usually record the statements of the representatives.[62]

III. Tacit Ratification

31 Both Art 14 and Art 2 para 1 lit b regulate ratification on the assumption that the State expresses its consent to be bound by a formal act. The question has therefore arisen whether there is room for **tacit ratification by *de facto* execution**. In the *Succession of Queen Marie-Henriette* case, the Belgian Court of Cassation thought so, judging that the actual marriage between the Austrian Princess *Marie-Henriette* to future King *Leopold II* in execution of a matrimonial convention had replaced formal ratification of that convention.[63] This view is sometimes echoed in doctrine.[64]

32 However, outside such rather exceptional circumstances, **mere compliance should generally not be admitted as a form of ratification**. Apart from the difficult test whether particular conduct of the State in question was actually rooted in the latter's intention to comply with a treaty to which it had not expressed formal consent to be bound, such possibility would also be at odds with the intention of the other States. Given that they have actually required ratification as a means for expressing consent to be bound, it can be assumed that they expected such ratification to be expressed by formal act in order to provide legal security as to the range of States Parties and the date of their commitment.[65]

IV. Delays and Deadlines

33 Usually, treaty clauses on ratification, acceptance or approval do not provide for a specific deadline. In this scenario, States are free to choose the date of their ratification. Occasionally that may take considerable time. Nevertheless, ratification, acceptance or approval expressed after a number of years is no less valid than speedy ratification.

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[62] *Bolintineanu* (n 60) 685.

[63] Cour de Cassation (Belgium) 25 January 1906, Pasicrisie belge I-95, cited in *P Gautier* La pratique de la Belgique aux confines des traités (1993) 484–485.

[64] *I Detter* Essays on the Law of Treaties (1967) 23. See also *FO Wilcox* The Ratification of International Conventions (1935) 38 arguing that the early execution of the 1840 Treaty relating to the pacification of the Levant constituted tacit ratification. However, as the early execution had been expressly agreed in a Protocol between Prussia, Russia, Great Britain, Austria and the Ottoman Empire, it is more a case of provisional application of certain provisions of the treaty (a notion unknown to the author).

[65] For a similar concern with respect to tacit ratification, see *S Szurek* in *Corten/Klein* Art 11 MN 22.

The Isle of Pines Treaty of 1904 between Cuba and the United States was not ratified until 1925.[66] The French-Swiss Treaty on the Pacific Settlement of Disputes of 1925 was only ratified by France in 1934.[67] Mixed agreements between the European Union and its Member States, on the one hand, and a third State, on the other, nowadays need 29 instruments of ratification, acceptance or approval (27 from the Member States, one from the Union, one from the third State) before they enter into force. This process takes on average 3–4 years.[68]

In order to overcome such delays, which may at times be politically undesirable, States and international organizations may either rely on the interim duty of signatories not to defeat the object and purpose of the treaty (Art 18 lit a)[69] or resort to provisional application under Art 25.[70] Sometimes, international organizations have mechanisms to induce ratification at their disposal.[71] Another method is setting **deadlines for ratification, approval or acceptance**. With that technique, a certain pressure is exercised on the respective parliaments to speed up ratification as passing the deadline would have the consequence that the treaty would never enter into force. **34**

The Sino-British Joint Declaration on the transfer of sovereignty over Hong Kong was signed by the two prime ministers on 19 December 1984 in Beijing. Point 8 thereof provided: "This Joint Declaration is subject to ratification and shall enter into force on the date of the exchange of instruments of ratification, which shall take place in Beijing before 30 June 1985."[72] The instruments of ratifications were indeed exchanged on 27 May 1985, triggering the entry into force of the treaty only half a year after signature.

[66] *Wilcox* (n 64) 107.

[67] *Bastid* (n 27) 45.

[68] *F Hoffmeister* Curse or Blessing? Mixed Agreements in the Recent Practice of the European Community and its Member States in *C Hillion/P Koutrakos* (eds) Mixed Agreements revisited (2009) 249.

[69] PCIJ *Certain German Interests in Polish Upper Silesia* (Merits) PCIJ Ser A No 7, 30 (1926), where the PCIJ argued that Germany retained sovereignty over the ceded territories to Poland under the Treaty of Versailles in the time between signature and entry into force of the Treaty between the two States through ratification, but was prevented from misusing its right to dispose of her property.

[70] On the relationship between the interim obligation arising out of Art 18 and provisional application → Art 18 MN 30 and *WM Reisman/MH Arsanjani* What is the current value of signing a treaty? in *S Breitenmoser et al* (eds) Festschrift L Wildhaber (2007) 1491, 1505–1511 suggesting that States resort more to provisional application rather than Art 18 when some form of commitment is necessary to prevent actions that could defeat the object and purpose of the treaty pending ratification.

[71] See Art 19 para 5 of the ILO Convention, according to which ILO Conventions shall be laid before domestic authorities within 18 months after their adoption in the ILO. Together with the fact that ILO Conventions are not signed by the states, but authenticated by the President of the Labour Conference and the Director-General this has been seen as an indicator that ILO Conventions are the product of international legislation rather than ordinary international treaties (*F Maupain* The ILO's Standard-Setting Action: International Legislation or Treaty-Law? in *V Gowlland-Debbas* (ed) Multilateral Treaty-making (2000) 130–132).

[72] http://www.cmab.gov.hk/en/issues/joint3.htm.

35 Nevertheless, even when an express ratification **deadline** set by a treaty is **passed**, the parties can still subsequently agree to prolong them to make entry into force by timely ratification possible.

> On 27 August 1829, the governments of the United States and Austria-Hungary signed a treaty of commerce and navigation. According to its Art XIII, the exchange of ratifications was to occur within 12 months after signature in Washington. The US Senate gave advice and assent only on 3 February 1831. Although the deadline had thus been passed, the treaty entered into force on 10 February 1831, as the Austrian Emperor expressed his consent to the prolongation of the deadline in his certificate on the exchange of ratifications of that day.[73]

36 Finally, it should be noted that **ratification does not necessarily make the treaty binding for the ratifying State**. Rather, in a bilateral context, the exchange of ratification instruments is required to bring a treaty into force (→ Art 16). For multilateral conventions, it depends on the treaty's final clauses how many instruments of ratification are required for that purpose (→ Art 24). Only if the treaty has reached the threshold prior to the deposit of the ratification at issue, will that act have the effect of making the ratifying State a party thereto. Pending the entry into force of the treaty, a State that has already ratified it is under the interim obligation not to defeat the object and purpose of the treaty (Art 18 lit b).

V. Lack of Ratification, Acceptance or Approval

37 Art 14 does not address the **consequences where ratification, acceptance or approval do not occur**. As the expression of consent to be bound is a voluntary act which lies in the sole discretion of the State concerned, [74] refusal thereof is not illegal under contemporary international law. Moreover, the lack of ratification, acceptance or approval may indicate a State's intention not to be bound by rules laid down in the convention, unless there is very definite and very consistent unilateral behaviour – falling short of ratification – to the contrary.

> In the *North Sea Continental Shelf* case the ICJ had to decide whether the equidistance method for delimitating the continental shelf between States with adjacent coasts, as laid down in Art 6 of the 1958 Geneva Convention on the Continental Shelf, could be invoked by Denmark and the Netherlands against Germany. According to its Art 11, the Convention required 22 ratifications for its entry into force. Germany had signed the Convention, but never ratified it. The Court attached significance to the lack of ratification, observing that "[i]n principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the régime of the convention is to be

[73] The treaty is reproduced at http://avalon.law.yale.edu/19th_century/aust01.asp, and the facts surrounding the prolongation of the ratification period are recounted at note 1.

[74] *S Rosenne* Treaties, Conclusion and Entry into Force (1984) 7 EPIL 464, 466 speaks of the "complete freedom to ratify or not".

> manifested – namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way."[75]

Of course, the State may nevertheless bear the **political responsibility** for not becoming a party to important treaties. In that respect, one may remember the weakening of the post-war system through the US failure to become a member of the League of Nations in 1919, the breakdown of European military integration in 1954 when the French National Assembly did not ratify the Treaty Establishing the European Defence Community, or the deliberate absence from major human rights conventions by a number of Arab, African, and Asian States. **38**

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[75]ICJ *North Sea Continental Shelf (Germany v Denmark, Germany v Netherlands)* [1969] ICJ Rep 3, para 28.

Article 15

Consent to be bound by a treaty expressed by accession

The consent of a State to be bound by a treaty is expressed by accession when:

(a) the treaty provides that such consent may be expressed by that State by means of accession;
(b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or
(c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

Contents

A. Purpose and Function

Art 15 deals with situations where a treaty has been adopted, and the deadline for signature has lapsed. In most cases, the treaty will have entered into force and will have become binding on the (majority of) negotiating States. Then, a State wishing to join the treaty is not allowed to exercise any signatory rights or to ratify it. Rather, it must undergo the **distinct procedure of accession**. **1**

However, **acceding to a treaty-regime is not a given right** under international law. Rather, it depends on the will of the original negotiating States whether they intended to create a restricted regime or a treaty dedicated to universal participation. Against that background, Art 15 serves the purpose of recalling the cases in which accession is allowed. Again, as is the case with Arts 12–14, the decisive test is to establish the intention of the negotiating States or parties to the treaty in question. **2**

B. Historical Background and Negotiating History

The **tension between restricted treaties and universal conventions** has existed for a long time in international relations. Due to their purpose to create stronger bilateral links, early treaties on military alliances and friendship did not contain any clauses providing for the accession of other States. The same goes for bilateral **3**

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commercial treaties of a give-and-take character. The situation changed with the rise of multilateral conventions whose aim was to establish an objective regime for States. Already the Treaty of Westphalia 1648 between the Holy Roman Emperor and the King of France and their respective allies allowed for the inclusion of non-negotiating entities through subsequent nomination by general consent or by either party.[1] Famously, the General Treaty concluded at Vienna on 9 June 1815, and ending the dominance of France under Napoleon over Europe was only signed by the seven major powers (Austria, France, United Kingdom, Portugal, Prussia, Russia and Sweden, with Spain deliberately refraining from signature). However, in order to make it a pan-European peace treaty, it contained an invitation of accession to all powers assembled in the Congress.[2] Such accessions were initiated by a formal declaration made by the acceding power to the signatories, followed by acceptance by the contracting States and subsequent ratification of the two acts.[3]

4 In 1852, the Treaty of London did away with the need to operate ratifications. Accession to this treaty could be declared by the acceding power, which would receive an act of acceptance from the depository, the Court of Copenhagen. The General Act of Berlin (1885) then introduced another important **procedural novelty**. According to Art XXXVII, any power that had not signed the Act could adhere to it by simple notification of its accession by declaration. Such notification would then be circulated to the signatories by the depositary. It was also clarified that such adhesion would carry with it all rights and obligations under the General Act for the adhering power.[4] Thus, the act of declaring acceptance of accession had also fallen away.

5 With the **emergence of newly independent States** after World War I, and in particular after World War II, the question of accession became even more salient as a matter of politics. Given that a number of international conventions did not address the issue of accession, it was uncertain whether there should be a presumption of universality of treaties. Moreover, there was **political tension** between whether the opening of treaties to all States could boost the political status of such entities as the German Democratic Republic, North Korea, North Vietnam or certain national liberation movements.[5]

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[1] Art CXXVII of the 1648 Treaty of Münster provided: "In this present Treaty of Peace are comprehended such, who before the Exchange of the Ratification or in six months after, shall be nominated by general Consent, by the one or the other Party; mean time by a common Agreement, the Republic of Venice is therein comprised as Mediatrix of this Treaty." 1 CTS 271.

[2] Art CIXX of the 1815 General Treaty of Vienna read: "All the Powers assembled in Congress, as well as the Princes and free towns, who have concurred in the arrangements specified, and in the Acts confirmed, in this General Treaty, are invited to accede to it." 64 CTS 454.

[3] *FO Wilcox* The Ratification of International Conventions (1935) 59.

[4] Art XXXVII paras 1 and 2 of the General Act of 26 February 1885 reads: "The powers who have not signed the Present General Act shall be free to adhere to its provision by a separate instrument. The adhesion of each power shall be notified in diplomatic form to the Government of the German Empire, and by it in turn to the other signatory or adhering powers."

[5] *S Bastid* Les traités dans la vie internationale – conclusion et effets (1985) 63.

Against that background, the ILC put forward a Draft Art 8 on participation in a treaty, a Draft Art 9 on the opening of a treaty to the participation of additional States, and Draft Art 13 on accession. These three provisions of the 1962 ILC Draft read together embodied the idea that every State may become a party to a general multilateral treaty, whereas negotiating States have the right to restrict participation in all other cases.[6] However, some governments objected to this construction. For some, the right to universal participation would put the depositary in an awkward position to decide upon instruments of accession of entities whose status is disputed.[7] Others endorsed this approach with vigour.[8] In 1965, debates on Draft Arts 8 and 9 on participation in a treaty also showed a strong division in the Commission and led to their deletion after a 9 : 10 vote.[9] However, some more neutral elements of those articles were transferred to Draft Art 13 in the form of the 1966 ILC Draft.[10] The Drafting Committee at the Vienna Convention made a minor change in the text[11] and the proposal of Czechoslovakia at the Conference to bring back the 'all States' clause[12] was voted down.[13] Accordingly, **Art 15**, as adopted, **does not contain a presumption that treaties with no accession clauses are open to the participation of all States**. Rather, in all cases, the intentions of the negotiating States or parties must be analyzed. This principle is fully accepted in today's State practice, so that the content of Art 15 has nowadays hardened into customary international law **6**

C. Elements of Article 15

I. Accession

According to Art 2 para 1 lit b, 4th alternative, "accession" means the **international act** so named whereby a State establishes on the international plane its consent to **7**

[6]For an account of the discussions in the ILC leading to this draft see *D Mathy* Participation universelle aux traités multilatéraux (1972) 68 RBDI 529, 536–541.

[7]*Waldock* IV 26–27, reporting the comments from the governments of the United States and the United Kingdom. Also Japan and Luxembourg spoke out against the right to universal participation.

[8]*Waldock* IV 28, reporting the comments by, *inter alia*, the Polish, Czechoslovak, Hungarian, Mongolian, Romanian and Russian delegations. For an explanation of the views of the then socialist governments see *I Lukashuk* Parties to Treaties – The Right of Participation (1972) 135 RdC 231, 296–301.

[9]*Villiger* Art 15 MN 3.

[10]Final Draft 271.

[11]The 1966 ILC Final Draft laid down that the consent to be bound by a treaty is expressed by accession when the treaty *or an amendment to the treaty* so provides. The reference to the amendment was deleted at the Vienna Conference because such amendments were seen to be an integral part of the treaty by the Drafting Committee.

[12]A/CONF.39/C.1/L.104, UNCLOT III 128 paras 141–146

[13]*Lukashuk* (n 8) 303–306.

be bound by a treaty. It hereby resembles ratification, acceptance or approval, as it is a unilateral act under international law.

8 The **instrument of accession** can take different forms. It is usually a document so entitled and signed by a high representative of the State. The use of State emblems or other signs of solemnity is optional.

9 Accession is **completed** when the instrument of accession is exchanged between the contracting States, deposited with the depositary or notified to the contracting States, if so agreed (→ Art 16). At that moment, the treaty relationship between the parties and the acceding State is created through their corresponding wills: the parties, having offered accession (normally through the adoption of an accession clause, → MN 12) and the new member through accepting this offer by accession.[14]

10 Accession **cannot** be made subject to **subsequent ratification**.[15] In contrast to earlier practice of the League of Nations, which regarded such practice admissible,[16] the UN Secretary-General does not notify to other States instruments of that kind in his or her capacity as depositary of multilateral treaties.[17] Nowadays, accession 'subject to ratification' is rarely found, and was probably due to a misunderstanding of the nature of accession.[18]

II. Allowance of Accession

11 Accession expresses the consent to be bound to a treaty. For that purpose, it is not necessary that the treaty itself has already entered into force. Indeed, many treaty clauses count ratifications and accessions together when establishing the threshold for entry into force of a treaty. This shows that **accession to a treaty not yet in force is perfectly possible under Art 15**. The old rule that accession could not be performed while the treaty was open to signature or was limited to States that had not participated in the negotiation is therefore no longer in use.[19] However, accession will only have legal effect if it concurs with the corresponding will of the negotiating States or parties. Such intention can occur in various configurations, which are laid down in lit a–c.

1. Treaty Clauses

12 According to Art 15 lit a, accession will bind the acceding States if the treaty so provides. This is the normal case in modern conventions, which contain a **final clause** to that effect. States are free in how to design them in an open or restricted

[14] *JF Marchi* in *Corten/Klein* Art 15 MN 42.

[15] Final Draft, Commentary to Art 12, 199 para 3.

[16] *Wilcox* (n 3) 63.

[17] *S Szurek* in *Corten/Klein* Art 11 MN 17.

[18] *Aust* 113.

[19] *S Rosenne* Treaties, Conclusion and Entry into Force (1984) 7 EPIL 464, 465.

way. In that respect, it is useful to recall the evolution of accession clauses with respect to States, other entities and intergovernmental organizations.

a) States

In the 1960s, an important model was framed within the UN to overcome the antagonistic views of the Western powers and the Eastern bloc with respect to the status of, *inter alia*, the German Democratic Republic, North Korea and North Vietnam. The latter not being Member States of the United Nations or any specialized agency,[20] it was convenient to reserve participation and accession to States that had already been admitted to the UN system. The so-called **Vienna formula**, named after the final clauses of the two Conventions of 1961 and 1963, accordingly referred to all State Members of the UN or of any of the specialized agencies or parties to the ICJ Statute[21] or any other State invited by the General Assembly.[22] The clause was also used for the 1966 Human Rights Covenants and the VCLT itself (→ Arts 81, 83). It met harsh resistance in socialist doctrine on political grounds,[23] but could also be criticized from a more balanced point of view as questions of recognition can be de-linked from becoming party to a multilateral convention.[24] **13**

In 1963, another important precedent was set. The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water[25] was negotiated by the United Kingdom, the United States and the USSR. It provided for its entry into force by ratification of the three original parties. However, under Art III para 1 of the treaty, the treaty was opened for signature (before entry into force) or accession (after entry into force) to "all States". However, in order to overcome the unpleasant scenario to be faced with an accession instrument of an entity belonging to the opposite camp, all three powers acted as depositary.[26] Where the **'all States' formula** was used in UN conventions with the UN Secretary-General acting as depositary,[27] **14**

[20] *D Mathy* Participation universelle aux traités multilatéraux (1972) 68 RBDI 529, 531.

[21] This reference was designed to allow the participation of Switzerland who was a party to the ICJ Statute but not yet a member of the UN.

[22] Arts 48 and 50 VCDR, Arts 74 and 76 VCCR. Precursors of the formula were used in the four 1958 Geneva Conventions on the Law of the Sea 450 UNTS 11, 499 UNTS 311, 516 UNTS 205, 559 UNTS 285.

[23] See, *eg*, *G Schirmer* Universalität völkerrechtlicher Verträge und internationaler Organisationen (1966) 146. Similarly, *Lukashuk* (n 8) 295 arguing that the freedom to choose one's treaty partners was incompatible with the general principles of international law, and contradicting *ius cogens*.

[24] *Mathy* (n 20) 563–566.

[25] 480 UNTS 43.

[26] *Mathy* (n 20) 555.

[27] See *eg* Art XIII of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid 1015 UNTS 243 and Arts 14 and 16 of the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents 1035 UNTS 167.

he or she would seek the opinion of the General Assembly prior to accepting an instrument of accession.[28] However, after the compromise of 1973 (allowing UN membership of a number of States whose status was disputed) and the end of the East–West confrontation in the 1990s, such precautions have become superfluous. Nowadays, open multilateral conventions use the 'all States' formula without further ado. Accordingly, it can be found in most modern UN conventions.[29]

15 More **restricted clauses** are typically used in a regional context. For example, conventions drawn up in the Council of Europe usually reserve the right to signature and subsequent ratifications to Member States. Generally lacking specific accession clauses,[30] it thereby becomes clear that only Council of Europe States may accede to those conventions. Similarly, a number of Inter-American conventions are restricted to States of that continent. For example, Art 54 of the American Treaty on Pacific Settlement 1948 ('Pact of Bogotá')[31] provides:

> Any American State which is not a signatory to the present Treaty, or which has made reservations thereto, may adhere to it, or may withdraw its reservations in whole or in part, by transmitting an official instrument to the Pan American Union, which shall notify the other High Contracting Parties in the manner herein established.

16 Sometimes, a restriction can also be agreed between **specifically interested States** irrespective of any geographical proximity.

> The Antarctic Treaty of 1 December 1959 was originally signed by 12 countries active in Antarctica during 1957–1958 and willing to accept the conference invitation of the US government. As the circle of signatories (Argentina, Australia, Belgium, Chile, France, New Zealand, Norway, South Africa, United Kingdom, United States and USSR) was somewhat random, it was agreed to allow accession by those States that have a demonstrated interest in the Antarctic by carrying out substantive research there. On the basis of Art XIII para 1 in conjunction with Art IX para 2, another 16 States were allowed to accede to the treaty regime (and its protocols).

17 However, since the regime of the Antarctic continent touches upon the interest of all States in the common heritage of mankind,[32] such restrictive practice seems **open to criticism**.

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[28] 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, paras 81–83.

[29] See *eg* Art 26 of the 1984 UN Convention Against Torture 1465 UNTS 89, Art 35 of the 1992 Convention on Biological Diversity 1760 UNTS 79. An exception is the 1992 UN Framework Convention on Climate Change 1771 UNTS 107, where the use of the Vienna formula (probably by mistake) led to a discussion whether the Federal Republic of Yugoslavia could become a party thereto or not (*Aust* 116).

[30] An exception is the 1995 Framework Convention for the Protection of National Minorities ETS 157. According to Art 29 para 1 thereof, the Committee of Ministers of the Council of Europe may also invite non-member States of the Council of Europe to accede to the Convention.

[31] 30 UNTS 55.

[32] *J Frakes* The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise? (2003) 21 Wisconsin ILJ 409.

Finally, a typical accession clause the right to accede may be reserved to States invited to do so. Such **invitations** can be dedicated to specific States. This technique is common for example for military alliances. **18**

Art 10 of the 1949 Treaty establishing the NATO[33] provides that any other European State may accede to it upon a unanimous invitation by the parties. On the basis of such specific invitations, NATO gradually increased its membership from originally 12 to nowadays 28 members (United States and Canada plus 26 European States).

In the alternative, an invitation can also be extended to all States. **19**

Arts 81 and 83 VCLT itself reserved accession to Member States of the UN, its specialized agencies or the IAEA, parties to the ICJ Statute or any other State invited by the UN General Assembly. In the 'Declaration on Universal Participation in the Vienna Convention on the Law of Treaties', recorded in the Final Act of the Vienna Conference,[34] the Conference invited the General Assembly to give consideration to the matter of issuing invitations in order to ensure the widest possible participation in the Convention. After the accession of the Federal Republic of Germany and the German Democratic Republic to the UN in 1973, the General Assembly issued an invitation to 'all States' by virtue of Resolution 3233 (XXIX) of 12 November 1974.

b) Non-state Entities

The **offer** of accession can also be **extended to non-State entities**. A famous example is Art 307 UNCLOS, which allows accession of those entities that were invited to sign under Art 305 para 1, which reads: **20**

[33]North Atlantic Treaty 34 UNTS 243.

[34]UNCLOT III 285:

"DECLARATION ON UNIVERSAL PARTICIPATION IN THE VIENNA CONVENTION ON THE LAW OF TREATIES

The United Nations Conference on the Law of Treaties,

Convinced that multilateral treaties which deal with the codification and progressive development of international law, or the object and purpose of which are of interest to the international community as a whole, should be open to universal participation,

Noting that articles 81 and 83 of the Vienna Convention on the Law of Treaties enable the General Assembly to issue special invitations to States which are not Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency, or parties to the Statute of the International Court of Justice, to become parties to the Convention,

1. *Invites* the General Assembly to give consideration, at its twenty-fourth session, to the matter of issuing invitations in order to ensure the widest possible participation in the Vienna Convention on the Law of Treaties;

2. *Expresses the hope* that the States Members of the United Nations will endeavour to achieve the object of this Declaration;

3. *Requests* the Secretary-General of the United Nations to bring this Declaration to the notice of the General Assembly;

4. *Decides* that the present Declaration shall form part of the Final Act of the United Nations Conference on the Law of Treaties."

> This Convention shall be open for signature by: (a) [. . .]; (b) Namibia, represented by the UN Council for Namibia; (c) all self-governing associated States which have chosen that status in an act of self-determination supervised and approved by the United Nations in accordance with General Assembly Resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of such matters; (d) all self-governing associated States which, in accordance with their respective instrument of accession, have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of such matters; (e) all territories which enjoy full internal self-government, but which have not attained full independence in accordance with General Assembly Resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of such matters; [. . .].

21 This formulation allowed the inclusion, for example, of the Cook Islands or the Marshall Islands into the treaty regime at the time. However, **later treaty practice** made recourse to this formula superfluous as both the Cook Islands (after its accession to the WHO in 1984) and the Marshall Islands (after the dissolution of its trusteeship status in 1990) were accepted as States.[35]

c) International Organizations

22 Historically, law-making treaties were not open to international organizations for two reasons. First, most of the international organizations confined the exercise of treaty-making power to the conclusion of seat agreements or other agreements intrinsically linked with their internal functioning. Second, the only international organization that wished to accede to multilateral conventions regulating a certain policy field (namely the then European Community) was prevented from doing so. Based on the socialist theory that international organizations needed universal recognition,[36] Russia and its allies preferred not to grant accession rights to the European Community. A **major shift** occurred in 1982, as **Art 305 para 1 lit f UNCLOS** allowed accession to international organizations according to Annex IX of the Convention. This Annex then defined an international organization as an intergovernmental organization consisting of States, which have conferred competences on matters under the Convention, including the competence to enter into treaties in respect of such matters and laid down a number of specific rules on participation and liability. After formal recognition of the European Community by the socialist countries in 1986, the more elegant term of 'regional economic integration organizations' came into use. A typical 'REIO' clause that has been followed in many other instances stems from Art 22 of the 1992 Framework Convention on Climate Change[37]:

> (2) Any regional economic integration organization which becomes a Party to the Convention without any of its Member States being a party shall be bound by all the obligations under the Convention. In the case of such organizations, one or more of whose members is

[35] Summary of Practice (n 28) paras 85–86.

[36] *Lukashuk* (n 8) 268.

[37] See n 29.

a Party to the Convention, the organization and its Member States shall decide on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organization and the Member States shall not be entitled to exercise rights under the Convention concurrently.

(3) In their instrument of ratification, acceptance, approval or accession regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by the Convention. These organizations shall also inform the Depository, who shall in turn inform the Parties, of any substantial modification in the extent of their competence.

In the alternative, the **international organization can also be named as such**. That has been the practice in the Council of Europe *vis-à-vis* the European Community (now Union).[38] Early Council of Europe conventions, which had not been open for accession by the EC have been made accessible through the adoption of additional protocols,[39] and most newer conventions already contain a clause that allows the Community to become a party straight away. Occasionally, the European Community (Union) is also directly named in certain international commodity agreements as a party. **23**

2. Otherwise Established Agreement Between Negotiating States

Art 15 lit b echoes (*cf* Art 12 para 1 lit b and Art 14 para 1 lit b) in its reference to the establishment of an agreement between negotiating States that accession of other States is allowed. This rule constituted at the time an important deviation from the traditional rules in the field. It is therefore seen as a progressive development of the law reflecting the overall lack of formalism to be discerned in Arts 12 and 15 VCLT.[40] Accordingly, **no examples** can be cited from the time prior to the adoption of the Convention, and there seem to be none from the post-Vienna era either.[41] **24**

3. Subsequent Allowance

Art 15 lit c deals with the more difficult case where the **final clause of a treaty does not provide for accession**, but where all the parties to the treaty subsequently allow **25**

[38] *R Brillat* La participation de la Communauté européenne aux conventions du Conseil de l'Europe (1991) 37 AFDI 819–832.

[39] Art 1 of the 1983 Additional Protocol to the European Agreement on the Exchange of Therapeutical Substances of Human Origin ETS 109; Art 1 of the 1983 Additional Protocol to the European Agreement on the Temporary Importation, Free of Duty, of Medical, Surgical and Laboratory Equipment for Use on Free Loan in Hospitals and Other Medical Institutions for Purposes of Diagnosis or Therapy ETS 110; Art 1 of the 1983 Additional Protocol to the European Agreement on the Exchanges of Blood-Grouping Re-agents ETS 111. For a discussion of the discussions in the Council of Europe, see *P-H Imbert* Le consentement des États en droit international – Réflexions à partir d'un cas pratique concernant la participation de la CEE aux traités du Conseil de l'Europe (1985) 89 RGDIP 353, 374–381.

[40] *A Bolintineanu* Expression of Consent to Be Bound by a Treaty in the Light of the 1969 Vienna Convention (1974) 68 AJIL 672, 682.

[41] *Villiger* Art 15 MN 10 does not mention any practical example; neither does *Aust* 111–113.

such accession. Since "party" means a State which has consented to be bound by the treaty and for which the treaty is in force (Art 2 para 1 lit g), the will of those States who only signed the original treaty is irrelevant.

26 In many cases, the subsequent agreement will take the form of **formal amendment** to the original treaty.[42] However, as Art 15 lit c does not mention a specific formal requirement, it also allows opening up hitherto restricted conventions by informal means between the parties.

> For example, although Art 94 of the 1907 Hague Convention on the Pacific Settlement of International Disputes provided that non-participating States to the Second Hague Peace Conference can only accede to the Convention upon explicit agreement of the parties, Finland, Poland and Czechoslovakia were allowed to accede upon tacit agreement between the parties of the Hague Convention only.[43] In contrast, the PCIJ could not find any indication that the Allied Powers to the 1918 Armistice Convention and the 1919 Spa Protocol with Germany intended to confer a right to Poland to accede to those treaties when they declared *de iure* recognition of Poland. It therefore rejected Poland's contention that it had been allowed to and had actually become a party to those treaties by subsequent tacit accession.[44]
>
> Another interesting case in point is General Assembly Resolution 1903 (XVIII) of 18 November 1963 addressing accession to certain technical and non-political conventions drawn up under the auspices of the League of Nations. The Assembly noted that, according to the terms of those treaties, the Council of the League of Nations was empowered to invite additional States to become parties, but that it had ceased to exist. In view of the succession of the League of Nations by the United Nations, it therefore decided to exercise this power and invited all States to become a party to those conventions (para 1). As the legal basis for this step it "recorded that those members of the United Nations which are parties to the treaties mentioned above assent by the present resolution to the decision set forth in paragraph 1." The resolution hence expressed an informal agreement by the States Parties to the League of Nations Conventions within the meaning of Art 15 lit c VCLT.[45]

27 Another contemporary method of bringing together the consent of parties for the accession of a non-signatory, which had not been expressly allowed in the final clauses, is the **notification by the depositary**. If none of the parties objects to the accession, it is deemed accepted.[46]

III. Accession to International Organizations

28 Accession to international organizations may differ from the prototype of acceding to a bilateral or multilateral treaty as envisaged in Art 15, as such act is subject to the rules of the organization according to Art 5. Indeed, many organizations do not allow accession by a simple deposit of an instrument of accession to the founding

[42] *Bolintineanu* (n 40) 682.

[43] *Ibid* n 50.

[44] PCIJ *Certain German Interests in Polish Upper Silesia* (Merits) PCIJ Ser A No 7, 28–29 (1926).

[45] Final Draft, Commentary to Art 12, 199 para 4.

[46] *Aust* 110.

treaty of the organization (as was done *eg* by early technical unions).[47] Rather, the applicant State may have to undergo a specific **admission procedure** and meet certain substantive criteria before being admitted.[48]

> Accession to the United Nations is only open for peace-loving States that accept the obligations in the Charter and which, in the judgment of the Organization, are able and willing to carry out these obligations. Admission is effected by a decision of the UN General Assembly upon recommendation of the Security Council, according to Art 4 para 2 UN Charter. That means that any permanent member of the Security Council can block the admission of a State to the UN.

Sometimes, **specific terms of accession** need to be negotiated for the incoming member. Such terms can then be laid down in a decision of the organization or a separate accession treaty. **29**

> According to Art XII para 1 of the 1994 Marrakesh Agreement,[49] the WTO is open for accession to any State or separate customs territory possessing full autonomy in the conduct of its external relations and of the other matters governed by the covered agreements. The applicant must negotiate its terms of accession with the WTO. Practically, any applicant conducts bilateral negotiations with any WTO member separately to lay down the substantive trade concessions. At the end of the process, the WTO Ministerial Conference approves accession and agreement on the terms of accession with a two-thirds majority (Art XII para 2). In contrast, the accession treaty of a candidate country for the European Union is concluded between the candidate and all the old Member States under Art 49 para 2 TEU (and not the EU itself).

Finally, it is also possible that **one international organization accedes to another one**. As the European Community was able to become a party to a number of multilateral conventions, it also sought membership in those international organizations, which deal with matters falling under its competence. In order to achieve accession, the above-mentioned REIO clause (→ MN 22) would then have to be inserted into the constitution of the international organization itself, which most often triggers the need for a formal amendment. **30**

> In 1991, the Food and Agriculture Organization amended its Constitution to allow for the membership of the European Community as a "member organization" (Art II paras 3–10 FAO Constitution).[50] Pending a formal amendment to the 1950 Brussels Convention

[47] Compare the remark of Judges *Basdevant*, *Winiarski*, *McNair* and *Read* in their joint dissenting opinion in ICJ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion) [1948] ICJ Rep 82, 84: "The first conclusion that emerges from the reading of Article 4 in its entirety is that the Charter does not follow the model of the multilateral treaties which create international unions and frequently contain an accession clause by virtue of which a declaration of accession made by a third State involves automatically the acquisition of membership of the union by that State."

[48] *JF Marchi* in *Corten*/*Klein* Art 15 MN 34–36.

[49] 1869 UNTS 299.

[50] The FAO Constitution, as amended, is retrievable at www.fao.org/docrep/010/k1713e/k1713e01.htm#P8_10 (last visited 10 January 2011). On the details of the EC's accession to the FAO see *R Fried* The European Economic Community: a Member of a Specialized Agency of the United Nations (1993) 4 EJIL 239 and *J Sack* The European Community's Membership of

Establishing the World Customs Organization,[51] the World Customs Organization Council granted rights and obligations "akin to membership" to the European Community on an interim basis.[52] The European Community was also admitted to a number of technical organizations.[53]

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S Bastid Les traités dans la vie internationale – conclusion et effets (1985).
F Hoffmeister Outsider or Frontrunner? Recent Developments Under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies (2007) 44 CMLR 41–68.
II Lukashuk Parties to Treaties – The Right of Participation (1972) 135 RdC 231–328.
D Mathy Participation universelle aux traités multilatéraux 68 RBDI (1972) 529–567.

International Organizations (1995) 34 CMLRev 1246. On the internal organization of FAO membership by the EC see ECJ (CJ) *Commission v Council* C-25/94 [1996] ECR I-1469.

[51] 157 UNTS 129.

[52] See Council Decision 2007/688/EC of 25 June 2007 on the Exercise of Rights and Obligations Akin to Membership ad interim by the European Community in the World Customs Organisation [2007] OJ L 274/11.

[53] *F Hoffmeister* Outsider or Frontrunner? Recent Developments Under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies (2007) 44 CMLRev 41, 46 *et seq*.

Article 16

Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

(a) their exchange between the contracting States;
(b) their deposit with the depositary; or
(c) their notification to the contracting States or to the depositary, if so agreed.

Contents

A. Purpose and Function

Art 16 sets out how the consent of a State to be bound by ratification, acceptance, approval or accession is completed on the international plane. It thereby fixes the **critical date as of which contractual relations with the other States are established**. However, by enumerating the exchange between the contracting States, the deposit with the depositary or the notification to the contracting States or to the depositary as three different possibilities, it again underlines the flexibility of the Convention with respect to treaty making. **1**

B. Historical Background and Negotiating History

When the habit of ratification after signature was established **in the eighteenth and nineteenth centuries** (→ Art 11 MN 6), the corresponding **custom arose to exchange** those **instruments** as a means of establishing mutual consent to be bound. Being in possession of the other side's instrument of ratification and having a copy of one's own, there could be no doubt that the corresponding consent to be bound by the treaty had been expressed. **2**

This condition was relaxed with respect to certain multilateral treaties. While the General Treaty of the Vienna Act 1815 itself contained the classical formulation **3**

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
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that the ratifications must be exchanged,[1] one of the attached documents, namely the Confederative Act for Germany of 8 June 1815 contained in Art 20 the novelty that all high contracting parties (Austria, Prussia, the Netherlands, Denmark and others) should notify their ratifications within six weeks to the Austrian Chancellery in Vienna. This device was certainly inspired by a need to speed up the entry into force of a multilateral treaty between 17 entities. The next important multilateral treaty of the nineteenth century was the Paris Peace Treaty of 1856 between Russia, the Ottoman Empire, France and the United Kingdom, and the neutral Germany and Austria. Here, the pattern of bilateral treaties was applied again (it was first signed on 30 March 1856, followed by an exchange of instruments of ratification between all representatives on 27 April 1856[2]. It appears that the real **breakthrough** for the method of deposit then occurred with the **Berlin General Act of 1885** and the Hague Peace Conferences of 1899 and 1907.[3] Under the League of Nations, the practice was further consolidated when deposit of the relevant instrument with the Secretary-General was deemed sufficient.[4] Nevertheless, it was unclear whether only the subsequent circulation to the other parties established the necessary mutual consent, or whether receipt of the instrument by the depositary was enough.

4 Against that background, the ***Right of Passage*** **case of 1957** brought some useful **clarifications**. Portugal had accepted the compulsory jurisdiction of the ICJ on 19 December 1955 and filed the application against India only three days later. India objected to the jurisdiction of the Court, arguing that the short time-span between making the declaration and bringing the case had not allowed the UN Secretary-General to circulate the declaration in his function as depository. The Court rejected the objection and found that

> "by the deposit of its Declaration of Acceptance, with the Secretary-General, the accepting State becomes a Party to the System of the Optional Clause in relation to the other declarant States, with all the rights derived from Art 36. The contractual relations between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established '*ipso facto* and without special agreement' by the fact of making the Declaration."[5]

5 In 1962, the ILC adopted Draft Art 15 on exchange or deposit of instruments.[6] Not provoking much thought on the part of the governments, the article was further simplified and renumbered in 1966,[7] as parts of it were transferred to Art 17. In its

[1] Art CXXI General Treaty reads: "The present Treaty shall be ratified and the ratifications exchanged within six months."

[2] See generally on the negotiations of this treaty *W Baumgart* Der Friede von Paris 1856 (1970).

[3] *J Basdevant* La conclusion et la rédaction des traités et instruments diplomatiques autres que les traités (1926) 15 RdC 539, 585–586.

[4] *FO Wilcox* The Ratification of International Conventions (1935) 37.

[5] ICJ *Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125, 146.

[6] [1962-II] YbILC 174.

[7] Final Draft, Text of Art 13, 201.

commentary, the ILC considered in general terms whether deposit of an instrument creates the legal nexus between the parties, or whether the legal nexus only arises upon their being informed by the depositary. With reference to the *Indian Passage* case, it opted for the former solution.[8] The Vienna Conference unanimously adopted Draft Art 13 without any further amendment. In view of the preceding practice, there can be no doubt that Art 16 reflects **customary law**.[9]

C. Elements of Article 16

As can be drawn from the opening phrase ("unless the treaty otherwise provides"), Art 16 sets out **residuary standard procedures** where the treaty does not contain any procedural requirements with respect to ratification, acceptance, approval or accession. **6**

I. Exchange of Instruments

According to Art 16 lit a, the instruments can establish consent to be bound upon their exchange between the contracting States. This mode is **ordinary for bilateral treaties**.[10] States hence agree on the ceremony and venue where the instruments are to be exchanged. They can also agree that the exchange takes place by sending reciprocal letters to each other. In contrast to earlier practice,[11] the person who carries the instrument of ratification, acceptance or approval does not have to produce additional full powers. The fact that he or she is in possession of the instrument is regarded as his or her sufficient authority to proceed with the exchange.[12] **7**

When the exchange is made on the same day, that day also marks the **date of the entry into force** of the bilateral treaty. If the second instrument arrives later, the date of this instrument is decisive. The date of entry into force of the treaty by the exchange of ratification instruments is without prejudice to the right of parties to agree on interim measures pending ratification. **8**

> In the *Arbitral Award of the King of Spain* case, the ICJ had to determine the exact date of entry into force of the treaty between Honduras and Nicaragua of 7 October 1894 regarding the delimitation of their border. Art VIII thereof stipulated that "the Convention shall be submitted in Honduras and Nicaragua to constitutional ratifications, the exchange of which shall take place in Tegucigalpa or in Managua, within sixty days following the date in

[8] Final Draft, Commentary to Art 13, 201 paras 1–4.

[9] *F Horchani* in *Corten/Klein* Art 16 MN 4.

[10] *Aust* 84.

[11] *JM Jones* Full Powers and Ratification (1946) 61–62.

[12] *H Blix* Treaty-Making Power (1960) 53.

which both governments have complied with the stipulation of this article'. The exchange of ratifications actually occurred on 24 December 1894. However, as Art IX of the Treaty also provided for the immediate organization of the Mixed Border Commission, Nicaragua argued that the treaty had therefore already entered into force upon signature. The Court looked at both treaty provisions and the subsequent practice of the parties. It concluded that it was the intention of the parties that the treaty should come into force on the date of exchange of ratifications but that – in the meantime – the Commission might be set up.[13]

9 Exceptionally, the exchange of instruments is also used to bring about **modifications of the treaty**. In such case, the exchange serves to record consent to be bound by the original treaty and the amendments together.

In September 1977, the United States and Panama signed a bilateral treaty. When giving its approval in March and April 1978, the US Senate attached a number of amendments, conditions, reservations and interpretations to the treaty. When the governments exchanged the instruments of ratification, they agreed in the protocol on the exchange ceremony that the treaty shall apply in conformity with the attached conditions.[14]

II. Deposit

10 Art 16 para b mentions the possibility to deposit the instrument with the depositary of the treaty. This is the traditional way of expressing consent to a multilateral treaty by way of ratification, acceptance, approval or accession. The **consent is internationally declared on the date on which the instrument arrives with the depositary**. Subsequent notification to the other parties is immaterial in this regard.

In the *Cameroon v Nigeria* case, Nigeria filed a preliminary objection against the jurisdiction of the Court. It argued that Cameroon's declaration to accept the Court's compulsory jurisdiction had been deposited on 3 March 1994, but only circulated by the Secretary-General eleven months later. Accordingly, Cameroon's application of 29 March 1994 had been premature in Nigeria's view, as Nigeria did not know and could not have known about Cameroon's acceptance. The Court confirmed its earlier ruling in the *Right of Passage* case (→ MN 4) and held that "this general rule is reflected in Articles 16 and 24 of the Vienna Convention: the deposit of instruments of ratification, acceptance, approval or accession to a treaty establishes the consent of a State to be bound by treaty; the treaty enters into force as regards that State on the day of deposit."[15]

11 **Upon receipt**, the depositary will proceed with the instrument as provided for in the treaty. In UN practice, he or she will usually confirm receipt and make an announcement in the UN Journal prior to circulating a notification to the other

[13] ICJ *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v Nicaragua)* [1960] ICJ Rep 192, 208.

[14] *S Bastid* Les traités dans la vie internationale – conclusion et effets (1985) 44.

[15] ICJ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening)* (Preliminary Objections) [1998] ICJ Rep 275, para 31.

parties to the agreement.[16] Pending the entry into force of the treaty, the State is still allowed to withdraw the deposit of its instrument from the depositary.[17]

> In 1950, the Greek government had deposited an instrument of acceptance of the 1948 Convention on the Intergovernmental Maritime Organization. Prior to the entry into force of the Convention in 1958, it withdrew that instrument in 1952. It then resubmitted acceptance of the Convention in 1958 with a reservation. With that technique it complied with the rule that reservations need to made at the time of deposit of the instrument.[18]

Had the treaty already entered into force, however, the legality of such withdrawal would have had to have been assessed under the terms of the treaty.

III. Notification

Art 16 lit c allows **substitution of the transmission of the instrument itself by a simple notification** either to the contracting States or to the depositary, if so agreed. On the one hand, this option entails a further simplification and expedition of matters, but on the other hand it also creates certain risks for legal security. In contemporary practice, it is scarcely, if ever, done.[19] **12**

In contrast, States may regularly have recourse to another type of notification. Rather than notifying the other side that an instrument of ratification, acceptance, approval or accession has been issued, they may **notify the other side that their domestic requirements have been fulfilled**. Here, it is not the issuance of the instrument plus notification, which expresses the consent to be bound, but the corresponding notifications about the fulfilment of domestic requirements, as foreseen in the final clauses of the given treaty. Such mode of expressing consent to be bound is covered by the **'other means' clause in Art 11** and not by Art 16 lit c.[20] The same is true for the negative notification in some Council of Europe conventions: again, as the States have never issued any instrument of ratification, acceptance, approval or accession in the first place, there is no notification in the sense of Art 16 lit c.[21] Rather, the non-objection to the entry into force of the treaty within a certain period marks the consent to be bound (→ Art 11). **13**

[16] *F Horchani* in *Corten/Klein* Art 16 MN 23.

[17] 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, para 157.

[18] *Ibid* para 158.

[19] *Aust* 106.

[20] Dissenting *F Horchani* in *Corten/Klein* Art 16 MN 31.

[21] *Ibid* MN 32.

Article 17

Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles 19 to 23, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Contents

A. Purpose and Function

Art 17 para 1 sets out the general rule that ratification must extend to the entire treaty, unless the treaty permits otherwise or the other contracting States so agree. Art 17 para 2 contains the corresponding rule that an expressly allowed choice between different treaty provisions should be made in a clear manner. The whole article is therefore designed to **provide for clarity as to when and how partial consent to be bound by a treaty can be expressed**. It is scarcely relevant in practice or jurisprudence and may be seen as one of the more superfluous provisions of the Convention. **1**

B. Historical Background and Negotiating History

Historically, **consent to be bound by a treaty extended to the treaty text in its entirety**. If a State wished to restrict its consent to be bound to certain provisions, it made a reservation. Accordingly, the question of partial consent did not arise in early times. **2**

In the aftermath of World War I, an interesting problem arose with respect to **membership in the ILO**. The ILO Constitution was brought into force as part of the four Paris peace treaties.[1] Given that, under the Treaty of Versailles, the ILO was considered a permanent machinery associated with the League of Nations (Art 427 Treaty of Versailles) and that the expenses of the organization were met out of the general funds of the League (Art 399 Treaty of Versailles), the question **3**

[1] Part XIII of the 1919 Treaty of Versailles, Part XIII of the 1919 Treaty of St-Germain-en-Laye, Part XII of the 1919 Treaty of Neuilly-sur-Seine, Part XIII of the 1920 Treaty of Trianon.

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arose whether a State could become a member of the ILO only, without being a member of the League of Nations. Despite a textual indication that membership could only be acquired through membership of the League,[2] in 1919, the ILO allowed membership of the non-League countries Germany and Austria. Brazil's membership of the ILO was also unaffected when the former left the League of Nations in 1928.[3] Remarkably, in 1934, also, the US Congress authorized the President to accept, for the United States, the quality of a member of the ILO without assuming any obligation under the League of Nations Covenant.[4] Indeed, on 22 June 1934, the International Labour Conference extended an invitation to the United States, which then became a member of the ILO upon writing a letter of acceptance to the Director of the International Labour Office on 20 August 1934. The fact that the United States became a member of the ILO without ratifying the Treaty of Versailles implied the possibility of expressing consent for parts of the treaty only,[5] even in the absence of a final clause to that effect.

4 After World War II, a number of international conventions resorted to the **technique of 'offering' certain provisions** to the States. Rather than striving for an equal level between all States Parties, the idea was to promote the advancement of some protection by leaving a choice for the States, where they are best prepared to take international obligations. Examples for such conventions could be found in the area of dispute settlement,[6] labour law[7] or social law.[8]

5 The ILC had first included the substance of today's Art 17 in Draft Art 15 of the 1962 Draft.[9] In 1965, it separated the subject, whereupon Draft Art 14 of the 1966 Final Draft[10] was formulated. As no debate in the Vienna Conference arose, Art 17 VCLT was adopted unanimously. It may be assumed that the provision reflects **customary law**.[11]

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[2]According to Art 387 para 2 Treaty of Versailles, the original members of the League of Nations were also members of the ILO; moreover, according to the same provision, being admitted to the League at a later stage also conferred membership to the ILO.

[3]*MO Hudson* The Membership of the United States in the International Labor Organization (1934) 28 AJIL 669, 672–673.

[4]Resolution of Congress of 19 June 1934, 78 Congressional Record 12359, cited in full by *Hudson* (n 3) 669–670.

[5]*S Bastid* Les traités dans la vie internationale – conclusion et effets (1985) 69 n 1.

[6]Art 38 of the 1949 Revised General Act for the Peaceful Settlement of International Disputes 71 UNTS 102; Art 34 of the 1957 European Convention on the Peaceful Settlement of International Disputes ETS 23.

[7]See *eg* Art 25 of the 1947 ILO Convention No 96 on Labour Inspection; for more ILO examples see *C Hilling* in *Corten/Klein* Art 17 MN 5.

[8]Art 20 of the 1961 European Social Charter ETS 35; Arts A and B of the 1996 Revised European Social Charter ETS 163.

[9][1962-II] YbILC 174 *et seq*.

[10]Final Draft, Commentary to Art 14, 201 para 1.

[11]*C Hilling* in *Corten/Klein* Art 17 MN 8.

C. Elements of Article 17

Art 17 para 1 speaks of consent of a State to be bound by part of the treaty. Such an expression of will is only valid if the treaty so permits or the other contracting States so agree. Such agreement may be reached especially during the negotiations. **6**

Partial ratification is **without prejudice to the regime on reservations** as laid down in Arts 19–23. That means that a State can also make specific reservations on the part of the treaty on which it expressed consent to be bound. **7**

> An example where a treaty allowed both partial ratification and reservations thereto is the Revised General Act for the Pacific Settlement of International Disputes of 1949. While Art 38 set out the possibility to ratify only parts of the Act, Art 39 enumerated the allowed content of possible reservations.

Art 17 para 2 deals with the more common situation of where the treaty permits a choice between different provisions. States may be given the choice of accepting a certain minimum number of provisions[12] or must accept one category of provisions, while being free within another category.[13] Another example is Art 4 para 3 CCW, which permits the choice between at least two out of three protocols attached to the Convention. **8**

Art 17 para 2 requires that **a State makes clear to which provisions its consent to be bound relates**. When the depositary receives an instrument of partial ratification, it will verify whether that instrument complies with the provisions of the treaty in question. **9**

> When the UN Secretary-General received an instrument of accession to the 1980 Convention on Certain Conventional Weapons "and protocols" without the indication of which protocols the State concerned was also accepting, he deferred the deposit of the instrument until he had received this indication.[14]

Selected Bibliography

MO Hudson The Membership of the United States in the International Labor Organization (1934) 28 AJIL 669–684.

[12] Art 12 of the 1985 European Charter of Local Self-Government ETS 122.

[13] Art 2 of the 1992 European Charter on Regional and Minority Languages ETS 148, requiring the ratification of Part II on the protection of the language in question, while leaving a choice on Part III concerning the promotion of such languages.

[14] 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, para 146.

Article 18

Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Contents

A. Purpose and Function

In modern international practice, the process of concluding a treaty usually runs through different stages, beginning with negotiations, to the adoption of the text, signing and ratification by the parties, and leading up to the entry into force in accordance with the requirements set out in the treaty. Arts 9 to 17 VCLT refer to this process by describing some of its stages and setting up rules for them. The **multi-stage treaty-making process** can take a considerable amount of time, sometimes years, to be concluded, in which time period the provisions of the treaty are not binding on the parties (unless, of course, a provisional application has been agreed upon in accordance with Art 25 VCLT). **1**

Art 18 sets out an obligation for those States that have committed themselves in a formal way to a treaty, but are not yet bound by that treaty itself. The provision thereby **protects the negotiated agreement** between the (future) parties to the **2**

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
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treaty so that, when the time comes for ratification, the rationale of the agreement is still in place, to become the valid object of an expression of consent to be bound. Together with the object of consent, Art 18 protects **the legitimate expectation of the other participants** in the treaty-making process that a State which has expressed its acceptance of the treaty, albeit not yet in binding form, would not work against the object of its acceptance. This protection is of particular significance in the time period between signature and ratification and between ratification and the entry into force of the treaty, since at those points the States have used formal acts of treaty-making to express their acceptance of the treaty.

3 The formality of that expression creates a basis for reliance and trust on part of the other participants, which Art 18 protects by **creating an interim obligation** for every State having expressed its acceptance in that manner. That obligation does not give full effect to the substance of the treaty, which could, pending the entry into force, only be done by the instrument of provisional application (→ Art 25). Instead, Art 18 creates an autonomous obligation, taking the purpose of the treaty as a point of reference and protecting it by means of a reduced obligation: the States concerned are not bound to comply with the treaty, but not to destroy its very essence, thus not to render its entry into force *de facto* meaningless.

4 The interim obligation laid down in Art 18 is basically an obligation of good faith, thus an explicit **manifestation of the general principle of good faith**,[1] which is inherent in the law of treaties, and indeed in the whole of international law.

> Art 18 has even been considered a codification (sic!) of the principle of good faith by the European Court of First Instance.[2]

If some consider the legal rationale behind Art 18 to be the prohibition of abuse of rights,[3] rather than the principle of good faith, this does not alter the legal background of the provision fundamentally. Since the interim obligation set out Art 18 is, therefore, **an autonomous obligation under general international law**, and not deriving from the treaty itself, it cannot be seen as a retroactive extension of the principle of *pacta sunt servanda*, and thus an exception to the non-retroactivity principle.[4] Furthermore, it creates neither an exception to the *pacta tertiis* rule, [5] nor to Art 24 VCLT and the rules on the entry into force of a treaty.

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[1] ILC Final Draft, 202 para 1; *W Morvay* The Obligation of a State Not to Frustrate the Object of a Treaty Prior to its Entry into Force (1967) 27 ZaöRV 454; *Villiger* Art 18 MN 5; *J Klabbers* Strange Bedfellows: The 'Interim Obligation' and the 1993 Chemical Weapons Convention in: *E Myjer* (ed) Issues of Arms Control Law and the Chemical Weapons Convention: Obligations Inter Se and Supervisory Mechanisms (2001) 11, 14. *Cf* also Art 9 Harvard Draft 778: "under some circumstances, however, *good faith* may require that [. . .]" (emphasis added).

[2] ECJ (CFI) *Greece v Commission* T-231/04 [2007] ECR II-63, paras 85–86.

[3] *MA Rogoff* The International Legal Obligations of Signatories to an Unratified Treaty (1980) 32 Maine LR 263, 272 and 288–296. Explicitly undecided *PV McDade* The Interim Obligation Between Signature and Ratification of a Treaty (1985) 32 NILR 5, 18 and 27.

[4] *Sinclair* 86; *Villiger* Art 18 MN 6.

[5] *Sinclair* 99.

Considering that State practice and international jurisprudence prior to the drafting of the VCLT was sparse and incoherent, the inclusion of Art 18 in the Convention was, **at the time, very much an act of progressive development**, rather than a codification of pre-existing customary law.[6] The point is disputed, however, with some authors claiming a customary law character already for the 1960s,[7] and referring to the ILC, which itself considered in its Final Draft the obligation laid down in draft Art 15 to be "generally accepted".[8] For the present time, and as a consequence of Art 18 being in force for 30 years, however, the rule is generally **accepted to reflect customary international law**[9] – even if, as *Aust* sees it, there "is virtually no practice in the application of the provision"[10] subsequently to the coming into force of the VCLT. **5**

The **German Constitutional Court** referred in 2003 to Art 18 as containing a prohibition to frustrate the purpose of a treaty and applied that principle to an extradition treaty between India and Germany which had not yet been ratified by the parties. [11]

In *Öcalan v Turkey* (2003) the **ECtHR** pointed out that Turkey complied with the interim obligation pursuant to Art 18 when she suspended the implementation of capital sentences after having signed Protocol No 6 to the ECHR.[12]

In 2004, the Court of Appeals of Santiago (Chile) in the ***Miguel Angel Sandoval* case** set aside a national amnesty law which prevented the criminal prosecution of state agents involved in the disappearance of a Chilean national. The Court relied on Art 18 VCLT and held that to apply the amnesty law would have amounted to defeating the object and purpose of the 1994 Inter-American Convention on the Forced Disappearance of Persons, which Chile had signed but not ratified.[13]

In 2007, the **ECJ,** in a case concerning a Memorandum of the EU Member States on the sharing of the costs of their representations in Nigeria, turned to the principle of good faith as a rule of customary international law and explicitly called Art 18 a codification of that principle (!),[14] which the Court of First Instance had already done before in the *Opel Austria* case.[15] In its further reasoning, however, it becomes clear that the Court of First Instance was simply applying the good faith principle as such, and not the interim

[6] *Cf Sinclair* 43; *L Boisson de Chazournes*/*A-M la Rosa*/*MM Mbengue* in *Corten*/*Klein* Art 18 MN 1 and 7; *Klabbers* (n 1) 12; *DP O'Connell* International Law, Vol 1 (2nd edn 1970) 223–224.

[7] *Eg*, *Morvay* (n 1) 458; *Rogoff* (n 3) 284; *JS Charme* The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma (1992) 25 George Washington JIL & Economy 71, 76–85.

[8] ILC Final Draft, 202 para 1.

[9] Beside the authors named in n 7, *Villiger* Art 18 MN 20; *Klabbers* (n 1) 12; *Reuter* MN 110; *McDade* (n 3) 13 and 25; *L Boisson de Chazournes*/*A-M la Rosa*/*MM Mbengue* in *Corten*/*Klein* Art 18 MN 21.

[10] *Aust* 94. But see the examples of State practice given by *McDade* (n 3) 12–13, citing official statements from the 1970s of the Governments of Canada, the Netherlands, Switzerland and the United States in confirmation of the interim obligation.

[11] Federal Constitutional Court (Germany) 108 BVerfGE 129, 140–141 (2003).

[12] ECtHR *Öcalan v Turkey* (GC) App No 46221/99, 12 March 2003, para 185.

[13] Case reported by *Palchetti* in The Law of Treaties Beyond the Vienna Convention (2011), 25, 33-34; the court documents in Spanish can also be found at www.haguejusticeportal.net.

[14] ECJ (CFI) *Greece v Commission* (n 2) paras 85–86.

[15] ECJ (CFI) *Opel Austria v Council* T 115/94 [1997] ECR II-39, paras 90–91.

obligation as one of its concrete emanations.[16] Also, the Court of Justice accepted on appeal in that case the "customary principle of good faith" as *ratio decidendi*, but did not mention Art 18 at all. [17]

The **Inter-American Commission on Human Rights** mentioned Art 18 as a binding rule of international law (even if erroneously as one of treaty interpretation), when it held in the *Mossville* case of 2010: "While the United States, as a signatory of the American Convention (*scil*: on Human Rights) is obliged under general principles of treaty interpretation to refrain from acts which would defeat its object and purpose, this instrument is not binding upon the State [. . .]."[18]

6 Occasionally **specific treaty provisions** are agreed, which seek to give some kind of material content to the general principle expressed in Art 18. Examples can be found in the practice of accession to international organizations, when the new Member States are partly included in the organization's procedures, before their accession comes legally into force.

Such was *eg* agreed in an instrument entitled "Procedure for the Adoption of Certain Decisions and Other Measures to Be Taken During the Period Preceding Accession", which was annexed to the Final Act signed with the Treaty of Accession of Denmark, Norway, Ireland and the United Kingdom to the European Communities (1972); the instrument provided, *inter alia*, that during the period preceding accession certain proposals or communications of the Commission be brought to the knowledge of the acceding States, and that consultations on that proposals take place in an Interim Committee.[19]

B. Historical Background and Negotiating History

7 The obligation to refrain from acts that might affect a treaty that has been signed but not yet ratified, originated in **express treaty clauses** drawn up since the late nineteenth century, which sought to protect the *status quo* in the interim period between signature and ratification.

The most famous example can be found in Art 38 of the General Act of Berlin (1885): "En attendant les Puissance signataires du présent Acte Générale s'obligent à n'adopter aucune mesure qui serait contraire aux dispositions du dit Acte."[20]

The Protocol to the Convention for the Control of Trade in Arms and Ammunition (1919) provided: "At the moment of signing the Convention [. . .] the undersigned Plenipotentiaries declare in the name of their respective Governments that they would regard it as contrary to the intention of the High Contracting Parties and to the spirit of the Convention that, pending the coming into force of the Convention, a Contracting Party should adopt any measure which is contrary to its provisions."[21]

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[16] *Cf* ECJ (CFI) *Greece v Commission* (n 2) para 99; similarly *Opel Austria v Council* (n 15) para 93.

[17] ECJ (CJ) *Greece v Commission* C-203/07 P [2008] ECR I-8161, para 64.

[18] IACHR *Mossville Environmental Action Now v United States*, Report No 43/10, 17 March 2010, para 22; see also the earlier *Juan Paul Garza v United States*, Report No 52/01, Case 12.243, 4 April 2001, para 94 with n 48.

[19] *Cf* 1 UKTS 292 = [1972] OJ L 73/203, sub I; reported by *Sinclair*, 43–44.

[20] 165 CTS 485, 502.

[21] Cited by *McDade* (n 3) 11, and by *T Hassan* Good Faith in Treaty Formation (1981) 21 VaJIL 443, 452.

> Art 19 of the Washington Treaty for the Limitation of Naval Armament (1922) provided: "the United States, the British Empire and Japan agree that the *status quo* at the time of the signing of the present Treaty, with regard to fortifications and naval bases, shall be maintained in their respective territories and possessions specified hereunder".[22]

The adoption of such explicit provisions may indicate that, at the time, there was an international *opinio iuris* in favour of an interim obligation as a general rule of international law, but, as always, the apparent need to include provisions of the described kind can just as well be interpreted in the opposite direction, that is to indicate the absence of a general interim obligation. In hindsight, however, it is taken as evidence of an emerging customary rule, prohibiting action which tends to defeat a treaty's object and purpose.[23]

International jurisprudence of the early twentieth century does not establish clearly the existence of interim obligation as a general rule of law at the time. In two cases, national courts were concerned with interim obligations of States in the period between the signature of the Treaty of Versailles in 1919 and its entry into force in 1920. **8**

> In the *Bismarck* case[24] the Polish Supreme Court held that transfer of property of the Prussian Treasury to individuals was illegal because it was contrary to the stipulations and the spirit of the Versailles Treaty. In the *Schwerdtfeger* case,[25] the Danish Provincial Court found that a lease of property was calculated to effect or weaken the significance of the forthcoming international cession under the Treaty of Versailles of an island to Denmark.

In the *Polish Upper Silesia* case before the PCIJ in 1926, Poland argued that Germany had violated international law by alienating, prior to ratifying the Treaty of Versailles, certain property that was to be ceded to Poland according to that Treaty. The Court avoided the issue, if there was actually something like a legal interim obligation, by stating that:

> "the Court may confine itself to observing that, as, after its ratification, the Treaty did not, in the Court's opinion, impose on Germany such obligation to refrain alienation, it is, *a fortiori*, impossible to regard as an infraction of the principle of good faith Germany's action in alienating the property before the coming into force of the Treaty which had already been signed."[26]

The only international decision of the time that explicitly rests on an interim obligation arising from a signed treaty is the ***Megalidis* case** decided by the Greco-Turkish Mixed Arbitral Tribunal in 1928. After having signed the Treaty of Lausanne in 1923, but prior to its coming into force, Turkey had seized property of a Greek national, claiming that the property was exempted from restitution by virtue of Art 67 of that Treaty. The Tribunal held that the seizure was illegal since

[22] 25 LNTS 201, 209.

[23] *Hassan* (n 21) 453.

[24] Supreme Court (Poland) *Polish State Treasury v von Bismarck* [1923/24] 2 AD 80–81 (1923).

[25] Eastern Provincial Court (Denmark) *Schwerdtfeger v Danish Government* [1923/24] 2 AD 81–83 (1923).

[26] PCIJ *Certain German Interests in Polish Upper Silesia* (Merits) PCIJ Ser A No 7, 39 (1926).

Turkey was obliged to refrain from any action that might impair the operation of the Lausanne Treaty:

> "Il est de principe que déjà avec la signature d'un traité et avant sa mise en vigueur, il existe pour les parties contractantes une obligation de ne rien faire qui puisse nuire au traité en diminuant la portée de ses clauses [. . .] ce principe n'est qu'une manifestation de la bonne foi."[27] For its reasoning, however, the Tribunal did not rely on State practice but on the scholarly opinion of *Fauchille*.

9 The **Harvard Draft of 1935** on the law of treaties formulated for the first time an interim obligation arising from the principle of good faith in a somewhat codified version. Art 9, entitled "Obligation of a signatory party prior to the entry into force of a treaty," stated that:

> under certain circumstances [. . .] good faith may require that pending the coming into force of the treaty the States shall, for reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult.[28]

However, as can be clearly seen from the commentary to that provision,[29] the obligation was seen to be of moral, rather than of a legally binding character.

10 **In the ILC**, it was SR *Waldock* who, following the example set by SR *Lauterpacht*[30] and SR *Fitzmaurice,*[31] regarded the interim obligation as being a legal duty and introduced four provisions on the subject in his first report in 1962. In his view, the interim obligation was to arise in four situations: first, upon adoption of the treaty text, second, for treaties subject to ratification in the time between signature and the decision on ratification or acceptance, third, for treaties not subject to ratification that were to come into force upon a future date in the time period between the consent to be bound and the entry into force, and fourth, for ratifying States for the time pending the entry into force of the treaty unless the entry into force is unduly delayed.[32] In those situations, a State was to refrain from any action "calculated to frustrate the objects of the treaty or to impede its eventual performance". The Commission agreed with *Waldock*'s proposals and ordered the Drafting Committee to combine all provisions into one single article.[33] The Drafting Committee dropped *Waldock*'s formulation "or to impede its eventual performance" and extended the interim obligation to States that had only entered into negotiations. The new article eventually became draft Art 17 of the 1962 Draft.[34]

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[27] *Megalidis v The State of Turkey* 8 TAM 390, 395 (1928); summary reprinted in (1927-1928) 4 AD 395; French quotation also at *McDade* (n 3) 14.

[28] Harvard Draft 778.

[29] *Ibid* 780–781.

[30] *Cf Lauterpacht* I 91 and 110.

[31] *Cf Fitzmaurice* I 113 and 122

[32] *Waldock* I 39–53.

[33] [1962-I] YbILC 179 para 3.

[34] [1962-II] YbILC 175.

However, a number of States expressed the opinion that the Commission had gone too far in including an interim obligation for States that had merely entered into negotiations,[35] arguing that such an extension lacked support in international practice.[36] Consequently, SR *Waldock* proposed to delete the extension,[37] but the Drafting Committee kept it in the text and the ILC adopted it as draft Art 15 lit a of its Final Draft in 1966.[38] The wording had also been changed from "acts calculated to frustrate the objects" to "tending to frustrate the objects", thus bringing a more objective tone into the description of the illegal behaviour.[39] **11**

During the **Vienna Conference** in the Committee of Whole, the United Kingdom proposed to delete the entire Art 15, which was rejected. However, a proposal to delete Art 15 lit a was adopted on a roll-call vote by 50 to 33 with 11 abstentions.[40] In the Plenary, the Polish delegation proposed to add to the provision the situation that a State "has changed exchanged instruments constituting a treaty" as an equivalent to signature,[41] which amendment was adopted to give the final form to what now constitutes Art 18. **12**

C. Elements of Article 18

Art 18 is characterized by a somewhat inverted **structure**: the provision begins with a *chapeau* that stipulates the content of the interim obligation (→MN 30), followed by two paragraphs laying down the conditions under which the interim obligation applies (→ MN 14 and → MN 23). These paragraphs distinguish two situations, which bring the interim obligation into operation and set out, for each of the situations, a condition under which the obligation comes to an end. Both situations for the application of the interim obligation describe a particular stage in the common treaty-making procedure, as it is envisaged under the VCLT. The interim obligation that they bring into operation is the same for both situations. **13**

[35] *Cf eg* the comments by the governments of Australia, Canada, Finland, Japan, the Netherlands, Poland and Sweden, [1966-II] YbILC 279, 284, 292, 315, 323 and 338.

[36] UNCLOT I 97 *et seq*.

[37] *Waldock* IV 42 *et seq*.

[38] ILC Final Draft, 172. Art 15 lit a ran: "A State is obliged to refrain from acts tending to frustrate the object of a proposed treaty when (a) it has agreed to enter into negotiations for the conclusion of the treaty, while these negotiations are in progress."

[39] The ILC Drafting Committee claimed that the change was only made in the interest of clarity and did not widen the interim obligation, *cf* UNCLOT I 361.

[40] UNCLOT III, 131 para 167.

[41] UN Doc A/CONF.39/L.16, UNCLOT III.

I. Interim Obligation Triggered Before Consent to Be Bound (lit a)

14 Art 18 lit a refers to situations where a State has in a formal way accepted a negotiated treaty, but has **not yet expressed its consent to be bound** by the treaty in the manner agreed upon, which is why it can at any time end the interim obligation by "making its intention clear not become a party".

1. Treaty Subject to Ratification, Acceptance or Approval

15 The provision applies to treaties the conclusion of which has been agreed by the parties to occur **in successive stages**, and where the legally decisive of those stages, *ie* ratification, acceptance or approval (*cf* Arts 11–17), is still pending for the State concerned. The legitimate expectations protected in lit a are based on the fact that the State has entered the process of concluding the treaty, which it has not yet completed or aborted, that it has, in other words, established the "provisional status", which the ICJ ascribed to the signatory State in the *Genocide Convention* opinion.[42] Treaties that are concluded in a one-stage procedure (*eg* by means of signature only), as well as accessions to treaties which are effected through only one formal act, do not fall under lit a.

2. Signature or Exchange of Instruments

16 The scope *ratione temporis* of the interim obligation under lit a is, at its starting point, defined by reference to the signing of treaty or the exchange of instruments constituting the treaty. The provision refers to **the final signature**, not to the initialling or signature *ad referendum* which are both clearly distinguished from signature in Art 10 lit b VCLT.[43] Also, lit a does not refer to the signature within the meaning of Art 12 VCLT, since that provision addresses signature as an act of expressing the consent of a State to be bound by the treaty, thus an act not subject to ratification or approval. Similarly, the exchange of instruments envisaged in lit a must, by the fact that it occurs subject to ratification, *etc*, be distinguished from the exchange of instruments referred to in Art 13 VCLT.

17 The act of signing must, in order to give rise to the interim obligation under lit a, be **legally effective and binding**, thus it must have been carried out by a person acting with the required official capacity and in the appropriate form. In case of multilateral treaties that are opened for signature for a defined period of time, only the actual signing brings lit a into application. Art 18 does apply irrespective of any intention, which the State might pursue with its signature.

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[42] *Cf* ICJ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15, 28.

[43] *Fitzmaurice* I 122 para 58; *L Boisson de Chazournes/A-M la Rosa/MM Mbengue* in *Corten/Klein* Art 18 MN 42.

3. Making the Intention Clear Not to Become a Party

The interim obligation under lit a ends as soon as the State makes its intention clear not to become party to the treaty. Thus, the State itself is able, by aborting the process of concluding the treaty, to create a situation where the interim obligation can no longer be violated because it is no longer binding for that State. The possibility of bringing the obligation to an end in this manner illustrates the **sovereign will of the State *not* to conclude the treaty** in question. **18**

Art 18 lit a confirms, therefore, the general principle of international law that a State, which has signed a treaty subject to ratification, is not by that fact alone under a legal obligation to actually ratify that treaty, except, of course, where the parties agreed otherwise.[44] In principle, however, **ratification is a discretionary act**, even for signatory States, and may be withheld for any reason. **19**

> Thus, already the Harvard Draft on the law of treaties of 1935 stated in its Art 8: "The signature of a treaty on behalf of a State does not create for that State an obligation to ratify the treaty."[45]

A signatory State is therefore entitled under international law to declare at any time that it is not going to ratify the treaty, *ie* that it is withholding its consent to be bound by it. In practice, most prominently relating to the US withdrawal from the Rome Statute in May 2002,[46] such action by a signatory State became known as **"unsigning"** [47] (→ Art 12 MN 26).

However, Art 18 lit a is silent on **the means by which a State has to express** its withdrawal from the treaty, *ie* its intention not to become a party to it, in order to bring the interim obligation to an end. The provision simply requires that the State wishing to do so "make the intention clear". From the context and purpose of Art 18 itself, it may safely be concluded that an implicit action contrary to the object and purpose of the treaty does as such not suffice in this respect,[48] because otherwise Art 18, in particular its prohibition to defeat object and purpose, would become meaningless. In fact, it may be considered to be a further purpose of the provision to ensure that States make their intentions clear by other means than by committing such acts.[49] **20**

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[44] *R Bernhardt* Völkerrechtliche Bindungen in der Vorstadien des Vertragsschlusses (1957/58) 18 ZaöRV 652, 659–660; *JP Cot* La bonne foi et la conclusion des traites (1968) 4 RBDI 140, 150; *PD O'Connell* International Law, Vol 1 (2nd edn 1970) 222; *Rogoff* (n 3) 267; *McDade* (n 3) 10 in n 20; *J Verhoeven* Droit International Public (2002) 385. A proposal to include a duty to submit a signed treaty to ratification was rejected early in the ILC's work on the law of treaties, *cf* [1951-I] YbILC 37–39 and 156–157.

[45] Harvard Draft 769.

[46] *Cf* 2009 Multilateral Treaties Deposited with the Secretary General, UN Doc ST/LEG/SER.E/21 Vol II 192 note 8 (ch XVIII.10).

[47] *Aust* 117; *ET Swaine* Unsigning (2003) 55 Stanford LR 2061 *et seq*.

[48] *McDade* (n 3) 24; *Klabbers* (n 1) 17; *Swaine* (n 46) 2082. The point had been raised by the French delegate at the Vienna Conference, *cf* UNCLOT I 100 para 45.

[49] *ME Villiger* Customary International Law and Treaties (1985) MN 472.

21 Moreover, since by signing the treaty, the State expressed its acceptance in a formal manner, it seems only natural that the 'clear' expression of the intention to invalidate the signature would require **some measure of formality**; in any case, it should be as final and explicit as the act of signing the treaty had been. The normal way to make that intention clear would be to send a diplomatic note to that effect to the depositary of the treaty, but any other kind of official declaration would, of course, be equally appropriate.

> When the US Government declared that it did not intend to ratify the **Rome Statute** on the ICC, which the previous US administration had signed on 31 December 2000, it sent on 6 May 2002 a formal note to the UN Secretary-General, in his capacity as depositary of that treaty.[50]
>
> The practice of the United States, however, is not entirely uniform in this respect. When the US Senate declined ratification of the **Comprehensive Nuclear Test Ban Treaty** in 1999 and the United States subsequently declared that it would not become a party to that treaty in various fora, it still remained member of the Preparatory Commission and thus participated in arrangements of the treaty for its provisional application. The least that can be said is that this was not a clear-cut case of ending the interim obligation under Art 18 lit a.[51]

22 But, as Art 18 lit a does not set up any formal requirement for "making the intention clear" not to ratify, the **implied expression** of that intention cannot, as a matter of principle, be excluded. For the sake of clarity and reliability in international treaty relations, however, implied conduct should only be sufficient for the purpose of "unsigning" under certain circumstances. If the required intention of a State has become known through its public conduct to other signatory States, and those other States are, as a consequence, aware of that intention, this might, depending on the circumstances, add up to a sufficiently clear position for bringing the interim obligation to an end.[52] On the other hand, the mere refusal to submit a signed treaty for **legislative consent**, or the rejection of the treaty on part of the legislation may be based on considerations of domestic or constitutional policy and does not, as such, make the foreign-policy intentions of that State sufficiently clear, at least not clear enough for the purposes of lit a.[53]

II. Interim Obligation Triggered by Consent to Be Bound (lit b)

23 Art 18 lit b applies when a State – which is then a contracting State, as defined by Art 2 para 1 lit f VCLT – has expressed, in the required manner, its consent to be bound by the treaty, but this does not yet bring the treaty into force. Usually, this

[50] *Cf* n 45.

[51] *A Michie* The Provisional Application of Arms Control Treaties (2005) 10 Journal of Conflict and Security Law 345, 369–370.

[52] *Cf Villiger* Art 18 MN 15–16; *Hassan* (n 21) 456–457, both referring to the fact that, at the Vienna Conference, a Malaysian proposal to change the words to "expressed its intention in the clearest terms" had been refused (UNCLOT I 131).

[53] Point raised by *Swaine* (n 47) 2082–2083 in n 96.

is the case with multilateral treaties which require that all or a certain number of parties have expressed their consent to be bound (*eg* ratified the treaty), or that a certain period of time elapses after the necessary number of ratifications has been attained. Art 18 lit b applies in the interval between the valid declaration of consent to be bound of each contracting State and the coming into force of the treaty for that State. Since in lit b the **State has already done everything necessary** on its part to make the treaty enter into force, it seems natural to expect that its behaviour is to a greater extent oriented towards the content of the treaty than for signatory States under lit a: at this final stage of the conclusion of the treaty, the sovereign freedom of action of States deserves much less protection than, for example, under lit a.[54]

1. Expressing Consent to Be Bound

The proviso in lit b refers, without any limitation or qualification, to the expression by a State of its consent to be bound by the treaty. It encompasses, therefore, **all means which Art 11 VCLT envisages** for that kind of expression. Which means applies to the treaty in question must be established according to its terms or by agreement of its parties. Under the conditions of Art 12 VCLT (→ Art 12 MN 14 *et seq),* this may also be done by signature, *ie* by final signature not subject to ratification. Also the accession to a treaty, which is already in force, falls under lit b, which demonstrates that the "entry into force" herein refers to the coming into force in relation to the individual State concerned. **24**

2. Entry into Force Not Unduly Delayed

The interim obligation under lit b is limited by the somewhat unclear time criterion of "undue delay". By doing so, the provision pays credit to the greater attachment of the State to the treaty than under lit a, since here the State cannot, at least not by the terms of Art 18, free itself of the interim obligation by a unilateral act, but is released from it only through an objective fact. The length of time that has to elapse before the entry into force of the treaty can be said to be unduly delayed must **be determined in the light of the circumstances of every individual case**. Various attempts to introduce a fixed time-limit into the provision failed both during the work of the ILC[55] and at the Vienna Conference.[56] **25**

Since lit b refers to the expression of consent by every individual contracting State, the **time period to be measured** is that between the individual expression and the entry into force for the individual State. Naturally, in most cases the **26**

[54] *Morvay* (n 1) 461.

[55] SR *Waldock* had proposed to adopt a time limit of ten years (Waldock IV 45), which did not find much support in the Commission, *cf* [1965-I] YbILC 88 *et seq*.

[56] Argentina, Ecuador and Uruguay had introduced a time limit of 12 months into the debate, *cf* UNCLOT III 131, para 164.

absolute delay of the entry into force of the treaty as such will play a role in this respect.

27 Factors to be taken into account for determining **the undue character of the delay** may include the number of contracting States, the complexity of the subject of the treaty, the amount of political controversy about it and the time it took to negotiate the treaty. As a rule of thumb, for multilateral conventions with a universal participation, it is not uncommon to take more than five years from the adoption of the text until the entry into force (it took the VCLT itself more than 10 years!).[57]

3. Withdrawal of Consent to Be Bound?

28 Art 18 lit b does not provide itself for the withdrawal of a contracting State from the treaty, pending the latter's entry into force, it does not contain a provision for 'unratifying' the treaty, just as it does for 'unsigning' in lit a. Yet, it appears that to withdraw a consent to be bound does not, in itself, amount to defeating the object and purpose of the treaty, thus it is not in breach of the obligation in Art 18.[58] The result is a *non-liquet*: the question of whether a State which has consented to be bound may withdraw its consent before the treaty enters into force is simply **not addressed by Art 18**, nor by any other provision of the VCLT.

29 If, consequently, the withdrawal of the consent to be bound is not prohibited by the VCLT, the general principle would seem to apply that a contracting State is legally bound by a treaty after the latter came into force, whereas before that, its freedom of action still exists. Also, there is some **State practice** where States withdrew their instruments of accession or ratification before entry into force and met with no objections.

> Thus, for example, the Government of Greece, which in 1950 had deposited an instrument of acceptance of the Convention on the Intergovernmental Maritime Organization (1948), withdrew that instrument in 1952 (before the entry into force of the Convention), but reaccepted the Convention on 31 December 1958, with a reservation. And the Government of Spain, which on 29 July 1958 had deposited an instrument of accession to the Customs Convention on the Temporary Importation for Private Use of Aircraft and Pleasure Boats (1956), withdrew the said instrument on 2 October 1958 (before the entry into force of the Convention) and then deposited a new instrument with a reservation.[59] Furthermore, in 1999 and 2002 Italy and Luxembourg, respectively withdrew their instruments of ratification of the Fish Stocks Convention (1995).[60]

In the light of this practice, the UN Secretary-General, in his function as depositary of multilateral treaties, **generally allows the withdrawal** of an instrument of

[57] *Cf Klabbers* (n 1) 17 with regard to 1993 Chemical Weapon Convention.

[58] *Aust* 120.

[59] Both instances reported in 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev. 1, para 158.

[60] 2009 Multilateral Treaties Deposited with the Secretary General (n 46) Vol III 504 note 1 for Italy and note 2 Luxembourg (ch XXI.7).

ratification or of a similar nature until the entry into force of the treaty, on the understanding that, until that time, States are not definitely bound by the treaty.[61]

III. Contours of the Interim Obligation

The interim obligation binding States under Art 18 requires them "to refrain from acts which would defeat object and purpose" of the treaty, which they have signed or in respect of which they have declared their consent to be bound. It follows from the wording and the design of Art 18 that the content of the obligation is the same for signatory States (lit a) and contracting States (lit b). That content is necessarily geared toward the content of the treaty, influenced and determined by it, but it **cannot amount to full compliance** with its provisions, since the latter is not owed by the parties before the entry into force of the treaty. The very rationale of the interim obligation, founded on a general principle of international law and not on the specific treaty (→ MN 4), requires a substantial difference, not merely one of degree, between the obligations flowing from the treaty and those under Art 18. In this respect, the interim obligation is to be distinguished from the provisional application of the treaty under Art 25 VCLT. **30**

Nevertheless, the **content of the treaty is of some significance** for determining the interim obligation. As shown earlier (→ MN 8), the PCIJ held in the *Polish Upper Silesia* case that acts, which a State has not to refrain from after the treaty has entered into force, cannot, *a fortiori*, be contrary to good faith before that moment, thus cannot amount to a violation of the interim obligation.[62] **31**

The interim obligation has its roots in the general principle of good faith (→ MN 4), but it essentially protects the legitimate expectations of the other participants in the treaty-making process (→ MN 2). This is why it **can only be invoked** by States that have themselves signed or ratified the treaty in question. On the other hand, the very essence of good faith would seem to exclude that signatory or contracting States, which have themselves participated in the acts defeating the object and purpose of the treaty, or supported those acts, could invoke a violation of the interim obligation by those very same acts.[63] If the treaty in question entails subjective rights for individuals, *ie* rights that can be invoked by private individuals as against the States Parties (*eg* human rights treaties), it would seem natural that those **individuals** could also demand compliance with the interim obligation in respect of their rights. Naturally, the interim obligation can be invoked prior to the entry into force of a treaty.[64] **32**

[61] Summary of Practice (n 59) para 157.

[62] PCIJ *Certain German Interests* (n 26) 39.

[63] *Villiger* Art 18 MN 8.

[64] *Villiger* (n 49) MN 469.

1. Object and Purpose of the Treaty

33 The essential criterion for shaping the interim obligation according to Art 18 is the object and purpose of the treaty, the term being used here with **the same meaning as in other provisions** of the Convention, for example in Arts 19 or 31 (→ Art 31 MN 53–58).[65] As in those articles, "object and purpose" refers to the reasons for which the States concluded the treaty and to the general result, which they want to achieve through it.[66]

34 Although the term appears in Art 18 in the singular form, the effectiveness of Art 18 would be diminished if the interim obligation would always be confined to protecting a single overarching *telos* of the treaty as a whole. For treaties that clearly pursue more than one purpose, it must be possible to define a variety of interim obligations. In essence, therefore, Art 18 must be taken to refer to the **object and purpose of individual treaty provisions**, if such can be identified.[67]

35 There are various ways of **identifying object and purpose** of a treaty or a treaty provision. Some treaties contain general clauses specifically stating their purposes, Art 1 UN Charter being the obvious example. Also, recourse to the title of the treaty may be helpful. Moreover, the preamble of a treaty is regularly a place where the parties list the purposes they want to pursue through their agreement. In other cases, the type of treaty may itself attract the assumption of a particular object and purpose, such as boundary treaties (final and stable fixing of frontiers). Generally, however, a reading of the whole treaty will be required to establish the object and purpose with some certainty. Also, contrasting the treaty in question with relevant treaties of the same kind can assist in establishing the *telos* of the former. In addition, intuition and common sense may provide useful indicators in identifying the object and purpose.[68]

> In a case before the German Federal Constitutional Court, a Vanuatu national was appealing his extradition from Germany to India, claiming he would face inhuman treatment there. The Court rejected the appeal on the ground that there was no real danger for the applicant, because India could be expected to comply with the interim obligation under Art 18 not to defeat object and purpose of the extradition treaty between Germany and India, which would in the Court's view exclude inhuman treatment. The Court identified the treaty's object and purpose as "creating a stable bilateral relationship in matters of legal assistance and extradition."[69]

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[65] *Villiger* Art 18 MN 10. For a detailed analysis of the term *eg I Buffard/K Zemanek* The 'Object and Purpose' of a Treaty: An Enigma? (1998) 3 ARIEL 311–343.

[66] → Art 31 MN 54; *Villiger* Art 18 MN 10.

[67] Concurring *Villiger* Art 18 MN 10; for the similar problem in treaty interpretation => Art 31 MN 55.

[68] *J Klabbers* 'Some Problems Regarding the Object and Propose of Treaties' (1997) 8 FinnYIL 138, 155.

[69] Federal Constitutional Court (Germany) (n 11) 141.

2. Defeating Object and Purpose

In order to define the acts prohibited by the interim obligation under Art 18, it has to be kept in mind that there must be a substantial gap in relation to the performance owed by the parties to the treaty after its coming into force (→ MN 30). **Not every departure from the provisions of a treaty**, pending its ratification or entry into force, will automatically defeat its object and purpose – otherwise the treaty would *de facto* enter into force upon signature and its requirements for entry into force would be undermined.[70] The threshold for violating the interim obligation must be much higher than that for violating the treaty. Furthermore, a grammatical comparison suggests that "defeating" the object and purpose refers to actions of a much more severe nature than those that are merely "incompatible" with object and purpose, as Art 19 lit c requires. **36**

The threshold of "defeat" may be described as a situation where the subsequent **performance of the treaty**, or indeed of one of its provisions, **is rendered meaningless**.[71] In such a situation, it is presumed, as *Villiger* puts it, that other States would not have concluded the treaty under the same conditions, had they known that such acts would be undertaken,[72] thus approximating the threshold of Art 18 to the concept of "essential basis" used in Art 62 para 1 lit a VCLT. This includes, but is not limited to,[73] all acts that make the performance of the treaty, when it enters into force, objectively impossible[74] or render it inoperative. **37**

> The classic example being that the treaty provides for the return of certain objects, which are destroyed by the possessor State before entry into force.

Furthermore, the State must not do anything that would prevent itself being able fully to comply with the treaty once it has entered into force[75] (**subjective impossibility** of performance).

> Here the traditional example would be that the treaty provides for territory to be ceded, but before entry into fore the ceding State transfers whole of the territory to a third State.

This standard, it is submitted, may be applied both to treaties of a more contractual nature and to those of a law-making character,[76] even though in the latter case it may be hard to imagine that an objective treaty regime is actually rendered meaningless by the actions of a single State, or even a group of States.

> Arguably it was contrary to object and purpose of the Rome Statute on the ICC, when signatory States of that Statute signed bilateral non-surrender agreements with the United

[70] *Klabbers* (n 1) 18.

[71] Thus *Waldock*, as expert consultant at the Vienna Conference, UNCLOT I 104 para 26.

[72] *Villiger* Art 18 MN 11.

[73] See *Waldock* (n 70) and the debate in UNCLOT I 97–106.

[74] *Rogoff* (n 2) 297.

[75] *Aust* 119.

[76] *Contra Klabbers* (n 1) 26.

States in order to prevent US nationals from being handed over to the ICC[77]; but it seems highly doubtful that those acts were actually suited to 'destroy' the purpose of the Statute, or even of some of its parts.

In *Öcalan v Turkey* the ECtHR noted that "the non-implementation of the capital sentence is in keeping with Turkey's obligation as a signatory State to this Protocol [Protocol No 6 to the ECHR], in accordance with Article 18 of the (VCLT), to 'refrain from acts which would defeat the object and purpose' of the Protocol."[78] Thus, the Court suggested that Turkey would violate its interim obligation if it actually applied the death penalty after having signed Protocol No 6 and before its ratification.

38 For determining the standard of "defeat", it is **of no relevance** whether the acts in question are permissible under general international law,[79] or whether the benefit of the negotiated bargain is thereby reduced for the other signatory or signatories.[80] Naturally, the simple act of non-ratification (in case of lit a) or of withdrawing the consent to be bound (in case of lit b) cannot amount to "defeating", since both are, in principle, discretionary acts for the States concerned (→ MN 19, 28). On the other hand, it seems to be generally accepted that Art 18 does not require that the incriminated acts are committed intentionally in bad faith, thus the test to be applied is an objective one.[81]

3. Obligation to Refrain

39 Art 18 obliges signatory and contracting States to "refrain" from certain acts, thus suggesting through its negative terms that the interim obligation simply requires a passive conduct on part of the States bound by it.[82] It may be asked, however, if the protection of object and purpose of a treaty could not in certain cases **require some active conduct** in order to prevent the treaty from becoming meaningless.

Thus, supposed that in a treaty signed, but not ratified, a State has promised to deliver products from a forest or mine, wouldn't the State be obliged under Art 18 to – actively – provide for the maintenance of the forest or mine in order not jeopardize the production of the goods owed under the treaty?[83]

It is submitted that for reasons of the *effet utile* of Art 18, the exact meaning of the obligation to "refrain" can only be determined in every individual case in the light of the commitments made under the treaty. If that commitment implies that the signatory State has to deliver something upon entry into force, it may be very

[77]Thus, the Parliamentary Assembly of the Council of Europe in Resolution 1300 (25 September 2002), sub 10, and Resolution 1336 (25 June 2003), sub 9, to be found at http://assembly.coe.int (last visited 10 January 2011).

[78]ECtHR *Öcalan v Turkey* (GC) (n 12) para 185.

[79]*Villiger* (n 48) MN 470.

[80]*Rogoff* (n 2) 297.

[81]*Villiger* Art 18 MN 14; *Aust* 119.

[82]Thus *eg Rogoff* (n 2) 297; *L Boisson de Chazournes/A-M la Rosa/MM Mbengue* in *Corten/Klein* Art 18 MN 62.

[83]Example given by *Villiger* Art 18 MN 13.

well be under a – legal – duty not to let certain things happen, which would make performance under the treaty impossible. Not to frustrate object and purpose of the treaty can under certain circumstances imply the obligation to refrain from *not* doing something, which is necessary to safeguard the very object of the treaty.[84]

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[84]Concurring *L Boisson de Chazournes/A-M la Rosa/MM Mbengue* in *Corten/Klein* Art 18 MN 66–67.

Section 2
Reservations

Article 19

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;
(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Contents

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
DOI 10.1007/978-3-642-19291-3_21,

A. Definition, Purpose, and Function of Reservations

1 The **notion of reservation** is defined in Art 2 para 1 lit d of the Convention. According to this definition, "reservation" means "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Before the adoption of the Convention, several other definitions had been used in practice and discussed in literature. These definitions are, however, largely similar to the definition given in the Convention.[1] The definition thus reflects the customary law notion of a reservation.[2]

2 The **purpose of reservations** is to create flexibility within a system of treaty obligations, in order to allow for the inclusion of States, which are unable or unwilling to accept all the obligations contained in the treaty. Reservations are thus meant to solve a certain dilemma of many multilateral treaties. On the one hand, there is, quite often, a desire to include as many States as possible. This interest requires respecting the possibly diverging interests to a rather large extent. On the other hand, such an approach tends to water down the obligations, which can be included in the treaty, a consequence which is especially undesirable in cases of objective regimes, most obviously when creating international human rights obligations. The dilemma may be described in a nutshell as a collision between universality (of the parties) and integrity (of the obligations).

3 Reservations must be distinguished from **interpretative declarations** which a party may make on the occasion of signing or ratifying a treaty. Such declarations are not in themselves binding, but may be taken into account when interpreting a treaty.[3] The distinctive criterion of reservations in comparison with other unilateral acts of States, which they may adopt when signing or ratifying a treaty is the legal effect of formally modifying the treaty obligations. Whether such an effect is intended by a given statement is a matter of interpretation.

4 In its Guide to Practice finalized in 2010[4] the ILC devoted the whole first part to questions of definition. It takes up the definition contained in Art 2 para 1 lit d VCLT[5] and notably establishes criteria for distinguishing reservations and interpretative declarations.[6]

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[1] For reference, see *R Kühner* Vorbehalte zu multilateralen völkerrechtlichen Verträgen (1986) 9 *et seq*; → Art 2 lit d.

[2] *T Giegerich* Treaties, Multilateral, Reservations to in MPEPIL (2008) MN 1.

[3] *Ch Tomuschat* Admissibility and Legal Effects of Reservations to Multilateral Treaties (1967) 27 ZaöRV 463, 464–465.

[4] As to the Guide to Practice → MN 39–40.

[5] Draft Guideline 1.1. The Draft Guidelines – which will be referred to repeatedly throughout this commentary – are reprinted as Annex to Art 23.

[6] Draft Guidelines 1.3. (including Draft Guidelines 1.3.1 to 1.3.3) → Annex to 23.

Reservations create problems with regard to the **principle of consent** underlying all treaty relations. Consent would, at least in principle, require the acceptance of all reservations by all parties to the treaty. One needs little fantasy to imagine that such a requirement would render the instrument practically useless. International legal practice and doctrine have been grappling with this fundamental problem for more than half a century now and, although certain achievements have been made, the issue is still on the agenda of the ILC (→ MN 38–40). **5**

While it is universally accepted that the concept of reservations applies in a **multilateral context**, the question may be asked whether it is possible to formulate reservations to bilateral treaties. In a bilateral context, the need for flexibility does not arise and any valid reservation would necessarily modify the treaty as such with effect for both parties. For these reasons, the possibility of reservations to bilateral treaties is sometimes excluded. However, the wording of neither Art 2 para 1 lit d nor of the provisions in Arts 19–23 VCLT expressly excludes **bilateral treaties** from the scope of application. In fact, the matter was discussed during the conference and explicitly left open. While several amendments aiming to limit the notion to multilateral treaties were rejected,[7] the president of the Drafting Committee took care in stating that "the deletion of the reference to multilateral treaties from the title of Section 2 did not, however, mean that the Drafting Committee had decided that reservations to bilateral treaties were possible. The purpose of the deletion had merely been not to prejudge the question in any way."[8] In view of this situation, bilateral treaties cannot be regarded as automatically excluded from the system relating to the treatment of reservations established by the Convention. Given that specific situation, "reservations" to bilateral treaties need careful examination as to whether the declaration really aims at modifying the treaty obligations. There is a certain likeliness that instead of a binding reservation a mere declaration of interpretation is intended. In fact, many of the declarations to bilateral treaties, which are labeled as 'reservation' lack the intention to create binding legal effect.[9] If, on the contrary, a legal effect is intended, such "reservations" must often be seen as an attempt to renegotiate the content of the treaty in question. The ILC, therefore, decided to exclude "reservations" to bilateral treaties from its Guide to Practice.[10] Even though this approach has the merit of legal clarity, in view of the open wording and the unclear history bilateral treaties should not *per se* be excluded from the scope of application of Arts 19–23 VCLT. Rather, a strict test is to be **6**

[7] See, *eg* the amendments submitted by China, UN Doc A/Conf.39/C.1./L.13, Chile, UN Doc A/Conf.39/C.1/L.22 and Hungary, UN Doc A/Conf.39/C.1/L.23, compiled in UNCLOT III 111–112 para 35.

[8] UNCLOT II 37 para 20.

[9] *Kühner* (n 1) 29 n 159–161; *T Schweisfurth* Vorbehalte zu internationalen Verträgen unter besonderer Berücksichtigung der östlichen Vertragstheorie [1970-II] Internationales Recht und Diplomatie 46, 56.

[10] Draft Guideline 1.5.1; see the commentary of the ILC on that Draft Guideline which contains a detailed analysis notably of the practice of the United States of America, Report of the ILC on the work of its Fifty-first session, [1999-II] YbILC 120–124.

applied when interpreting "reservations" to bilateral treaties. Only if the intention to unilaterally modify the treaty can be clearly established such "reservations" can be considered to fall within the scope of reservations as covered by the VCLT.

B. Historical Background

I. Nineteenth Century to World War I

7 The **first known reservation** is a reservation made by the Kingdom of Sweden and the Kingdom of Norway to the Final Act of the Vienna Congress in 1815.[11] During the nineteenth century, the practice of reservations remained sporadic; nevertheless, some examples have become famous.[12]

8 While in 1899, during the **First Hague Conference**, reservations were still considered to be exceptional,[13] the Second Conference in 1907 generated about 65 reservations with regard to at least 11 of the 14 conventions.[14]

9 State practice of the time required express or tacit consent to a reservation by all other parties to the treaty for the reservation to become effective. If the reserving State did not succeed in receiving the unanimous acceptance of its reservation, it had either to withdraw the reservation or it had to refrain from becoming a party to the treaty.[15] This doctrine, which is called the **unanimity doctrine**, reflects the principle of consent which has been and continues to be fundamental to the law of treaties.

II. The Inter-war Period

10 The inter-war period is characterized by a **split development**. While practice at the universal level, basically formed by the Secretary-General of the League of Nations as depositary for many multilateral instruments, followed the traditional pattern of the unanimity doctrine, on the American continent a different approach developed beginning with the 1920s.

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[11]The 1815 General Treaty of the Final Act of the Congress of Vienna, 64 CTS 454; *F Horn* Reservations and Interpretative Declarations to Multilateral Treaties (1988) 7; *Kühner* (n 1) 57; *A Pellet* in *Corten/Klein* Art 19 MN 3.

[12]*A Pellet* in *Corten/Klein* Art 19 MN 2 n 9.

[13]*M Huber* Gemeinschafts- und Sonderrecht unter Staaten in *P Oertmann* (ed) Festschrift Gierke (1911) 817, 827 n 2.

[14]*Kühner* (n 1) 57 n 27 (12 conventions); there are slightly varying figures: *Horn* (n 11) 7, speaks of "11 out of 13 conventions [. . .] subject to 67 reservations" referring to a study initiated by the Carnegie Endowment (*JB Scott* (ed) The Hague Conventions and Declarations of 1899 and 1907 (1915) 236–237) while at the same time criticizing these figures.

[15]*JM Ruda* Reservations to Treaties (1975) 146 RdC 95, 112.

The **practice on the universal level** is well documented.[16] The most significant incident was created by the attempt of Austria to sign the International Opium Convention[17] while entering a reservation regarding the system of implementation provided for in the convention. An objection by the United Kingdom led to a legal opinion by a Committee of Experts, which was formally accepted by the Council of the League. This opinion states the following: **11**

> "In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void."[18]

The consequence of the position just described is that a State which makes a reservation cannot become a party if only one of the other States Party to the treaty in question objects. This position was practiced consistently throughout the League of Nations period.[19] **12**

During the same period the **Pan-American Union developed a different practice**. The main difference is that under the Pan-American approach objections did not necessarily result in the exclusion of the State having entered a reservation. In addition, implicit acceptance of reservations was considered possible. In that regard, Art 6 of the 1928 Havana-Convention[20] provided for the following: **13**

> [. . .] In case the ratifying States make reservations to the treaty it shall become effective when the other party informed of the reservations expressly accepts them, or having failed to reject them formally, should perform action implying its acceptance. In international treaties celebrated between different States, a reservation made by one of them in the act of ratification affects only the application of the clause in question in the relation of the other contracting States with the State making the reservation.

The **consequence of this approach** is that the treaty enters into force in its entirety between the States having accepted it without any reservations. It enters into force with the modifications provided for in the reservation in relation to those States, which have accepted (formally or implicitly) the reservation. However, the provision does not state the legal relation between the State having entered a reservation and those which have rejected it. It was later clarified by supplementary rules which the **14**

[16] *Ruda* (n 15) 112; *Schweisfurth* (n 9) 49 *et seq*; *HD Wolkwitz* Vorbehalte in Kollektivverträgen (1968) 53 *et seq*; *PH Imbert* Les Réserves aux traités multilatéraux (1978) 25 *et seq*; *JK Koh* Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision (1982) 23 Harvard ILJ 71–116; in the Harvard Research Draft the practice on the universal level is characterized as: "[. . .] the Secretariat of the League of Nations [. . .] apparently does not regard an accession which is subject to reservations as definitively deposited until those reservations have been communicated to and accepted by the States signatories of or parties to the treaty concerned", Harvard Draft 910.

[17] 1925 International Opium Convention 81 LNTS 317; see the detailed account and analysis by *HW Malkin* Reservations to Multilateral Conventions (1926) 7 BYIL 141–162.

[18] (1927) 8 Official Journal of the League of Nations 881.

[19] For further examples, see *Kühner* (n 1) 60–61.

[20] 1928 Havana Convention on Treaties PAULTS 3.

Governing Board of the Pan-American Union adopted, that the treaty "shall not be in force between a government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations."[21] Accordingly, in such a case, both States were formally parties to the multilateral treaty in question, however, without being in a bilateral contractual relationship.

15 Yet, **another approach was followed within the International Labor Organization** which generally excluded reservations to the Conventions negotiated under its auspices.[22] Limited exceptions were made regarding the territorial scope of application and the principle of reciprocity.[23]

III. UN-Practice Before the 1951 Advisory Opinion of the ICJ

16 The early years of the United Nations are characterized by **largely divergent positions on the issue of reservations**. These views reflect fundamentally different views on international law in general. To some extent, they are still visible today.

17 The **UN Secretary-General** continued the position which had been developed in the context of the League of Nations, while at the same time introducing some flexibility into the rather rigid system of unanimity by accepting implicit forms of approval of reservations.[24] The **American States** continued the position developed in the context of the Pan-American Union. The **Soviet Union** followed an approach which required strict respect for the principle of sovereignty, according to which a reservation should not preclude the entry into force of all other provisions not affected by it.[25] This approach produced results quite similar to those achieved by the doctrine developed within the Pan-American Union; however, the Soviet position remained unclear as to the consequences of formal objections.[26]

18 Given the growing importance of multilateral treaties, the issue of reservations became more and more important. The Genocide Convention[27] generated a number of reservations and objections thereto which led the Secretary-General to submit a report on the issue to the Sixth Committee of the General Assembly.[28] There, the

[21] ICJ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15 *et seq*.

[22] The position of the ILO is reproduced in ICJ *Genocide Convention* (Written Statement) (n 21) 227 *et seq*.

[23] *Ibid*.

[24] See the Report of the Secretary General to the 5th General Assembly, 20 September 1950, UN Doc A/1372; *Wolkwitz* (n 16) 56 *et seq*; *K Holloway* Les Réserves dans les traités internationaux (1958); *K Holloway* Modern Trends in Treaty Law: Constitutional Law, Reservations and the Three Modes of Legislation (1967) 126 *et seq* and 136–137; *Ruda* (n 15) 133.

[25] See the position of the Secretary General in his report to the Sixth Committee of the UNGA, 20 September 1950, UN Doc A/1372 paras 3–50.

[26] *Schweisfurth* (n 9) 49, 59–60.

[27] 1948 Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277.

[28] For reference → n 25.

different positions were formally presented. This resulted in **UNGA Resolution 478 (V),**[29] which addressed the problem in three steps: the ICJ was to be asked an Advisory Opinion on *the Legality of Reservations to the Genocide Convention*, the ILC received a mandate to deal with the issue of reservations in the context of its work on the codification of the law of treaties and the Secretary-General was instructed to continue his existing practice with regard to reservations and approval or rejection thereof, however without prejudice as to the legal effect of objections to reservations as it might be recommended in the following session of the General Assembly.

IV. The ICJ's Advisory Opinion Concerning Reservations to the Genocide Convention

The Advisory Opinion given by the ICJ on the legal treatment of reservations to the Genocide Convention proved as **catalyst for the further development**. The General Assembly asked several questions, the most central being whether or not the reserving State may be regarded as party to the convention if one or more other States have objected to the reservation. **19**

In its answer to this question, the Court followed neither of the competing concepts which had developed in State practice. The Court placed great emphasis on the **object and purpose of the Genocide Convention**. It argued that, in contrast to the usual inter-State treaty, the Genocide Convention followed purely humanitarian aims. In such a type of convention, it was impossible to speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. This approach led the Court to a new criterion concerning the validity of reservations. Basically, the Court introduced a compatibility test, which required an assessment of whether or not the reservation was compatible with object and purpose of the convention: **20**

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

[29] 16 November 1950, UN Doc A/517.

> appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation."[30]

21 The Court finally answered, by a narrow majority of 7 to 5, that

> "a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention."[31]

As can be easily seen by a comparison with Art 19 lit c VCLT, the approach introduced by the Court, at least in substance, made its way into the codification of the law of treaties.

22 Based on this approach, the Court further considered that **each party to a treaty has the right to an autonomous assessment of a reservation**. If it considers the reservation to be incompatible with the object and purpose of the treaty, it can consider that the reserving State is not a party to the treaty. If, on the other hand, it accepts the reservation, it can consider the reserving State as a party to the treaty. Finally, it restricted the possibility for a formal objection to signatories and parties to the treaty in question. Objections by signatories could, however, only produce legal effects at the moment of their ratification. By contrast, objections by States which had a right to sign and accede, but had not yet done so, were without any legal effect.[32]

23 The **Advisory Opinion was widely criticized within and outside the Court**. The main argument, which was also advanced in a joint dissent by four judges, was that the Court had neglected the previous practice which pointed into the direction of unanimity in order to have valid reservations.[33] Similar criticism was voiced in literature[34] and in the ILC. However, irrespective of the validity of these arguments at the time of their presentation, today's historical perspective on the 1951 Advisory Opinion has to state that it has largely shaped the law of reservations as it currently stands. It has played an important role during the negotiations on the section dealing with reservations in the VCLT.

24 The ILC, which had been asked separately by the General Assembly to deal with the issue of reservations in Resolution 478 (V), discussed the opinion rendered by the ICJ and presented a special report on the issue.[35] In that report, the ILC criticized the Court and suggested a narrow reading of the opinion. The **ILC remained focused on the traditional unanimity principle** and argued that basically any provision of a treaty would contribute to its object and purpose and that, hence, it was difficult

[30] ICJ *Genocide Convention* (n 21) 24 *et seq*.

[31] *Ibid* 29.

[32] *Ibid* 30.

[33] *Ibid* 32.

[34] *Ruda* (n 15) 135 *et seq*; *Schweisfurth* (n 9) 49, 51 *et seq*; *Wolkwitz* (n 16) 81 *et seq*; *Koh* (n 16) 71–116; *C Redgwell* Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties (1993) 64 BYIL 245, 252.

[35] [1951-I] YbILC 100–106, 125–129 and 133, 159–213 and 366–394.

to make out those from which derogation could be accepted without compromising the object and purpose of the treaty.[36]

V. Further Developments in the General Assembly

The issue remained on the agenda of the General Assembly which by a narrow majority (23 in favour, 18 against and 7 abstentions) adopted resolution 598 (VI) on 12 January 1952.[37] This resolution, which has been qualified as "one of the fundamental documents in the history of the law of treaties",[38] was of particular importance for the later development because – after long discussion in which all the positions taken earlier had been presented again – the **General Assembly asked the Secretary-General to continue to act as depository** with regard to reservations and objections, however, **without pronouncing himself on the legal effects of such documents** and to leave it to each State to draw the respective consequences. This solution followed the lines of the Advisory Opinion concerning the Genocide Convention and reduced the role of the Secretary-General to a notary public. However, it also created legal uncertainty with regard to treaties requiring a certain number of ratifications for their entry into force. If reservations had been made to such treaties, in the absence of reaction from the States, the Secretary-General was unable to decide whether the number had been met or not. **25**

The system suggested by resolution 598 (VI) remained limited to multilateral conventions entering into force after its adoption in January 1952. For conventions prior to that date the traditional unanimity rule remained applicable. This resulted in **two separate legal regimes** depending on the date of entry into force, a solution which was hardly satisfactory in view of the general law of reservations. Following debates concerning a reservation by India to the Intergovernmental Maritime Consultative Organization (IMCO),[39] the General Assembly adopted resolution 1542 B (XIV) on 7 December 1959. This resolution extended the guidelines contained in resolution 598 (VI) to all reservations made to treaties for which the UN Secretary-General acted as depositary, irrespective of their date of entry into force. **26**

C. Negotiating History

Parallel to these activities of the General Assembly, the ILC dealt with the issue of reservations in the course of its activities concerning the codification of the law of treaties. During the 17 years in which the ILC deliberated the subject, **different** **27**

[36]ILC, Report of the ILC Covering the Work of its Third Session, UN Doc A/1858, para 24 (1951).

[37]UNGA Res 598 (VI), 12 January 1952, [1963-II] YbILC 24.

[38]*S Rosenne* Developments in the Law of Treaties (1989) 430.

[39]289 UNTS 48; for an account of the debate, see *O Schachter* The Question of Treaty Reservations at the 1959 General Assembly (1960) 54 AJIL 372–379; *Ruda* (n 15) 153 *et seq*.

approaches where followed by three Special Rapporteurs. These approaches may be seen as a reflection of developments in the law concerning reservations. While the first two Special Rapporteurs, *Lauterpacht* and *Fitzmaurice*, remained attached to the traditional unanimity principle, *Waldock* paved the way for the current system of the VCLT.

I. The Reports by *Lauterpacht* and *Fitzmaurice*

28 SR *Lauterpacht* dealt with the difficult situation which had arisen following the opinion of the ICJ and the GA resolutions by submitting one draft article *de lege lata* and, *de lege ferenda*, four alternative proposals. While the *de lege lata* article followed entirely the traditional unanimity rule,[40] the alternatives were presented as a **new compromise between the unanimity rule and the principle of sovereignty** to formulate reservations. They had the "flexibility of the Pan-American rules, but they provided more guarantees against the abuse of making reservations."[41]

29 Following SR *Lauterpacht*, who had been elected judge at the ICJ, SR *Fitzmaurice* prepared a total of five reports from 1956 to 1961, of which only the first dealt with the issue of reservations. **SR *Fitzmaurice* basically kept the unanimity principle**. He introduced, however, a new distinction which influenced the further discussions. His report distinguishes between bilateral, plurilateral and multilateral treaties. While the draft in Art 38 contained a clear prohibition of reservations for bilateral and plurilateral treaties (understood as treaties made between a limited number of States for purposes specially interesting those States), it suggested a more a flexible approach as regards multilateral treaties. According to this approach, reservations which had been advanced during the negotiations and which had not met objections were acceptable. Similarly, reservations made subsequent to the negotiations were acceptable if circulated to all the States which had taken part in the negotiations without meeting objections. Since neither the suggestions by SR *Lauterpacht* nor those by SR *Fitzmaurice* had been discussed in the ILC, they could only indirectly influence the further debate in so far as they have been taken in the discussions concerning the reports by SR *Waldock*, who succeeded to SR *Fitzmaurice* in 1961.

II. Special Rapporteur *Waldock* and the Discussion in the ILC

30 In his first report, SR *Waldock* kept the distinction between bilateral, plurilateral and multilateral treaties. He did not alter the approach concerning bilateral and plurilateral treaties either. However, regarding the treatment of reservations to

[40] "Unless otherwise provided by the treaty, a signature, ratification, accession or any other method of accepting a multilateral treaty is void if accompanied by reservations not agreed by all parties to the treaty." *Lauterpacht* I 123 *et seq*.

[41] *Ruda* (n 15) 158.

multilateral treaties, SR *Waldock* proposed a new concept which aimed at **more flexibility**. He argued that all proposals that were based on the traditional unanimity principle had met resistance in the General Assembly. Furthermore, the practice by the Secretary-General, although refraining from any formal assessment of a reservation, had the practical effect that "under the present system a State making a reservation will in practice be considered a party to the convention by the majority of those States which do not give notice of their objection to the reservation."[42] SR *Waldock* argued that the sovereignty of other negotiating States, which refrained from entering reservations, could be respected by introducing a system of objections and by applying the principle of reciprocity. Finally, SR *Waldock* conceded that a certain degree of inequality was unavoidable if one departed from the unanimity principle. The obligations of States with and States without reservations naturally would never be identical. He maintained, however, that this point should not be overestimated since if the State wishing to make a reservation remained completely outside the system it would also be in a better position as compared to those who accepted the obligations. On the other hand, by entering into the treaty subject to certain reservations, the reserving State at least to some extent was bound by the treaty.

Against this background, SR *Waldock* proposed a model which basically relied **31**
on the **(subjective) Pan-American approach, while combining it with the 'object and purpose' formula** contained in the ICJ's 1951 Advisory Opinion. He also separated the issue of 'formulation' of reservations, which he considered as a proposal, from the legal effects of such a formulation, which were largely dependent on the reaction of the other negotiating States. The proposal contained a general provision regarding the power to formulate reservations and procedural aspects (Art 17) and two additional provisions concerning consent and objection to reservations and the respective effects (Art 18 and Art 19). The substantive part of Art 17 read as follows:

> Article 17. Power to formulate and withdraw reservations
> 1. (a) A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation, as defined in article 1, unless:
> (i) The making of reservations is prohibited by the terms of the treaty, or excluded by the nature of the treaty or by the established usage of an international organization; or
> (ii) The treaty expressly restricts the making of reservations to a specified category, or specified categories, of reservation and the reservation in question does not fall within the category or categories mentioned in the treaty; or
> (iii) The treaty expressly authorizes the making of a specified category, or specified categories, of reservation, in which case the formulation of reservations falling outside the authorized category or categories is by implication excluded.
> (b) The formulation of a reservation, the making of which is expressly prohibited or impliedly excluded under any of the provisions of sub-paragraph (a), is inadmissible unless the prior consent of all the other interested States has been first obtained.

[42] *Waldock* I 64.

> 2. (a) When formulating a reservation under the provisions of paragraph 1 (a) of this article, a State shall have regard to the compatibility of the reservation with the object and purpose of the treaty.
> (b) The effect of the formulation of a reservation upon the legal relations between the reserving State and the other State or States signing, ratifying, acceding to or accepting the treaty shall be determined by reference to the provisions of articles 18 and 19 below. [. . .][43]

32 As can be seen from the wording, the first two situations envisaged in Art 19 are to be Found in Art 17 para 1 lit a cl ii of the *Waldock* draft. By contrast, the 'object and purpose' formula, which today figures as an objective criterion in Art 19 lit c, is formulated in a subjective manner in the draft. It is an obligation incumbent upon the State formulating the reservation to have regard to the compatibility of the reservation with the object and purpose of the treaty. This subjective approach was a reaction to some of the criticism voiced against the ICJ's objective test.[44] SR *Waldock* expressly stated that his **proposal took up the Court's criterion as a general principle**, "without however attaching any sanction to it or giving it any express place in Arts 18 and 19, where the objective criteria of 'consent' and 'objection' are adopted as the tests for determining the legal relations between a reserving State and other parties to the treaty."[45]

33 The Commission, while generally accepting *Waldock*'s approach, rearranged the structure of the whole section on reservations and gave it more or less already its current shape. An important departure from *Waldock*'s proposal concerns again the 'object and purpose' formula which in the draft adopted by the Commission was transformed into an objective criterion. According to the draft, the formulation of a reservation is excluded when "the reservation is incompatible with the object and purpose of the treaty".[46] Instead of leaving the decision on the compatibility with the object and purpose of the treaty essentially to the reserving State (which might have been the consequence of *Waldock*'s initial proposal) **the 'object and purpose' formula was thus included among the factors to which consent and objection may relate**.[47]

34 With the UNGA Sixth Committee reacting favourably to the proposal,[48] the Court's approach of 1951 had, in principle, **overcome the traditional unanimity rule.**[49] There was, of course, still some way to go: In 1965, the issue of reservations was again on the agenda of the ILC. *Waldock* submitted his fourth report on the law of treaties to the Commission and in that report he presented a revised version of the earlier draft concerning reservations in order to respond to comments from governments. In 1966, the ILC finally submitted to the General Assembly a revised version

[43] *Waldock* I 60.
[44] *Waldock* I 65 *et seq*.
[45] *Waldock* I 66.
[46] Art 18 para 1 lit a of the 1962 Draft, [1962-II] YbILC 176.
[47] Commentary to Art 18 of the 1962 Draft, [1962-II] YbILC 180 para 15.
[48] UN Doc A/C.6/SR.736, 13 *et seq*.
[49] *A Pellet* in *Corten/Klein* Art 19 MN 55.

in which the substantive provisions had "undergone considerable rearrangement and revision."[50]

The rearrangement basically concerns the **logical order** of the different issues. **35**
In the 1962 Draft, five articles dealt with reservations to multilateral treaties. They covered the following issues: "Formulation of reservations" (Draft Art 18), "Acceptance of and objections to reservations" (Draft Art 19), "Effect of reservations" (Draft Art 20), "Application of reservations" (Draft Art 21) and "Withdrawal of reservations" (Draft Art 22). Except for minor drafting changes the two last mentioned articles were kept as such and became Arts 19 and 20 of the Final Draft. The other three articles were substantially revised. The procedural aspects of formulating, accepting and objecting to reservations were detached from the former Draft Arts 18 and 19 and placed together in a new Draft Art 18. By contrast, the new Draft Art 16 only dealt with the substantive rules regarding the formulation of reservations. The substantive provisions of the former Draft Arts 19 and 20 regarding acceptance of and objection to reservations were brought together in a new Draft Art 17. Thus, the Final Draft, just as the 1962 Draft set out the topic of reservations in five articles, but with a different internal logic.

Another important change concerns again the 'object and purpose' formula. In **36**
Waldock's concept, the contracting States would have been in a position to accept reservations which were incompatible with the object and purpose of the treaty. This was criticized by the United Kingdom, which argued for a judicial control concerning the compatibility of a reservation with the object and purpose of the treaty.[51] In its report, the Commission made the compatibility of a reservation with object and purpose expressly a condition for the validity of the reservation. At the same time, the Commission pointed out that assessing the compatibility with object and purpose required judgements by the other parties to the treaty in question. It therefore stressed that including the 'object and purpose' formula into the general provision regarding reservations required to read that provision "in close conjuncture with the provisions of Article 17 regarding acceptance of and objection to reservations." Thus, **the issue of a final arbiter concerning the compatibility with object and purpose was left undecided**, creating one of the most controversial issues in the law of reservations even today (→ MN 121–132).

III. Amendments to the Final Draft During the Vienna Conference

The **Final Draft was finally accepted** more or less as it had been prepared by the **37**
ILC. Nevertheless, given the controversial debate since the Court's Advisory Opinion in 1951, it is hardly surprising that it took quite an effort at the Conference to arrive at that result.[52] There was one major amendment to the text which should

[50]Final Draft, Commentary to Art 16, 206 para 8.

[51]*Waldock* IV 52 para 9.

[52]For references see *A Pellet* in: *Corten/Klein* Art 19 n 162.

be noted: while the Final Draft had suggested that an objection should preclude the entry into force of the treaty as between the reserving State and the State which had objected, unless a contrary intention had been expressed by the objecting State,[53] this presumption was reversed by the conference. According to the finally adopted text, the treaty enters into force between the reserving State and an objecting State, unless a contrary intention is definitely expressed by the objecting State" (→ Art 20 MN 47).

IV. The Current Deliberations in the ILC

38 In 1993, the ILC decided to include in its agenda, the topic "The law and practice relating to reservations to treaties". The Commission was of the opinion that although the VCLT set out important principles concerning reservations to treaties, these principles were too general to act as a guide for State practice and left a number of important questions unanswered. The Commission stressed that the regime established in Arts 19–23 should be left unchallenged, but it nonetheless considered that **the provisions needed clarifications and could be further developed**.[54] This approach of the ILC was endorsed by the UN General Assembly in its resolution 48/31 of 9 December 1993, on the understanding that the final form to be given to the work on the topic would be decided after a preliminary study was presented to the Assembly. Following this approval, the ILC appointed the French international lawyer *Allain Pellet* as Special Rapporteur for the topic.[55]

39 On the basis of his first report in 1995,[56] the Special Rapporteur **summarized the following conclusions**, which still govern the work of the ILC on the topic: (1) the title of the topic should henceforth read "Reservations to treaties"; (2) the work of the ILC should result in a guide to practice in respect of reservations; (3) there should be no change in the relevant provisions of the Vienna Conventions.

40 As of 2010, SR *Pellet* has submitted 16 Reports.[57] The purpose of the ILC was to "try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations [. . .]."

[53] Final Draft, Commentary to Art 16, 207 para 21.

[54] [1993-II] YbILC 96 paras 427–430.

[55] [1994-II] YbILC 179 para 381.

[56] SR *A Pellet* 1st Report on Reservations to Treaties [1995-II] YbILC 120 *et seq*.

[57] First Report (n 56); 2nd Report, [1996-II-1] YbILC 38–83; 3rd Report, [1998-II-1] YbILC 221–300; 4th Report, UN Doc A/CN.4/499 (1999); 5th Report, UN Doc A/CN.4/508 (2000); 6th Report, UN Doc A/CN.4/518 (2001);7th Report, UN Doc A/CN.4/526 (2002); 8th Report, UN Doc A/CN.4/535 (2003); 9th Report, UN Doc A/CN.4/544 (2004); 10th Report, UN Doc A/CN.4/558 (2005); 11th Report, UN Doc A/CN.4/574 (2007); 12th Report, UN Doc A/CN.4/584 (2007); 13th Report, UN Doc A/CN.4/600 (2008); 14th Report, UN Doc A/CN.4/614 (2009), 15th Report UN Doc A/CN.4/624 (2010), 16th Report UN Doc. A/CN.4/626 (2010).

The Commission speaks of "Draft Guidelines".[58] The **Guide to Practice** has been completed with the 2010 summer session of the ILC, when the Commission dealt with the last Draft Guidelines and provisionally adopted the whole set..[59] The final version of the Guide to Practice is to be adopted in 2011, when SR *Pellet* also intends to submit a final report with a proposal for two annexes to the Guide to Practice.[60] The complete version of the provisionally adopted Draft Guidelines is reprinted together with the official ILC commentary in the 2010.[61] The most important of these Draft Guidelines are referred to expressly in the following analysis.

D. Different Types of Reservations

The VCLT does not differentiate between different types of reservations. Hence, the **following distinctions are only of a systematic and analytical value**. They do not entail any consequences regarding their legal treatment under the VCLT. **41**

Depending on the goal pursued by a reservation, different types may be distinguished: If the reservation is to modify the temporal effects of a treaty obligation, it is usually referred to as ***ratione temporis***, if it relates to the territorial application of the treaty or its substance, the respective terms are ***ratione loci*** and ***ratione materiae***.[62] **42**

A specific form of reservations are so-called **'negotiated reservations'**. The term relates to reservation clauses in treaties which not only specify in detail the contents of possible reservations but also even mention the State, which may formulate such reservation.[63] **43**

In the interest of limiting the possible fragmentation resulting from reservations, some treaty regime contain clauses containing temporary restrictions for reservations **44**

[58]For details of the Commission's work on the Guidelines see *A Pellet* in *Corten/Klein* Art 19 MN 138 *et seq*; *Pellet* 3rd Report (n 57) 221, 235 *et seq* para 31*et seq*.

[59]ILC, Report of the ILC on the Work of its Sixty-second Session, UN Doc A/65/10, para 45 (2010).

[60]*Ibid* para 104.

[61]ILC Report 2010 (n 59) 36–73 (text only) and 73–271 (text and commentary) (2010) and → the Annex to Art 23 in this Commentary.

[62]*Giegerich* (n 2) MN 4.

[63]An example may be found in the original version of Art 32 para 1 lit b of the 1989 European Convention on Transfrontier Television ETS 132 (the provision has been amended in 2002): "At the time of signature or when depositing its instrument of ratification, acceptance, approval or accession: [...] the United Kingdom may declare that it reserves the right not to fulfil the obligation, set out in Article 15, para 1, to prohibit advertisements for tobacco products, in respect of advertisements for cigars and pipe tobacco broadcast by the Independent Broadcasting Authority by terrestrial means on its territory."; for a critical discussion of the notion of "negotiated reservations see *Pellet* 5th Report (n 57) paras 164–171.

(**'temporary reservations'**).[64] The difference between reservations *ratione temporis* and temporary reservations resides in the fact that reservations *ratione temporis* limit the application of the treaty obligation in time, whereas clauses with temporary limits on reservations limit the effects of the reservation in time.

45 An important group of reservations relates to declarations accepting the jurisdiction of international courts and treaty bodies competent under **optional clauses**. Such reservations are formally distinct from reservations under the regime of the VCLT because they relate to unilateral acts and not to treaty provisions. An important example is to be found in Art 36 para 3 ICJ-Statute, which specifically addresses the issue of reservations under the optional clause of Art 36 para 1 ICJ-Statute. While it is true that reservations to such unilateral acts raise problems analogous to reservations to treaties,[65] it should be noted that the ICJ operates on the basis that States are completely free in formulating reservations under Art 36 para 3 ICJ-Statute.[66] In the *Fisheries Jurisdiction* case, the ICJ expressly stated that "reservations from the Court's jurisdiction may be made by States for a variety of reasons; sometimes precisely because they feel vulnerable about the legality of their position or policy."[67] On the basis of this jurisprudence, the Court has, until now, never declared any reservation unlawful and invalid.

46 This position of the ICJ finds support in the literature. A major argument relates to the **difference between a unilateral acceptance of jurisdiction and multilateral agreements**, which have been "negotiated and finely tuned to take into account the interests of all States involved."[68] Even if this difference must be acknowledged, the question may nevertheless be asked whether the ICJ should be less open to accept strategies which aim at formally accepting the Court's jurisdiction while

[64] An example for a negotiated reservation with temporary limitation may be found in Art 17 (plus Annex) of the 1973 European Convention on Civil Liability for Damage caused by Motor Vehicles ETS 73: "Belgium may, at the time of signature or when depositing its instrument of ratification or acceptance of the Convention, declare that she reserves the right to exclude from the scope of the Convention material damage to vehicles, for a period of three years from the date of the entry into force of the Convention in her respect."; for further examples see *S Spilioupoulou Åkermark* Reservations: Breaking New Ground in the Council of Europe (1999) 26 ELR 499–500.

[65] *Giegerich* (n 2) MN 4.

[66] See notably ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, para 59: "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. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations. In particular, it may limit its effect to disputes arising after a certain date ; or it may specify how long the declaration itself shall remain in force, or what notice (if any) will be required to terminate it."; for further details see *C Tomuschat* in: *A Zimmermann*/*C Tomuschat*/*K Oellers-Frahm* (eds) The Statute of the International Court of Justice – A Commentary (2006) Art 36 MN 76.

[67] ICJ *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 432, para 54.

[68] *Tomuschat* (n 66) Art 36 MN 91.

at the same time trying to avoid it.[69] There is, of course, no obligation to accept the Court's compulsory jurisdiction under the optional clause of Art 36 para 1 of the Statute. But there is no obligation to participate in multilateral treaties either. Hence, there is a possibility to draw parallels between Art 36 para 3 ICJ-Statute and the general law of reservations under the VCLT: there is no general obligation to accept the Court's jurisdiction, but if it is accepted, reservations which aim at reversing this acceptance are not permissible. The approach taken by the Human Rights Committee might serve as an example (→ MN 117–118 and 127).[70]

E. Elements of Article 19

47 At first sight, the system of Art 19 seems to be fairly clear. Art 19 lit a and lit b deal with express regulations of reservations, while Art 19 lit c contains a general provision which provides for guidelines in the absence of an express regulation of the issue. A closer look reveals, however, that the issue is more complicated.

I. The "Formulation" of Reservations

48 Art 19 uses the word "formulate" instead of 'make'. This was a **deliberate choice of the drafters**: when China proposed to replace the words "formulate a reservation" with the words "make reservations" this was rejected by the Drafting Committee of the Vienna Conference on the grounds that the question of whether a reservation had been effectively 'made' was to be determined by the reaction of the other States Parties to the treaty in question.[71]

49 In view of the wording "formulate", the legal effects of a violation of the criteria mentioned in Art 19 lit a–c have been a matter of controversy throughout the years. Two schools are distinguished: the **'opposability' doctrine** argues that "the validity of a reservation depends solely on the acceptance of the reservation by another contracting State."[72] This would imply that, where no opposition is met, a reservation remains valid, even if it is formulated in contravention of Art 19. The **'permissibility' school**, by contrast, argues that the question of permissibility of reservations is not an issue, which is governed by the acceptance or opposition of other parties to the treaty, but essentially "an issue of treaty interpretation [which] has nothing to do with the

[69] Notably the so-called Vandenberg Reservation is a problematic example, see *SA Alexandrov* Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice (1995) 113–119.

[70] *M Nowak* CCPR-Commentary (2005) Art 41 MN 41.

[71] UNCLOT 121 para 2 (explanations by China), and 126 para 13 (statement by the Expert Consultant *Waldock*).

[72] *Ruda* (n 15) 190.

question of whether, as a matter of policy, other Parties find the reservation acceptable or not."[73]

50 During its ongoing deliberations on the subject of "Reservations to Treaties", the ILC tried to leave the matter open.[74] However, when SR *Pellet* nevertheless used the term 'validity' with regard to Art 19, assuming that it was neutral with regard to the abovementioned debate, he met resistance because it was felt that the terminology might already indicate the legal consequences of an 'invalid' reservation.[75] Therefore, for a number of years, the ILC used the term "(in)admissible". This, however, created new problems since it could be inferred that the formulation of an 'inadmissible' reservation was a violation of international law which could, consequently, engage international responsibility of the State concerned. Therefore, and for lack of a better term, **SR *Pellet* returned to the term 'validity'** in order "to describe the intellectual operation consisting in determining whether a unilateral statement made by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty in their application to that State or organization is capable of producing the effects attached in principle to the formulation of a reservation."[76] At the same time, he abandoned his approach of leaving open which effects an inadmissible reservation would produce.

51 However, when the issue was debated in the ILC, the positions taken were quite diverse and in consequence the **ILC postponed the deliberations** on the consequences of reservations in contravention of Art 19.[77] It was finally at its 2010 session that it addressed the issue.[78]

52 In indicating that a "State *may* [. . .] formulate a reservation" Art 19 sets out the "general principle that the formulation of reservations is permitted [. . .]".[79] In view of the historical development of the law on reservations to treaties (→ MN 7–26), this is the most important innovation of the Convention. In fact, **the provision reverses the traditional presumption resulting from the system of unanimity**. While under the traditional system reservations were in principle excluded (if not accepted by all other parties to the treaty in question), Art 19 is based on the assumption that, in principle, reservations may be formulated (if they are not impermissible for the reasons set out in Art 19).

[73] *Ibid.*

[74] See the *Pellet* 1st Report (n 56) 143 para 105.

[75] *Ibid* 120, 142 paras 97 *et seq*.

[76] *Pellet* 10th Report (n 57) para 2.

[77] ILC, Report of the ILC on the Work of its Fifty-eight Session, UN Doc A/61/10, 302–303 paras 138–143 and 157 (2006).

[78] For details → MN 108.

[79] *Waldock* I 180, para 15, and 207, para 17 (emphasis added).

II. 'Late' Reservations

The chapeau of Art 19 requires the reservation to be formulated "when signing, ratifying, accepting, approving or acceding to a treaty [...]". This implies, in principle, that it is **excluded to formulate a reservation after having expressed the consent to be bound** by the treaty. A first exception to this principle must be acknowledged where the treaty itself provides for such a possibility.[80] Furthermore, an analysis of state practice reveals that 'late reservations' are considered to be lawful when none of the other contracting parties objects to the reservation. This has led the ILC to formulate Draft Guideline 2.3.1, according to which "[u]nless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation."[81] The ILC also applied the presumption expressed in Art 20, para 5 to the acceptance of late reservations.[82] By contrast, if only one of the other contracting parties objects, the treaty remains in force for the lately reserving state without the reservation becoming effective. This is the inevitable consequence which flows from the fact that the consent to be bound by the treaty (without the reservation) had already been given. The consequence is explicitly drawn in Draft Guideline 2.3.3.[83] **53**

The late **widening of the scope of an existing reservation** is subject to the rules applicable for late reservations. If, however, an objection is made to the widening, the initial reservation remains unchanged.[84] **54**

III. Explicitly Prohibited Reservations (lit a)

Art 19 lit a deals with an express prohibition of reservations. Such a **prohibition may be of a general character**, implying that the treaty in question does not accept any reservations at all. **55**

> Among the many examples of this kind of prohibition the 1998 Rome Statute of the International Criminal Court,[85] the 1989 Basel Convention on the Control of Transboundary

[80] A good example is Art 10 para 1 of the 1999 International Convention on Arrest of Ships, UN Doc A/CONF.188.6, which provides that "[a]ny State may, at the time of signature, ratification, acceptance, approval or accession, or at any time thereafter, reserve the right to exclude the application of this Convention to any or all of the following [...]".

[81] See the commentary in ILC, Report of the ILC on the Work of its Fifty-third Session, [2001-II] YbILC, 184–189.

[82] Draft Guideline 2.3.2; see the commentary in ILC Report 2001 (n 81) 189 *et seq*.

[83] See the commentary in ILC Report 2001 (n 81) 190 *et seq*.

[84] Draft Guideline 2.3.5; for the commentary see ILC, Report of the ILC on the Work of its Fifty-ninth Session, UN Doc A/61/10, 269–274 (2006).

[85] 2187 UNTS 90, Art 120.

> Movements of Hazardous Wastes and Their Disposal,[86] or the 1985 Protocol No 6 to the ECHR[87] may be mentioned.

56 Another clear form of prohibited reservations is to be found in provisions which do not generally exclude reservations to the treaty as such, but merely to **certain specified provisions**.[88] In such a situation, it is clear that reservations are allowed with regard to all other provisions not mentioned in the prohibition.

57 The situation becomes more difficult when a treaty does not prohibit all reservations, nor reservations to specific provisions, but **certain types of reservations**. This form of dealing with reservations was expressly included in SR *Waldock*'s Draft Articles of 1962,[89] but did not make its way into the Convention. One may therefore ask the question how such prohibitions should be dealt with under the current system. An example in point is the 1977 International Sugar Agreement which states in Art 78 para 3 that

> [a]ny Government entitled to become a Party to this Agreement may, on signature, ratification, acceptance, approval or accession, make reservations which *do not affect the economic functioning of this Agreement*.[90]

The provision could either be read as an express prohibition in the sense of Art 19 lit a or it could be read as a guide for the interpretation of 'object and purpose' of the Convention in question and thus relate to Art 19 lit c. The ILC has opted for the first possibility. The 2005 report by SR *Pellet* suggests that the **prohibition of categories of reservations should be examined under Art 19 lit a.**[91] The proposal is convincing in view of the fact that the authors of such a prohibition apparently intended to expressly prohibit the category of reservation in question. This is certainly closer to Art 19 lit a than to Art 19 lit c. The ILC has therefore voted for Draft Guideline 3.1.1. according to which "a reservation is prohibited by the treaty if it contains a particular provision: [. . .] prohibiting certain categories of reservations."[92] It should be noted in this context, however, that the decisive problem is less one of the applicable law (Art 19 lit a or lit c), but rather one of interpretation of the prohibition and the reservation concerned: does the reservation in question fall within the prohibited category or not?

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[86] 1673 UNTS 126, Art 26 para 1.

[87] ETS 114, Art 4 AP 6.

[88] An example may be found in Art 4 para 1 of the 1954 United Nations Convention Relating to the Status of Refugees 189 UNTS 150: "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36–46 inclusive."; for details, see *A Pellet* in *A Zimmermann* (ed) The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol – A Commentary (2011) Art 42.

[89] The draft uses the term "category or categories of reservations", *Waldock* I 60.

[90] 1064 UNTS 219 (emphasis added).

[91] *Pellet* 10th Report (n 57) paras 30 *et seq*.

[92] *Ibid* para 32.

Within literature there is some discussion of whether **implicit**[93] **prohibitions** of reservations may be dealt with under Art 19 lit a.[94] The starting point for this discussion is the 1966 ILC Commentary which states that Art 19 lit a and b deal with cases "in which the reservation is expressly or impliedly prohibited by the treaty itself".[95] This raises the question of whether Art 19 lit a could be interpreted as also covering implicit reservations. An example which is sometimes discussed is Protocol No 11 to the ECHR, which did not expressly exclude the possibility of reservations, but in view of its substance (a complete restructuring of the surveillance mechanism established by the ECHR) was considered to exclude reservations since the surveillance mechanism was meant to be identical for all parties to the Convention.[96] While the result (exclusion of reservations to Protocol 11) seems highly plausible, the solution under Art 19 lit a is much less so. The uniform application of the surveillance mechanism could easily be seen as the 'object and purpose' of the Protocol No 11, thus excluding reservations under Art 19 lit c. **58**

Hence, the question which arises is how to **delineate the scope of application of Art 19 lit a and c**. In theory, one could distinguish an implicit prohibition of reservations (which would require at least some indication in the treaty that reservations should not be permitted) from the situation where the treaty is completely silent as to the admissibility of reservations. It must, nevertheless, be acknowledged that the intellectual operation is pretty much the same in both cases.[97] In the first situation, it is necessary to interpret the treaty as to the possible implicit prohibition. In the second situation, one is also faced with a problem of treaty interpretation, namely the determination of object and purpose of the treaty and an assessment of the compatibility of the reservation with the object and purpose determined (→ MN 66–102). In the interest of clarity and legal certainty, it is therefore preferable to limit the scope of Art 19 lit a to express prohibitions of reservations only.[98] The category of implied or implicit reservations must then be dealt with under either Art 19 lit b or Art 19 lit c.[99] **59**

[93]Sometimes also the word 'implied' is used.

[94]*Giegerich* (n 2) MN 9; *Tomuschat* (n 3) 469 *et seq*; *A Pellet* in: *Corten/Klein* Art 19 MN 153 *et seq*.

[95]Final Draft, Commentary to Art 16, 207 para 17.

[96]See *S Spilioupoulou Åkermark* Reservation Clauses in Treaties Concluded within the Council of Europe (1999) 48 ICLQ 479, 492.

[97]*Tomuschat* (n 3) 471.

[98]This is also the conclusion by *Pellet* 10th Report (n 57) paras 25–26.

[99]See again *Giegerich* (n 2) MN 9.

IV. Implicitly Prohibited Reservations (lit b)

1. General Considerations

60 At first sight, one might assume that Art 19 lit b deals with the **express authorization of reservations**, thus providing for the counterpart to Art 19 lit a. However, such an understanding is subject to serious doubts, since an express authorization would mean nothing more than a restatement of the general principle of admissibility of reservations already contained in the chapeau of Art 19 (→ MN 53).

61 Furthermore, the question would arise why, apparently, according to Art 19 lit b specified reservations, which are expressly allowed may be 'made', although the drafters deliberately avoided this wording in the chapeau of Art 19 and used the vague term "formulated" instead (→ MN 48). It is exactly on this basis that some authors argue that the wording of Art 19 is incoherent.[100] The whole problem, however, only arises if Art 19 lit b is read as dealing with authorized reservations. A closer look reveals that it is much more coherent to assume that Art 19 lit b – just like Art 19 lit a – deals with prohibited reservations, albeit not express but implicit prohibitions.[101] In the case of Art 19 lit b, the prohibition is derived *e contrario* from the clause which allows for specified reservations. If the treaty in question regulates specified reservations, one may assume that all other reservations are meant to be excluded. This understanding is underlined by the word "only" which stresses the *e contrario* argument. The "only" is one of the few amendments which the Conference added to the ILC draft[102] and was included following of a Polish proposal, which was then accepted by the Drafting Committee of the Vienna Conference.[103] It follows that **authorized reservations are not dealt with in Art 19 lit b**. This conclusion has great practical impact, since it makes it possible to apply Art 19 lit c to authorized reservations (→ MN 71).

62 The **Polish amendment is fundamental** since it actually changes the original presumption made by the Commission. Without the "only" any clause specifying certain permitted reservations would have created the presumption that all other reservations are prohibited. With the "only" added to the text, the presumption only becomes operative where the treaty in question already decides the issue by permitting "only" the specified reservations. It is, of course, a matter of interpretation of the treaty in question whether it "only" allows specific reservations. Nevertheless, the inclusion of the word "only" significantly alters the practical impact of the clause.[104] This must be seen against the general policy of the then Eastern block countries to facilitate as much as possible the formulation of reservations.

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[100] *Imbert* (n 16) 84–85.

[101] See notably *Pellet* 10th Report (n 57) para 15.

[102] *Villiger* Art 19 MN 5.

[103] UNCLOT III 134 para 177(iv)(c), UN Doc A/Conf.39/C.1/L.136.

[104] *Pellet* 10th Report (n 57) para 37.

2. The Notion of "Specified" Reservations

63 Basically, **three types of clauses allowing reservations** may be discerned. They mirror the clauses discussed with regard to Art 19 lit a (→ MN 55–59): A clause permitting reservations may either authorize reservations "only" to particular provisions, it may define categories of permissible reservations or it may generally authorize reservations. The last mentioned group can be dealt with fairly easily. Examples are rare. One may mention the 1983 European Convention on the Compensation of Victims of Violent Crimes,[105] which states in its Art 18 para 1 that "[a]ny State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession declare that it avails itself of one or more reservations." Since such a clause merely restates the general principle of permissibility of reservations under the VCLT, it can only be explained by the desire of the parties to the respective treaty to emphasize their freedom to formulate reservations.[106] Such a general permission of reservations excludes any *e contrario* argument and it cannot be qualified as dealing with "specified" reservations. Therefore, it remains outside the scope of Art 19 lit b. It has to be dealt with solely in the context of Art 19 lit c and Art 20 para 1 (→ MN 70).

64 An example for the first category – **reservations to specific provisions** – is the 1958 Geneva Convention on the Continental Shelf.[107] Art 12 para 1 of this Convention permits that any State may "make reservations to articles of the Convention other than to articles 1 to 3 inclusive." It follows quite easily that reservations to Arts 1–3 inclusive are prohibited.

An example of the second group – **permissible categories of reservations** – is contained in Art 39 of the 1928 General Act of Arbitration,[108] which allows reservations if they fall within the following "exhaustively enumerated" list:

> 2. [. . .] reservations may be such as to exclude from the procedure described in the present Act:
> (a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said party may have a dispute;
> (b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States;
> (c) Disputes concerning particular cases or clearly specified subject matters, such as territorial status, or disputes falling within clearly defined categories.

65 Just as with the categories of prohibited reservations under Art 19 lit a the determination of whether or not a reservation falls within in the ambit of permitted categories of reservations under Art 19 lit b is a matter of treaty interpretation. This may be illustrated by the following example: In the *Aegean Sea Continental Shelf*

[105] ETS 116.

[106] *Spilioupoulou Åkermark* (n 96) 495.

[107] 499 UNTS 311.

[108] 93 LNTS 343.

case,[109] the ICJ was confronted with a **Greek reservation to the 1928 General Act** relating to "disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece, including disputes relating to its rights of sovereignty over its ports and lines of communication." Under these circumstances, the Court had to determine, whether the Greek reservation fell within Art 39 para 2 lit b of the 1928 General Act. In its effort of interpretation, the Court first operated with a presumption that "[w]hen a multilateral treaty [. . .] provides in advance for the making only of particular, designated categories of reservations, there is clearly a high probability, if not an actual presumption, that reservations made in terms used in the treaty are intended to relate to the corresponding categories in the treaty."[110] In the following passage of the judgement, the Court considered the reservation of Greece to fall into this category.[111] According to the approach followed here, the effects of the Greek reservation would be dealt with only under Art 20 para 1, Art 19 lit b being only of relevance with regard to unauthorized reservations.

V. Reservations Incompatible with Object and Purpose (lit c)

1. General Considerations and Scope of Application

66 As has already been described in detail, the 'object and purpose'-test of Art 19 lit c originates in the 1951 Advisory Opinion of the ICJ (→ MN 19–36). The provision has rightly been described as the 'pivot' of the new approach to reservations followed by the VCLT.[112] Its function is to balance the **community interest to preserve the essence of the treaty** in question against the **desire of individual States to modify the obligations** according to their national interests and needs. In contrast to the ICJ, the VCLT applies the 'object and purpose'-test only to reservations, not to objections to reservations.[113]

67 Art 19 lit c applies in "cases not falling under subparagraphs (a) and (b)". The provision thus serves as a residuary clause, which covers all cases not dealt with under the other two provisions. This means that the **scope of application of Art 19 lit c is indirectly determined by the scope of application of Art 19 lit a and b**.

68 The most obvious case for the application of Art 19 lit c is treaties that do not regulate the question of reservations. There are, however, two further groups which derive from the interpretation for Art 19 lit a and b given above (→ MN 55, 60 and 61). As may be recalled, according to this interpretation, the two provisions deal with prohibited reservations only. This raises the question of how '**authorized**'

[109] ICJ *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 3 *et seq*.
[110] *Ibid* 3, 55.
[111] *Ibid* 3, 56.
[112] SR *A Pellet* 10th Report, Addendum 1, UN Doc A/CN.4/558/Add.1, para 55.
[113] ICJ *Genocide Convention* (n 21), 18, 24 *et seq*; → Art 20 MN 28.

reservations should be treated under the VCLT. For this purpose, different types of authorizations must be distinguished: According to Art 20 para 1, 'expressly' authorized reservations do not require the acceptance of the other parties. It follows that the VCLT considers expressly authorized reservations to operate automatically and consequently they are not subject to the 'object and purpose'-test of Art 19 lit c.[114]

However, there is also the possibility of an **implicit authorization**, which may derive *e contrario* from Art 19 lit a. If a treaty includes prohibitions of reservations and the reservation in question does not fall under the prohibitions, the question arises whether or not it is subject to the 'object and purpose'-test of Art 19 lit c. An example in point are reservations according to Art 42 of the Geneva Convention on Refugees, which do not relate "to articles 1, 3, 4, 16 (1), 33, 36–46 inclusive". **69**

A similar issue relates to **'unspecified' authorizations** within the context of Art 19 lit b. As may be recalled, the provision requires "specified reservations". What, then, is the law in case of an unspecified authorization? The issue may be illustrated by the decision of the Arbitral Tribunal in the *Delimitation of the Continental Shelf* case. In its decision, the Arbitral Tribunal held that Art 12 para 1 of the 1958 Convention on the Continental Shelf,[115] although using the formula "make reservations" did not in itself decide on the validity of reservations covered by it. The Tribunal held that an authorization in a treaty could only render the respective reservations immediately effective in case of "specific reservations". Such was in its view not the case with Art 12 para 1 of the 1958 Geneva Convention since it was couched in too general terms.[116] **70**

If one follows the arguments presented above in favour of the restriction of Art 19 lit a and b to prohibited reservations, the two provisions do not 'cover' any kind of authorized reservation. The logical consequence of this approach is that **such** **71**

[114] *Pellet* 10th Report, Addendum 1 (n 112) para 58; for details → Art 20 MN 25.

[115] The provision reads: "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive."

[116] "[. . .], the Court considers the view expressed by both Parties that Article 12 cannot be read as committing States to accept in advance any and every reservation to article other than Articles 1, 2 and 3 to be clearly correct. Such in interpretation of Article 12 would amount almost to a license to contracting States to write their own treaty and would manifestly go beyond the purpose of the Article. Only if the Article had authorized the making or specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance. But this is not the case with Article 12, which authorizes the making or reservations to articles other than Articles 1 to 3 in quite general terms. Article 12, as the practice of a number or States recorded in Multilateral Treaties in respects of which the Secretary-General Performs Depositary Functions confirms leaves contracting States free to react in any way they think fit to a reservation made in conformity with its provisions, including refusal to accept the reservations. Whether any such reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with (the reserving State under the treaty consequently depends on the intention of the State concerned." *Delimitation of the Continental Shelf between the United Kingdom and France (United Kingdom v France)* 18 RIAA 3 para 39 (1977).

reservations are subject to the 'object and purpose'-test of Art 19 lit c. This is in fact the approach suggested by the ILC, which states that "where a treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated [. . .] only if it is not incompatible with the object and purpose of the treaty"[117] and that "where a treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated [. . .] only if it is not incompatible with the object and purpose of the treaty."[118]

2. The Notion of "Object and Purpose"

72 Many authors have been struggling with the 'object and purpose'-standard of Art 19 lit c. It has been called **an 'enigma'**,[119] "difficult to define and thus hard to apply"[120] or remaining "as uncertain as when it first appeared in the Court's Advisory Opinion of 1951".[121] While these critical appraisals are without doubt correct, the problem remains that no better standard has been developed and that, in fact, in the absence of specific provisions dealing with reservations, nothing other than the "object and purpose" of a treaty seems to be available in order to evaluate the permissibility of reservations. This is underlined by Art 31 para 1, which refers to the 'object and purpose'-standard as a general guideline of interpretation.

73 Irrespective of the **inevitable vagueness** inherent in the formula,[122] the ILC has managed to adopt two Draft Guidelines which convincingly deal with the problem. Building on a statement by *Ago* in the 1962 deliberations of the ILC,[123] the ILC adopted Draft Guideline 3.1.5, according to which "[f]or the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential provisions of the treaty, which constitute its raison d'être."

74 On the basis of this general definition, the ILC decided to transpose and adapt the **principles contained in Arts 31 and 32 VCLT** concerning the interpretation of treaties in general, to the specific problem of interpretation that arises in the context of reservations. The result was Draft Guideline 3.1.6.:

> The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context. Recourse may also be had in particular to the title of the

[117] Draft Guideline 3.1.3, ILC Report 2006 (n 77) 324.

[118] Draft Guideline 3.1.4, *ibid*.

[119] *I Buffard/K Zemanek* The "Object and Purpose" of a Treaty: an Enigma? (1998) 3 ARIEL 311, 342.

[120] *Giegerich* (n 2) MN 10.

[121] *Reuter* 82.

[122] See notably the discussion of various approaches in the 10th Report, Addendum 1, of SR *Pellet* (n 112) paras 75–89.

[123] "The question of the admissibility of reservations could only be determined by reference to the terms of the treaty as a whole. As a rule it was possible to draw a distinction between the essential clauses of a treaty, which normally did not admit of reservations, and the less important clauses, for which reservations were possible." [1962-I] YbILC 141, para 35.

treaty, the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice agreed upon by the parties.

3. Practical Application of the 'Object and Purpose'-Formula

The **practical application** of Draft Guidelines 3.1.5. and 3.1.6. only poses problems where one can seriously debate the compatibility of a reservation with the object and purpose of the treaty in question. The 2005 Report of SR *Pellet* mentions a reservation to the Genocide Convention as a clear-cut example. If a State had the intention to make a reservation in order to reserve the right to commit acts of genocide, this would certainly run counter to the *raison d'être* of the Convention and hence violate Art 19 lit c.[124] **75**

While in such extreme cases the result obviously remains beyond doubt, it is equally obvious that the **formula must prove its value in the less clear-cut cases**. In this respect, it must be seen as a great achievement that the ILC has managed to sort out six groups of problematic reservations and to formulate Draft Guidelines for these groups.[125] **76**

a) Reservations to Clauses Concerning Dispute Settlement and the Monitoring of the Implementation of the Treaty

Especially in the context of human rights treaties the question arises as to whether and to what extent **reservations to the jurisdiction of monitoring bodies** created for the surveillance of the treaty in question are admissible. **77**

From the **jurisprudence of the ICJ**, it must be concluded that there is no general principle that such reservations are excluded. In two of its decisions concerning the *Legality of the Use of Force*, the Court held that reservations which Spain and the United States had formulated concerning the dispute settlement clause in Art IX of the Genocide Convention were permissible.[126] The Court did so despite the fact that some of the parties to the Genocide Convention had in fact taken the position that the reservations were incompatible with the object and purpose of the Convention.[127] **78**

In the **context of the ICCPR**, the Human Rights Committee had to deal with the specific problem of using the Optional Protocol in order to make reservations concerning the supervision of substantive provisions of the ICCPR. Trinidad and Tobago formulated a reservation on the occasion of the acceptance of the Optional Protocol with which it tried to exclude the Committee's competence to consider **79**

[124] *Pellet* 10th Report, Addendum 1 (n 112) para 93.

[125] *Ibid* paras 96–146.

[126] ICJ *Legality of the Use of Force (Yugoslavia v Spain; Yugoslavia v United States)* [1999] ICJ Rep 761, paras 29–33, and 916, paras 21–25; see also the similar approach in the case of *Armed Activities on the Territory of the Congo (New Application: 2002) (Congo v Rwanda)* (Provisional Measures) [2002] ICJ Rep 219 para 72.

[127] For references see *Pellet* 10th Report, Addendum 1 (n 112) para 96 with n 224.

communications from prisoners under the death sentence. The Committee had at that time already adopted in its General Comment No 24 on reservations to the ICCPR and the Optional Protocol. In that General Comment, the Committee had taken the position that reservations to the Optional Protocol may not be used in order to alter the substantive obligations deriving from the ICCPR itself.[128] Based on this reasoning, the Committee decided the case of *Kennedy v Trinidad and Tobago* and expressed its view that the reservation formulated by Trinidad and Tobago was invalid.[129] **A similar approach is taken by the ECtHR**..[130] An additional argument, on which the Court could rely under the European Convention, is Art 57 ECHR which only permits reservations "in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision."[131]

80 The analysis of the ILC led to the adoption of Draft Guideline 3.1.13:

> A reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:
>
> (i) The provision to which the reservation relates constitutes the raison d'être of the treaty; or
>
> (ii) The reservation has the effect of excluding its author from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that the author has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

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[128]"It is clear that the first Optional Protocol is itself an international treaty, distinct from the Covenant but closely related to it. Its object and purpose is to recognize the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State Party of any of the rights in the Covenant. States accept the substantive rights of individuals by reference to the Covenant, and not the first Optional Protocol. The function of the first Optional Protocol is to allow claims in respect of those rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant." General Comment No 24, UN Doc CCPR/C/21/Rev.1/Add.6, para 13.

[129]UNHRC *Kennedy v Trinidad and Tobago* Comm No 845/1999, UN Doc CCPR/C/67/D/845/1999, para 6.7; but see the joint dissenting opinion of the Committee members *Ando*, *Bhagwati*, *Klein* and *Kretzmer*; see on that decision *C Stahn* Vorbehalte zu Menschenrechtsverträgen: Anmerkungen zur Entscheidung des UN-Ausschusses für Menschenrechte im Fall R. Kennedy gegen Trinidad und Tobago (2000) 27 EuGRZ 2000, 607–614; *G McGrory* Reservations of Virtue?: Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol (2001) 23 HRQ 769, 804 *et seq*.

[130]ECtHR *Loizidou v Turkey* (GC) (Preliminary Objections) App No 15318/89 Ser A 310 para 77 (1995).

[131]*Ibid* para 76.

b) Reservations to General Human Rights Treaties

Reservations to human rights treaties are a **particularly tricky issue**.[132] It may be argued that the whole concept of reservations under the VCLT being based on reciprocity, is ill-fitted to deal with human rights treaties which aim at the establishment of objective obligations.[133] The general dilemma of reservations as an instrument standing between the preservation of the integrity of the treaty in question on the one side and the desire to include as many States as parties on the other becomes particularly relevant here. **81**

The ILC has opted for dealing with reservations to human rights under the **general regime of reservations established by the VCLT**.[134] Although this approach is sometimes contested,[135] it seems preferable given that most human rights treaties contain clauses, which expressly deal with reservations. However, the contents of these clauses are too diverse as to permit the establishment of a distinct **82**

[132]Literature on the subject is abundant: *R Baratta* Should Invalid Reservations to Human Rights Treaties be Disregarded? (2000) 11 EJIL 413–425; *R Goodman* Human Rights Treaties, Invalid Reservations and State Consent (2002) 96 AJIL 531–560; *L Lijnzaad* Reservations to UN-Human Rights Treaties – Ratify and Ruin? (1995); *E Neumayer* Qualified Ratification: Explaining Reservations to International Human Rights Treaties (2007) 36 Journal of Legal Studies 397–430; *A Pellet* in *Corten/Klein* Art 19 MN 81 *et seq*; *W Schabas* Reservations to Human Rights Treaties: Time for Innovation and Reform (1994) 32 CYIL 39–80; *A Seibert-Fohr* The Potentials of the Vienna Convention on the Law of Treaties with Respect to Reservations to Human Right Treaties in *I Ziemele* (ed) Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation (2004) 183–211; *B Simma* Reservations to Human Rights Treaties: Some Recent Developments in *Hafner et al* (eds) Festschrift Seidl-Hohenveldern (1998) 659–682; *Y Tyagi* The Conflict of Law and Policy on Reservations to Human Rights Treaties (2000) 71 BYIL 181–258.

[133]See notably the formulation of the Human Rights Committee in its General Comment No 24 (n 129) para 7: "In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken."

[134][1997-II] YbILC 56, paras 2 and 3; a similar position is taken Human Rights Committee in its General Comment No 24 (n 128) para 6, and in the Final Working Paper "Specific Human Rights Issues: Reservations to human rights treaties" submitted by Mrs *Françoise Hampson* on request of the then so-called Sub-commission on the Promotion and Protection of Human Rights (UN Doc E/CN.4/Sub.2/2004/42) para 71.

[135]*RP Anand* Reservations to Multilateral Treaties (1960–1961) 1 IJIL 84, 88; *Imbert* (n 16) 249; *M Coccia* Reservations to Multilateral Treaties on Human Rights (1985) 15 CalWILJ 1, 16; *Schabas* (n 132) 46. For commentaries on Human Rights Committee General Comment No 24 see: *EA Baylis* General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties (1999) 17 Berkeley JIL 277–329; *C Redgwell* Reservations to Treaties and Human Rights Committee General Comment No. 24 (52) (1997) 46 ICLQ 390–412; *K Korbelia* New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights (2002) 13 EJIL 437–477.

regime dealing comprehensively with reservations to human rights clauses. For instance Art 28 of 1979 Convention on the Elimination of All Forms of Discrimination against Women[136] and Art 52 of the 1989 Convention on the Rights of the Child[137] refer to the 'object and purpose'-standard, while Art 28 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[138] merely contains a clause relating to the monitoring mechanism, thus apparently submitting reservations to the substantive provisions of the Convention to the general regime of the VCLT. The same holds true for the two 1966 Covenants,[139] which operate without any provision dealing with reservations.

83 The **regional human rights instruments** back this impression of diversity.[140] While the 1969 American Convention on Human Rights (ACHR)[141] expressly refers to the regime of the VCLT (Art 75 ACHR), the African Charter is again silent on the issue. The ECHR, for its part, contains in Art 57 an elaborate clause which limits reservations to particular provisions and only to the extent that the law of the State concerned is not in conformity with the provision in question. According to Art 57 para 2 ECHR the State concerned must furthermore deliver a brief statement of the law concerned. It is, therefore, much more difficult under the ECHR to enter reservations than under the general regime of the VCLT.[142]

84 In the absence of any specific regulation, the decisive issue is **how to determine the object and purpose of the respective human rights instrument**. In order to find guidance, one may again refer to General Comment No 24 of the Human Rights Committee.[143] Furthermore, and more generally with regard to all human rights treaties, the ILC has formulated Draft Guideline 3.1.12., according to which

> "[t]o assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account should be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it."

[136] 1249 UNTS 13.

[137] 1577 UNTS 3.

[138] 1465 UNTS 85, 113.

[139] ICCPR and ICESCR.

[140] See *Giegerich* (n 2) MN 33.

[141] 1144 UNTS 143.

[142] *JA Frowein* in *JA Frowein/W Peukert* Europäische Menschenrechtskonvention, EMRK-Kommentar (2009) 628 *et seq*; *F Jacobs/R White* The European Convention on Human Rights (2006) 451 *et seq*; *P van Dijk et al* Theory and Practice of the European Convention on Human Rights (2006) Chapter 38, 1101 *et seq*.

[143] See the quotation above (n 133).

c) Reservations Relating to the Application of Domestic Law

The example of Art 57 ECHR just mentioned also relates to another category of problematic reservations, namely reservations aiming at the preservation of existing national law. **Such reservations are quite frequent**, not only in the context of human rights treaties. The background is well illustrated by the purpose of Art 57 ECHR. The provision creates the possibility for States that are, at the time of ratification, aware of certain obstacles in their national law, to nevertheless become a party to the Convention. **85**

This motivation, however, becomes problematic, if the **object and purpose of the treaty in question is precisely to change the respective national situations**. The problem is well illustrated by a former reservation of Indonesia to the Convention on the Rights of the Child according to which "[t]he ratification of the Convention on the Rights of the Child by the Republic of Indonesia does not imply the acceptance of obligations going beyond the Constitutional limits nor the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution."[144] Finland objected on the grounds that the reservation was contrary to the general principle of international treaty law, "according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty."[145] This reasoning is, however, logically flawed. It is, of course, true that Art 27 VCLT embodies a general principle according to which a party to a treaty may not invoke its national law in order to justify the non-fulfilment of its obligations. However, the precondition for the argument is that the treaty is already binding law, an issue which is precisely the question when reservations are formulated at the stage of ratification or accession.[146] Another look at Art 57 ECHR reveals that it is exactly the aim of that provision to avoid conflicts between treaty obligations and national law by permitting reservations. The problem is, thus, not one of the principles embodied in Art 27 VCLT, but rather, again, one of the application of the 'object and purpose'-test. In fact, a number of other countries objected to the same Indonesian reservation to the Convention on the Rights of Child on the grounds that the reservation was contrary to the object and purpose of the Convention in view of its generality.[147] Generally speaking, the problem of **86**

[144]Multilateral Treaties Deposited with the Secretary General 2009, UN Doc ST/LEG/SER.E/26, Vol I 410 note 24 (ch IV.11).

[145]*Ibid* 402 (ch IV.11).

[146]See the convincing critique in *Pellet* 10th Report, Addendum 1 (n 112) para 104.

[147]See, for instance, the objection entered by Norway: "A reservation by which a State Party limits its responsibilities under the Convention by invoking general principles of national law may create doubts about the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. It is in the common interest of states that treaties to which they have chosen to become parties also are respected, as to object and purpose, by all parties. The Government of Norway, therefore, objects to this reservation." Multilateral Treaties Deposited with the Secretary General (n 144) Vol I 404 (ch IV.11).

many domestic law reservations lies not so much in their reference to domestic law, but rather in the fact that they are often of a vague or sweeping character (→ MN 88 *et seq*).

87 The deliberations in the ILC resulted in the adoption of **Draft Guideline 3.1.11.**, which aims at clarifying the application of Art 19 lit c to such reservations:

> "A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific norms of the internal law of that State or international organization may be formulated only insofar as it is compatible with the object and purpose of the treaty."

d) Vague and General Reservations

88 Quite frequently, reservations raise problems in view of their vague or general character. From the perspective of the other parties to the treaty in question such reservations are problematic because they **result in an unclear scope of obligations for the reserving State**. Already during the drafting of the text of the VCLT, the desire of legal certainty and clarity was voiced.[148] A clear normative indication for vague and general reservations to be impermissible may also be seen in the wording of Art 2 para 1 lit d VCLT, which defines reservations as purporting "to exclude or to modify the legal effect of *certain* provisions of the treaty [. . .]."[149] It is telling that following comments by the Israeli Government on the Commission's first draft, a divergence between the French and the English text was corrected, the original English text having referred to "*some* provisions".[150]

89 Although, against this background, the issue of vague or general reservations might be discussed already as a question of whether such documents fulfil the criteria set out in the definition of reservations, **State practice deals with the issue under the 'object and purpose'-formula of Art 19 lit c**. In line with this general approach, the Human Rights Committee formulated the following requirement in its General Comment No 24:

> Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States Parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto.[151]

[148] See, for example, the statement of Chile at the Vienna Conference, UN Doc A/Conf.39/11/Add.1 UNCLOT I 5.

[149] Italics added.

[150] *Waldock* IV 15.

[151] General Comment No 24 (n 128) para 19.

A similar approach is followed under the ECHR. In the *Temeltasch* case of 1982, the ECommHR interpreted Art 57 para 2 (then Art 64 para 2) ECHR in the light of the **concern to avoid vague reservations**.[152] **90**

There are **many examples of vague and general reservations**. The most important group are reservations dealing with domestic law.[153] **91**

For instance, Canada formulated a reservation to the 1991 Convention on the Environmental Impact Assessment in a Transboundary Context (Espoo-Convention),[154] with which it sought to limit the obligations deriving from the Convention to those areas, where the Federal Government (as opposed to the provinces) had legislative competences.[155] Spain objected on the grounds "that this general reservation gives rise to doubts concerning Canada's commitment to the object and purpose of the Convention and recalls that, according to article 19 (c) of the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a treaty are impermissible."[156] Similarly, in the example of the Indonesian domestic law reservation to the Convention on the Rights of the Child cited above,[157] a number of other countries objected, more convincingly than Finland, by referring to the general character of the reservation.[158]

A specific version of the domestic law reservation is the so-called **'*Sharia* reservation'**, which aims at ensuring that the religious norms of the *Sharia* prevail over the respective treaty obligations. The *Sharia* reservation was most often used not only with regard to the 1979 Convention on the Elimination of All Forms of Discrimination against Women but also in relation to other human rights treaties. Examples are manifold. **92**

A good illustration is the reservation by Saudi Arabia to the 1966 International Convention on the Elimination of All Forms of Racial Discrimination[159] according to which the application of the Convention was subject to the condition that the provision in question does "not conflict with the precepts of the islamic *Shariah*".[160]

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[152]"The formal requirement in para 2 of Article 64 of the Convention is essentially a supplementary condition, which must be interpreted together with para 1 of that provision. It is recalled that the latter requires a reservation to refer to "any law in force" and prohibits reservations of a general character. This concern probably underlies the existence of paragraph 2. In other words, the information requested of States making a reservation should help to avoid the possibility of reservations of a general character being made." ECommHR *Temeltasch v Switzerland* Case 9116/80 (1983) 31 DR 120, 150.

[153]See already the discussion above → MN 85–87.

[154]30 ILM 800.

[155]"Inasmuch as under the Canadian constitutional system legislative jurisdiction in respect of environmental assessment is divided between the provinces and the federal government, the Government of Canada in ratifying this Convention, makes a reservation in respect of proposed activities (as defined in this Convention) that fall outside of federal legislative jurisdiction exercised in respect of environmental assessment.", Multilateral Treaties Deposited with the Secretary General (n 144) Vol III 678 (ch XXVII.4).

[156]Multilateral Treaties Deposited with the Secretary General (n 144) Vol III, 679 (ch XXVII.4).

[157]→ n 144.

[158]See the quotation of the Norwegian objection in n 147.

[159]660 UNTS 195, 212.

[160]Multilateral Treaties Deposited with the Secretary General (n 144) Vol I 154 (ch 11A.15).

In case of the *Sharia* reservation, a number of Western States usually object, arguing that the scope of the reservation was too vague and general and not relating to specific instances or provisions.

> A good example is the Danish objection to the reservation made by Saudi Arabia arguing that it was "unlimited in scope and undefined in character".[161]

93 It is on the basis of this practice that the ILC formulated **Draft Guideline 3.1.7.**, according to which "[a] reservation shall be worded in such a way as to allow its scope to be determined, in order to assess in particular its compatibility with the object and purpose of the treaty."

e) Reservations Relating to Provisions Embodying Customary Norms

94 Reservations to provisions which embody norms of customary international law raise general issues of the **relation between customary law and treaty law**. On several occasions, States have objected to reservations on the grounds that the provision in question was part of customary international law. They argue that a reservation to a treaty norm of customary international law could undermine the customary character of the norm.[162] However, this argument is not convincing in view of the fact that custom and treaty are mutually independent sources of international law. As the ICJ stated in the *North Sea Continental Shelf* cases "no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention."[163] It must also be borne in mind that – with the exception of norms having the character of *ius cogens* – States may create treaty obligations which contravene provisions of customary law. If States have this option by way of an international treaty, there is no compelling reason why this should be excluded by way of reservations to a treaty.[164]

95 General Comment No 24 of the Human Rights Committee raises the question whether these general considerations need to be modified with regard to **human rights treaties**. In fact, the Committee considers that "[a]lthough treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly,

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[161] *Ibid* 168.

[162] See, for instance, the Austrian Declaration referring to reservations by Guatemala to VCLT according to which "Austria is of the view that the Guatemalan reservations refer almost exclusively to general rules of [the said Convention] many of which are solidly based on international customary law. The reservations could call into question well-established and universally accepted norms. Austria is of the view that the reservations also raise doubts as to their compatibility with the object and purpose of the [said Convention]. Austria therefore objects to these reservations." Multilateral Treaties Deposited with the Secretary General (n 144) Vol III 531 (ch XXIII.1).

[163] ICJ *North Sea Continental Shelf (Germany v Netherlands, Germany v Denmark)* [1969] ICJ Rep 3, para 65.

[164] *E Klein* A Comment on the Issue of Reservations to the Provisions of the Covenant Representing (Peremptory) Rules of General International Law in *Ziemele* (n 132) 59, 61–62.

provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations."[165]

The argument of the Committee is that human rights treaties, in view of their **benefit for third persons** (*ie* the individual concerned) should be treated differently than other treaties. However, this approach is only partly convincing. First, it should be noted that all considerations which have already been presented concerning reservations to human rights treaties in general must be taken into account. It may well be that the reservation in question is incompatible with object and purpose for the reasons already discussed (→ MN 81–84). **96**

Second, and more importantly, the question should be dealt with under the more general perspective of **'codification conventions'**.[166] Human rights treaties, just as a number of other international treaties, at least in part aim at the codification of existing customary law. It is therefore argued that, in such treaties, reservations to norms which are binding under customary international law would render futile the codification effort.[167] Draft Guideline 3.1.8. states the position of the ILC as follows: **97**

> "1. The customary nature of a norm set forth in a treaty provision does not in itself constitute an obstacle to the formulation of a reservation to that provision. 2. A reservation to a treaty provision which sets forth a customary norm does not affect the binding nature of the customary norm in question in relations between the reserving State or international organization and other States or international organizations which are bound by that norm."

f) Reservations to Provisions Embodying Rules of Ius Cogens

In its **General Comment No 24**, **the Human Rights Committee** takes the position that reservations "that offend peremptory norms would not be compatible with the object and purpose of the Covenant."[168] The reasoning with the object and purpose of the treaty is contested by SR *Pellet* on the grounds that "a treaty might refer marginally to a rule of *ius cogens* without the latter being its object and purpose."[169] **98**

The question then arises which norms govern reservations to provisions incorporating rules of *ius cogens*. SR *Pellet* excludes the direct application of Art 53 VCLT to reservations arguing that this provision requires a contractual relationship. This, however, was not existent in case of reservations because they were unilateral acts.[170] If Art 53 is understood as referring not only to treaty provisions but as a general principle applicable to all legal acts, including unilateral ones, the problem **99**

[165] General Comment No 24 (n 128) para 8.

[166] *Pellet* 10th Report, Addendum 1 (n 112) para 123.

[167] *Giegerich* (n 2) MN 11; but see the more skeptical position by *Pellet* 10th Report, Addendum 1 (n 112) paras 124 *et seq*.

[168] General Comment No 24 (n 128) para 8.

[169] *Pellet* 10th Report, Addendum 1 (n 112) para 134.

[170] *Ibid* 132.

is solved (→ Art 53 MN 71–72). But even if such an extension of Art 53 is not accepted, the concept of *ius cogens* as such excludes the possibility to formulate reservations to norms which embody a rule of *ius cogens*.[171] Given the fact that reservations, although technically being unilateral acts, modify contractual relations, it is in any event justified to **apply Art 53 by analogy.**[172] Accordingly, Draft Guideline 3.1.9. states that "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law."

g) Reservations to Provisions Setting Forth Non-derogable Rules

100 A number of human rights treaties contain clauses concerning so-called non-derogable rights, *ie* rights which even in times of national emergency may not be derogated from. Examples are **Art 4 ICCPR, Art 15 ECHR or Art 27 ACHR**. It is again General Comment No 24, which raises the issue of a correlation between non-derogable rights and prohibitions of reservations. In fact, the Human Rights Committee, after a careful consideration of various aspects stated that

> "[w]hile there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation."[173]

This statement has (rightly) been brand marked as *petitio principii* by SR *Pellet*, because the Committee fails to give reasons for the specific onus.[174] At the same time, it seems evident that **the non-derogable character of certain rights** may be seen as an **indication for the importance** which the parties attached to these rights.

101 Accordingly, the solution to the problem must **differentiate following the reasons for the non-derogatory character**.[175] If the right in question is non-derogatory because the parties to the treaty considered it to be central to the object and purpose of the treaty, it will not pass the test of Art 19 lit c. If, however, the right in question is qualified as non-derogatory because the right in question, by its very nature, may not be affected by the state of emergency, reservations to that right cannot automatically be considered contrary to object and purpose of the treaty. It is against this background that Draft Guideline 3.1.10. was adopted, which basically reverses the presumption of permissibility:

> A State or an international organization may not formulate a reservation to a treaty provision relating to non-derogable rights unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

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[171] This is, in fact, the solution proposed by *Pellet* 10th Report, Addendum 1 (n 112) para 136.

[172] *Giegerich* (n 2) MN 11.

[173] General Comment No 24 (n 128) para 10.

[174] *Pellet* 10th Report, Addendum 1 (n 112) para 139.

[175] *Giegerich* (n 2) MN 12.

Finally, it must be underlined that if the non-derogable right is of *ius cogens* character reservations are impermissible already for that reason. **102**

F. Legal Consequences of Impermissible Reservations

In dealing with the legal consequences of reservations prohibited under Art 19 **substantive and procedural issues** need to be distinguished. **103**

I. Substantive Issues

The legal consequences of reservations prohibited under Art 19 must be assessed in a **two-step approach**. The first question that needs to be addressed is which legal consequences should be attached to reservations which are formulated in contravention of Art 19. If the consequence is that such reservations do not produce the result desired (*ie* modification of the treaty obligation concerned), the next step is to determine the consequences for the accession or ratification of the treaty in question. Is the consent to be bound subject to the validity of the reservation (and hence the reserving State not a party to the treaty in question) or is the reservation null and void but the instrument of ratification or accession valid (and hence the reserving State fully bound by the treaty, *ie* without the modifications intended by the reservation)? **104**

1. Nullity of the Reservation

a) The General Principle

Neither Art 19 nor Art 20 deals with the **legal consequences of a reservation which was formulated in contravention of Art 19**. The issue has already been touched upon when the current position of the ILC concerning the so-called 'opposability school' as against the 'permissibility school' was discussed (→ MN 49). The commentary of the ILC to the Final Draft is not helpful in that context because it also leaves the question open. It is sometimes argued that, at least with regard to Art 19 lit a and Art 19 lit b, the consequence was obvious. If the treaty, expressly or implicitly prohibits a specific reservation, a reservation formulated in spite of the prohibition cannot produce legal effects.[176] The question is, however, much less clear with regard to the 'object and purpose'-test demanded by Art 19 **105**

[176] *DW Greig* Reservations: Equity as a Balancing Factor? (1995) 15 AYIL 22, 52–53.

lit c. The issue was intensively discussed in the preparation of the VCLT, but with no concrete result.[177]

106 SR *Pellet* has opted for **nullity as a consequence** of a reservation impermissible under Art 19.[178] There are strong systematic arguments for this position. The most important argument is that the 'opposability school' (which would leave it to the reaction of the parties whether a reservation is incompatible with the object and purpose of the treaty) cannot convincingly explain the function additional to Art 20, which could possibly be served by Art 19 lit c.[179] This is openly admitted by some authors who view Art 19 lit c as a "mere doctrinal assertion, which may serve as a guidance to States regarding the acceptance of reservations, but no more than that."[180] However, this interpretation is questionable in view of the general principle of effectiveness of all treaty provisions which requires treaties to be interpreted in such a manner as to give a meaningful content to all treaty provisions.[181]

107 In addition to this, the **position of a number of States at the Diplomatic Conference clearly points into the other direction**.[182] A further systematic argument which is strongly presented by SR *Pellet* is that, in the absence of any indication whatsoever in the text of Art 19, it is hardly plausible to conclude on different legal consequences for Art 19 lit a and b (nullity of reservations in contravention to these provisions) and lit c (opposability, *ie* dependence on the reaction of the other parties to the treaty).[183] *Pellet* also convincingly explains the practice of the depositaries, notably the UN Secretary-General who refuse to communicate to the other parties the text of reservations which are prohibited by the treaty, while at the same time communicating reservations that are, *prima facie* incompatible with the object and purpose of the treaty. This practice must be seen against the background that assessing the compatibility with object and purpose requires an exercise of interpretation, which is much more complex and less certain in its outcome than determining the contravention to an express or implicit prohibition.[184]

108 On the basis of this analysis, the ILC adopted Draft Guideline 3.3. according to which "[a] reservation formulated in spite of a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and the purpose of the treaty is impermissible, without there being any need to distinguish between the consequences of these grounds for non-permissibility."[185] In 2010, the ILC

[177]See the detailed description of the negotiation history by *C Redgwell* Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties (1993) BYIL 245, 259–260.

[178]SR *Pellet* 10th Report, Addendum 2, UN Doc A/CN.4/558/Add.2, paras 195–200.

[179]*Redgwell* (n 177) 260.

[180]*Ruda* (n 15) 190.

[181]*Redgwell* (n 177) 261.

[182]See the analysis by *Redgwell* (n 177) 259–261.

[183]*Pellet* 10th Report (n 57) para 52; and Addendum 2 (n 178) para 183.

[184]*Pellet* 10th Report, Addendum 2 (n 178) para 184.

[185]ILC, Report of the ILC on the Work of its Sixty-first Session, UN Doc A/64/10, 302 *et seq* (2009).

furthermore adopted Draft Guidelines 4.5.1, which contains the **principle that invalid reservations are null and void**.[186]

If the consequence of nullity is accepted, the question arises as from which point in time nullity becomes operative. With regard to human rights treaties, it has been argued that for reasons of clarity nullity should only be accepted *ex nunc*, *ie* the moment of a decision stating nullity.[187] However, this solution can only be applied where treaty bodies exist which are entrusted with authoritative decisions on the validity of reservations. In all other cases, the solution is impossible because no exact point can be determined at which the nullity is manifest. Therefore, it seems preferable to stick to the usual solution of **nullity *ex initio***. **109**

b) The Role of the Other Parties to the Treaty

If reservations which are impermissible under Art 19 are to be considered null and void, this **consequence applies irrespective of the reactions of other contracting states**. This principle is spelled out in Draft Guideline 4.5.3 on "Reactions to invalid reservations", according to which "[t]he nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization."[188] However, the fact that the nullity does not depend on the objection of other parties should not obstruct the view on the practical importance of "objections" in which it is argued that the reservation in question is null and void. State practice in that regard is abundant, notably concerning reservations to human rights treaties. The ILC, therefore, rightly added a paragraph 2 to Draft Guideline 4.5.3, which states that "[n]evertheless a State or an international organization which considers that the reservation is invalid should, if it deems it appropriate, formulate a reasoned objection as soon as possible."[189] The position of the other parties will help in the process of assessing whether or not the reservation is permissible under Art 19. **110**

The question also arises as to whether the other parties to the treaty have the **option to accept an impermissible reservation**. With regard to Art 19 lit a and b, this possibility was rejected already quite early in the preparation of the Convention.[190] In view of the fact that SR *Pellet* proposed to treat the different grounds of invalidity contained in Art 19 alike,[191] there is no reason not to stretch this consequence also to Art 19 lit c. This consequence is embodied in Draft Guideline **111**

[186]For a commentary of this Draft Guideline, see ILC Report 2010 (n 61) 182–192.

[187]*I Cameron/F Horn* Reservations to the European Convention on Human Rights: The Belilos Case (1990) 33 GYIL 67, 119 *et seq*.

[188]ILC Report 2010 (n 61), 209.

[189]*Ibid*.

[190]See notably the references in *Pellet* 10th Report (n 57) para 50.

[191]"A reservation formulated in spite of the express or implicit prohibition arising from the provisions of the treaty or from its incompatibility with the object and the purpose of the treaty is not valid, without there being any need to distinguish between these two grounds for invalidity." *Pellet* 10th Report, Addendum 2 (n 178) para 187.

3.3.2 on the "Effect of individual acceptance of an impermissible reservation", which stipulates that acceptance of an impermissible reservation does not cure its nullity.[192]

112 There is one exception to these clear and convincing rules, which needs to be addressed more in detail. Already the draft presented by SR *Waldock* in 1962 provided for the possibility that "a reservation of a kind which is actually prohibited or excluded by the terms of the treaty" could be accepted if "the prior consent of all the other interested States" could be obtained. This proposal did not find its way into the Convention. But since such **collective acceptance of all other contracting parties** basically amounts to an amendment to the treaty itself, the ILC considered it possible to allow such a procedure. However, in view of the character of a *de facto* amendment of the treaty in question, the applicability of the twelve-month period in Art 20 para 5 seems questionable. The problem was solved by Draft Guideline 3.3.3 on the "Effect of collective acceptance of an impermissible reservation", according to which

> [a] reservation that is prohibited by the treaty or which is incompatible with its object and purpose shall be deemed permissible if no contracting State or contracting organization objects to it after having been expressly informed thereof by the depositary at the request of a contracting State or a contracting organization.[193]

c) Questions of State Responsibility

113 As has already been indicated in the discussion of the terminology (→ MN 50) **impermissible reservations raise the issue of State responsibility**. It must be asked whether a State that has formulated a reservation in contravention of Art 19 has committed an internationally wrongful act and can hence be held liable according to the principles of State responsibility. It can be argued that the internationally binding norm, which is breached is Art 19 itself.[194] However, this argument raises difficult questions of the relation between treaty law and the law of State responsibility. Following the ICJ in the *Gabčíkovo-Nagymaros Project* case, SR *Pellet* has adopted the position that the validity of reservations, just as the "determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties."[195] Relying furthermore on the fact that no State has ever invoked the responsibility of the reserving State when objecting to a reservation on the grounds of it being in contravention to Art 19, the ILC adopted Draft Guideline 3.3.1 on "Non-permissibility and international responsibility", according to which "[t]he formulation of an

[192] → Annex to Art 23, for a commentary of this Draft Guideline see ILC Report 2010 (n 61), *81 et seq*.

[193] For a commentary of this Draft Guideline, see ILC Report 2010 (n 61), 82–86.

[194] *Coccia* (n 135) 25 *et seq*.

[195] ICJ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, para 47; *Pellet* 10th Report, Addendum 2 (n 178) para 191.

impermissible reservation produces its consequences pursuant to the law of treaties and does not, in itself, engage the international responsibility of the State or international organization which has formulated it."[196]

2. Severability of Reservation and Ratification of the Treaty

The most controversial issue concerning the legal effects relates to the issue of severability, *ie* whether the invalidity of an impermissible reservation affects the consent of the State to the treaty as such. The VCLT does not expressly address the issue. The origin of the problem lies in the fact that the expression of consent which includes an impermissible reservation is contradictory in itself.[197] The State expresses its consent to be bound by the treaty while at the same time either trying to modify the terms of the treaty (in case of a violation of Art 19 lit a or b) or acting against its object and purpose (in case of a contravention of Art 19 lit c). Since **the paradox is inherent in the action**, it can hardly be solved by interpretation. Also, State practice as evidenced in objections is not conclusive, although there are some examples where States expressly objected to reservations while maintaining that they considered the reserving State was bound by the treaty.[198] **114**

In its 1951 Advisory Opinion to *Reservations to the Genocide Convention* the ICJ adopted the so-called **'total invalidity' solution**, which concludes that the State concerned did not become a party to the treaty in question at all.[199] This position is backed by some authors in literature.[200] It seems to have the advantage of being in line with the principle of consent which is fundamental to the law of treaties. However, it should not be neglected that the State concerned in fact did give its consent to be bound by the treaty (however infected with an impermissible reservation).[201] Therefore, it can also be argued that not becoming a party to the treaty does not correspond to the intention of the State concerned either. Under strict requirements of consent, this would lead to the hypothetical question of what the State would have preferred if it had anticipated the invalidity of its reservation. However in most cases it will be impossible to answer this question.[202] **115**

There are also **certain policy considerations**, which militate against total invalidity. In fact, if the only result of an impermissible reservation is the danger **116**

[196]ILC Report 2009 (n 185), 309–311.

[197]*Giegerich* (n 2) MN 21.

[198]See the examples quoted by *T Giegerich* Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungskompetenz von Vertragsgremien (1995) 55 ZaöRV 713, 776; *Simma* (n 132) 666.

[199]ICJ *Genocide Convention* (n 21) 21.

[200]*Baratta* (n 132) 413 *et seq*; *CA Bradley*/*JL Goldsmith*, Treaties, Human Rights, and Conditional Consent (2000) 149 Pennsylvania LR 399, 438.

[201]*Giegerich* (n 2) MN 21.

[202]Already in 1976 *Derek Bowett* suggested to distinguish the intention to be bound by the treaty from the intention to formulate a reservation and accords precedence to the intention to be bound, *DW Bowett* Reservations to Non-Restricted Multilateral Treaties (1976–77) 48 BYIL 67, 76 *et seq*.

of not being bound by the treaty, there are practically no risks for the reserving State. This could lead to an extensive practice of formulating reservations.[203] Another factor of consideration must be seen in the fact that a reservation to a specific provision of a treaty may only turn out to be impermissible after several years during which the reserving State would be treated as a party to the treaty. This is of particular relevance for human rights treaties. Here, binding decisions against that State may have been taken, although, finally, it turns out that it was not bound by the treaty at all.[204]

117 For these reasons, the **practice of human rights bodies points into the direction of severability**. Notably, the ECtHR and its American counterpart follow this concept. The ECtHR has, in a by now constant and consistent jurisprudence, decided to review the permissibility of reservations and, in case of impermissible reservations, to sever the reservation from the ratification. The former is declared invalid, while the latter is kept intact.[205] The Inter-American Court of Human Rights follows a similar approach.[206]

118 In its **General Comment No 24**, the Human Rights Committee adopted the severability concept with regard to the ICCPR. The General Comment states that

> "[t]he normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation."[207]

This **presumption of severability provoked protest from France, the United Kingdom and the United States**.[208] The Committee nevertheless followed its approach in the case of *Kennedy v Trinidad and Tobago*.[209] The Committee has been both praised[210] and criticized[211] for its approach.

119 Other universal human rights treaty bodies have followed **a more cautious approach**. In its Preliminary Opinion on the "Issue of Reservations to Treaties on Human Rights" of 13 March 2003, the Committee for the Elimination of Racial

[203] *Giegerich* (n 2) MN 22.

[204] *Giegerich* (n 198) 775 *et seq*.

[205] ECtHR *Belilos v Switzerland* App No 10328/83 Ser A 132 (1986); *Weber v Switzerland* App No 11034/84 Ser A 177 para 38 (1990); *Loizidou* (GC) (n 130) para 97 (1995); *Simma* (n 132) 670 *et seq*; *Giegerich* (n 198) 761 *et seq*.

[206] IACtHR *Hilaire v Trinidad and Tobago* (Preliminary Objections) Ser C No 80, paras 78 *et seq* (2001); see *V Gómez*, The Inter-American System: Recent Cases (2002) 2 HRLR 301, 303 *et seq*.

[207] General Comment No 24 (n 128) para 18.

[208] Report of the Human Rights Committee, GAOR 50th Session Supp 40, Vol I, 104, 130, 126, UN Doc A/50/40.

[209] UNHRC *Kennedy v Trinidad and Tobago* → (n 129).

[210] *Giegerich* (n 198) 768–769 and 776 *et seq*; *Simma* (n 132) 675 and 680; *Redgwell* (n 135) 390, 408 *et seq*; *Baylis* (n 135) 277–329; *Goodman* (n 132) 531–560.

[211] *EK Martens* Unzulässige Vorbehalte zu Menschenrechtskonventionen in *J Ipsen/E Schmidt-Jortzig* FS Rauschning (2001) 351, 359 *et seq*; *B Graefrath* Vorbehalte zu Menschenrechtsverträgen – Neue Projekte und alte Streitfragen [1996] HuV-I 68, 75.

Discrimination voted for a constructive dialogue with the State concerned arguing that

> "[t]his would be much more profitable than opening a legal struggle with all the reservation States and insisting that some of their reservations have no legal effect, that is that, in spite of their will when ratifying the Convention, they are bound by its integral text, which could detract the Committee from its main task, to promote as much as possible a complete and uniform application of the Convention, and could detract States Parties from issues concerning its implementation."[212]

After intensive deliberations the ILC decided to follow the severability approach. **120** It parts from the assumption that at least partial severability is to some extent supported by international practice. Notably, the Nordic and some other European countries tend to formulate objections, which have been described as being of "super-maximum" character.[213] The ILC opted for an **intermediate solution between severability and total invalidity** and adopted Draft Guideline 4.5.2 on the "Status of the author of an invalid reservation in relation to the treaty" which, in principle, enshrines the severability principle, but allows for modifications if necessary.

> "When an invalid reservation has been formulated, the reserving State or the reserving international organization is considered a contracting State or a contracting organization or, as the case may be, a party to the treaty without the benefit of the reservation, unless a contrary intention of the said State or organization can be identified. The intention of the author of the reservation shall be identified by taking into consideration all factors that may be relevant to that end, including:
> - The wording of the reservation
> - Statements made by the author of the reservation when negotiating, signing or ratifying the treaty, or otherwise expressing its consent to be bound by the treaty
> - Subsequent conduct of the author of the reservation
> - Reactions of other contracting States and contracting organizations
> - The provision or provisions to which the reservation relates, and
> - The object and purpose of the treaty."[214]

II. Procedural Issues

Given the unclear substantive situation, especially with regard to Art 19 lit c, it **121** would be highly desirable to have clear procedures for establishing the impermissibility of a reservation. However, the **VCLT itself does not provide for any specific procedures**.[215] The lack of such procedures certainly is not "entirely

[212]CERD/C/62/Misc.20/Rev.3, para 4.

[213]For details → Art 21 MN 33 *et seq*.

[214]For a commentary of this Draft Guideline see ILC Report 2010 (n 61) 192–208.

[215]It should nevertheless be recalled that over the years a number of proposals were made which aimed at establishing some procedure for determining the validity of reservations. Reference can be made to proposals presented as early as in 1953 by *Lauterpacht* (consent of two thirds of the States concerned required) *Lauterpacht* I.

satisfactory".[216] At the same time, it must also be acknowledged that the situation is in no way different than in international law generally, which is a decentralized legal order. Therefore, apart from the specific role of the depositaries and of treaty bodies entrusted with the supervision of treaty obligations, it is the parties themselves which have to assess the permissibility of reservations.

1. Role of the Depositaries

122 The 1969 VCLT does not specify the role of the depositaries with regard to the treatment of reservations. This was a deliberate choice, the ILC having decided to include the various acts of communication and notification in a single article, being part of the section dealing with the role of the depositary.[217] Hence, the **general provisions relating to the depositary (Arts 76–78) are applicable**.[218] The ILC adopted Draft Guideline 2.1.7, which applies the general principles concerning depositaries to reservations.[219]

123 As has already been mentioned, the **UN Secretary-General** initially subjected the admissibility of reservations to the unanimous acceptance of all parties to the treaty in question (→ MN 17).[220] With resolution 598 (VI), the General Assembly advised the Secretary-General to change this practice and

> "(i) to continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and (ii) to communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications."[221]

124 Since he is not to pass judgement on the legal effects of reservations or objections, the Secretary-General will in cases of **conventions requiring a certain number of ratifications for their entry into force**, in principle, include into the number of instruments all those that have been accepted for deposit, whether or not they are accompanied by reservations and whether or not those reservations have met with objections.[222]

125 During the deliberations in the ILC on the Draft Guidelines, the question arose as to whether it would be suitable to slightly enhance the role of the depositary with

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[216] *Pellet* 10th Report, Addendum 2 (n 178) para 155.

[217] Final Draft, Art 72, 270.

[218] For details see there.

[219] → Annex to Art 23.

[220] For details, see the 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, para 168; *PTB Kohona* Some Notable Developments in the Practice of the UN Secretary-General as Depositary of Multilateral Treaties (2005) AJIL 99 433–450.

[221] Resolution 598 (VI) (n 37) para 3b; UNGA Resolution 1452 B (XIV), 7 December 1959, [1963-II] YbILC 28, expanded this practice, which originally was confined to treaties concluded after 12 January 1952 also to treaties concluded prior to that date (para 1 of the resolution).

[222] Summary of Practice (n 220) para 184.

regard to **'manifestly invalid' reservations**. Since this was considered to be a progressive development of the role of the depositary, it was only after careful consideration of the reactions presented by the Member States that the ILC adopted Draft Guideline 2.1.8., according to which in case of a reservation which in the opinion of the depositary

> "is manifestly invalid, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the invalidity of the reservation. If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation."[223]

2. Role of Judicial and Quasi-Judicial Bodies

Not infrequently the validity of reservations will be a decisive point in judicial or quasi-judicial proceedings. Where a treaty sets up specific organs for monitoring the compliance with its provisions the question arises whether and to what extent such bodies are competent to assess the validity of reservations. The question is **most intensively discussed with regard to human rights treaties**, but it arises identically in all other contexts where a treaty body or any other international jurisdiction must explicitly or implicitly rule on the validity of a reservation. **126**

While initially also the human rights treaty bodies were hesitant in deciding on the validity of reservations,[224] notably the ECtHR and the Human Rights Committee under the ICCPR **followed a more progressive approach** in assuming the competence to decide on the validity of reservations (→ MN 117 and 118). Today the following general principles may be retained as largely accepted.[225] **127**

It is inherent in the concept of treaty bodies that they are **competent to rule on the permissibility of a reservation**, including its compatibility with the object and purpose of the treaty. Otherwise, the treaty bodies could not properly carry out the task entrusted to them. When the extent of substantive obligations undertaken by a State Party will be dependent on a reservation, the treaty body cannot operate without pronouncing on the validity of that reservation. This consequence applies irrespective of whether the treaty body is competent to give binding decisions in individual cases, issue advisory opinions or give its views on reports presented by **128**

[223] See notably the commentary on that Draft Guideline in ILC Report 2006 (n 77) 359–361.

[224] See notably the following decision by the Committee on the Elimination of Racial Discrimination of 1978: "The Committee must take the reservations made by States Parties at the time of ratification or accession into account: it has no authority to do otherwise. A decision – even a unanimous decision – by the Committee that a reservation is unacceptable could not have any legal effect." Official Records of the General Assembly, Thirty-third Session, Supp No 18, UN Doc A/33/18, para 374 lit a; more generally *Simma* (n 132) 671 *et seq*.

[225] See the description of the development and the references in *Pellet* 2nd Report (n 57) 72 paras 193–210; *Pellet* 10th Report, Addendum 2 (n 178) para 155; *Giegerich* (n 2) MN 34 *et seq*.

the State concerned.[226] The competence of treaty monitoring bodies to deal with the permissibility of reservations is dealt with in six separate Draft Guidelines of the ILC.[227]

129 The **legal authority of the treaty bodies is determined by their constitutive instrument**. If that instrument provides for binding legal authority,[228] the decision on the validity of reservations, even if only implicit, will also be binding. If, however, the instrument merely provides for 'views' which are not binding either for the party concerned or the other States party to the treaty in question, then the respective treaty body will only be in a position to present non-binding views on the validity of reservations.[229]

130 In the practice of the **Human Rights Committee reservations are not examined *ex officio*** but must be invoked by the State concerned. This practice was established in the *Case of Manuel Wackenheim v France*, where the Committee stated that "[a]lthough France has entered a reservation to article 5, paragraph 2 (a), the Committee notes that it has not invoked that reservation which does not, therefore, impede consideration of the communication by the Committee."[230]

3. The Other Parties to the Treaty in Question

131 The treaty bodies do not replace the system of dealing with reservations as established by the VCLT. This means that they are **entitled to assess the validity of reservations** for the purpose of their own competences. In the words of the ILC's Preliminary Conclusions on Reservations of 1997:

> "The Commission stresses that th[e] competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate, by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties."[231]

132 This implies that, given the **decentralized character of international law** as it currently stands, it is a matter for decision of the other States Parties to the treaty in question whether they will consider a reservation in contravention of Art 19 and hence invalid. If they pronounce a position in that regard, for instance when

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[226] *Cameron/Horn* (n 187) 119 *et seq*.

[227] See Draft Guidelines 3.2. and 3.2.1 to 3.2.5, → Annex to Art 23; for the commentary see ILC Report 2009 (n 185) 284–302.

[228] See, *eg* Arts 32 and 46 ECHR.

[229] See, *eg* Art 5 para 4 Optional Protocol ICCPR 999 UNTS 302.

[230] UNHRC Wackenheim v France Comm No 854/999, Un Doc CCPR/C/75/D/854/1999, 26 July 2002, para 6.2; for the different practice prior to this case, see *M 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 *I Ziemele* (ed) Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation (2004) 41, 54 *et seq*.

[231] [1997-II] YbILC 57.

objecting against a reservation,[232] this will certainly be taken into account by any judicial or quasi-judicial body which at a later point in time may be called upon to decide on the validity of the reservation concerned.

G. Customary Nature of Articles 19–23

In contrast to some positions in literature,[233] it seems difficult to give a general assessment on the customary nature of the provisions contained in Arts 19–23. While it is true, that there can be little doubt as to the customary nature of the flexible system for dealing with reservations as such. From today's perspective, the 1951 Advisory Opinion of the ICJ in the *Genocide Convention* case instigated a profound change of the law on reservations. In so far, the replacement of the former unanimity rule by the flexible system established under the VCLT can be considered customary law.[234] However, in those areas, where the VCLT did not provide for clear and universally accepted solutions, the customary nature remains doubtful. This is notably true regarding the treatment of reservations which are impermissible under Art 19 lit c.[235] Similarly, the consistent practice of the UN Secretary-General to treat, in his capacity as depositary, instruments of ratification which contain a reservation, for the purposes of determining the point in time at which the ratification takes effect, in contravention to the wording of Art 20, para 4 lit a and c as if they were deposited without the reservation, precludes the creation of customary law in that regard.[236] Furthermore, the rather short period of 12 months for the presumption in Art 20 para 5 cannot, in view of the ongoing debate on its appropriateness, be considered to form part of customary law.[237] By contrast, there are other areas where the customary character is beyond doubt.[238] **133**

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[232] For details → Art 21 MN 34.

[233] *Villiger* Arts 19–23 – Subsequent Developments, MN7.

[234] *Ibid.*

[235] → MN 102 *et seq.*

[236] → Art 20 MN 44 *et seq.*

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Article 20

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Contents

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A. Function and Structure

1 Art 20 deals with the **role of the other parties to a treaty** with regard to reservations, *ie* their acceptance of or objection to reservations. It can indeed be seen as the corollary to the possibility to formulate reservations.[1] Given the fact that the VCLT definitively departs from the unanimity rule (Art 9 para 2),[2] the other parties to a treaty need a legal instrument in order to defend their interests.

2 The provision **must be read in close conjunction with the requirements for reservations set out in Art 19**. In fact, one of the thorniest issues of the law of reservations is rooted in the unclear interplay between the two provisions: does the validity of a reservation depend on its acceptance or objection by the other States Parties to the treaty in question? Or is the validity of the reservation to be assessed solely on the basis of the criteria set out in Art 19? As has been set out in detail in the commentary concerning Art 19, the Convention must be interpreted as concentrating the issue of prohibited reservations in Art 19, whereas Art 20 only concerns reservations that are permitted.[3] For reasons of coherence, the following analysis is generally based on this interpretation.[4] However, since the issue has not been definitively settled yet,[5] consequences for other positions will also be addressed.

3 The **structure of the provision** needs explanation. The general principle concerning acceptance and objection of reservations is to be found slightly hidden in Art 20 para 4.[6] This provision sets out the applicable law where the treaty in question does not settle the issue of acceptance and objection itself. It can be inferred from Art 20 para 4 that the bilateral relations between a reserving State and any other State Party to the treaty in question are governed by the principle of consent (→ MN 7 *et seq*). Art 20 paras 1–3, by contrast, deal with specific situations: Art 20 para 1 addresses reservations, which are expressly authorized by the treaty itself (and which, in principle, do not require acceptance) (→ MN 25). Art 20 para 2 deals with the specific situation of certain multilateral treaties where the parties for certain reasons expect an unmodified application by all other parties

[1] The 1962 Commentary of the ILC spoke of the "corresponding power of other States to accept or reject the reservation." [1962-II] YbILC 62.

[2] See *I Brownlie* Principles of International Public Law (6th edn 2003) 585.

[3] For all details, see the section on 'opposability' or 'permissibility' → Art 19 MN 49 *et seq*.

[4] For similar positions, see for instance *Villiger* Art 20 MN 1.

[5] *T Giegerich* Treaties, Multilateral, Reservations in MPEPIL (2008) MN 20.

[6] *Villiger* Art 20 MN 9.

(which exceptionally requires acceptance of a reservation by all other parties) (→ MN 26 *et seq*). Art 20 para 3 addresses the specific situation of founding treaties of international organizations (where, in principle, acceptance by the competent organ of the organization is required) (→ MN 36 *et seq*). Finally, Art 20 para 5 sets up a presumption of acceptance after the expiry of a period of 12 months, a provision that operates in favour of reservations, since it requires the other parties of a treaty to object if they want to avoid the effects of a certain reservation (→ MN 50 *et seq*).

B. Negotiating History

The main elements of the negotiating history have already been described in the general historical context of the commentary of Art 19 (→ Art 19 MN 27–37). It is worth being mentioned once again, however, that it was **SR *Waldock* who in 1962 in his first report parted from the traditional unanimity principle** (→ Art 19 MN 30 *et seq*). It is a logical consequence of this systematic approach that *Waldock* had to address the issue of the legal consequences of consent and objections to reservations. This was done in two rather lengthy provisions, one of which dealt with "Consent to Reservations and its Effects" (Art 18 of the 1962 Draft) and the other with "Objection to Reservations and its effects" (Art 19 of the 1962 Draft).[7] While this approach had the merit of systematic coherence, it was nevertheless felt that the result was too complex.[8] The Drafting Committee therefore decided to devote a single provision to both consent and objection to reservations.[9] Furthermore, the Drafting Committee introduced a new Draft Art 18*bis* with the title "Validity of Reservations".[10] However, at that time the term 'validity' was highly controversial[11] and therefore later replaced with the more neutral formulation 'effect'.[12] **4**

When the ILC dealt again with the issue of reservations in 1965, the basic structure was kept. However, there were **important changes as to the order** in which the different issues were addressed. While the procedural aspects of formulating, accepting and objecting to reservations were grouped together in a new Draft Art 18, the substantive rules relating to acceptance and objection were now brought together in a new Draft Art 17 (→ Art 19 MN 35). **5**

An important issue in the drafting history relates to the **consequences of an objection**. In 1965 the Drafting Committee included a new para 4 lit a in its project **6**

[7][1962-II] YbILC 61 *et seq*.

[8][1962-I] YbILC 146 para 8 (*Jiménez de Aréchaga*); 148 para 29 (*Castrén*); [1962-II] YbILC 153 para 4 (*Pal*).

[9][1962-I] YbILC 221 *et seq*.

[10][1962-I] YbILC 225.

[11]See [1962-II] YbILC 176, n 48; for the still ongoing debate in the ILC on the concept of 'validity' → Art 19 MN 49 *et seq*.

[12][1962-I] YbILC 252 para 55.

of then Draft Art 19. While the 1962 Draft rested on the assumption that an objection precludes the entry into force of the treaty as between the objecting and the reserving States,[13] the rearranged Final Draft introduced the possibility for the objecting State to nevertheless allow the treaty to enter into force as between itself and the reserving State.[14] This implied that the general rule was a presumption that the treaty would not enter into force between the reserving and the objecting States.[15] During the **Vienna Conference the presumption was reversed,** meaning now that the treaty in question enters into force between the reserving and the objecting States "unless a contrary intention is definitely expressed by the objecting State."[16]

C. The Principle of Consent

7 The most fundamental principle underlying the law of treaties is consent between the parties.[17] It may be recalled in this context that the traditional approach of international law, prior to the 1951 Advisory Opinion of the ICJ, was the so-called **unanimity rule,** which required the consent by all other parties to the treaty to each reservation (→ Art 19 MN 9 *et seq*). Although departing from the unanimity rule (→ Art 19 MN 34), the VCLT does not give up the general requirement of consent. To the contrary: a close reading of Art 20 reveals that in principle consent is still required, albeit not by all parties and not in an express manner. The principle of consent is most easily visible in the context of an express acceptance of a reservation or in case of reservations authorized by the treaty itself,[18] both of which may be qualified as open forms of consent.

8 Art 20 para 5 reveals that tacit acceptance is the most probable form of consent: A party which does not object within the 12 months period is considered to have accepted the reservation in question. What is even more important is the **presumption contained in Art 20 para 4 lit b**. According to this provision, even in case of an objection, the entry into force of the treaty between the objecting State and the reserving State is presumed (→ MN 47 *et seq*). In such a situation, the legal consequences of the objection flow from Art 21 para 3, *ie* the provision to which the

[13] Art 19 para 4 lit c of the 1962 Draft, [1962-II] 62.

[14] Art 19 para 4 lit b of the Final Draft read: "An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State."

[15] *D Müller* in *Corten/Klein* Art 20 MN 11.

[16] Proposals for reversal of presumption were first defeated in 1968, but during the second Session in 1969, the Soviet Union succeeded with a new attempt. See UNCLOT I 135 paras 35 *et seq* and UNCLOT II 35 para 79.

[17] *W Heintschel von Heinegg* in *Ipsen* Völkerrecht (5th edn 2004) § 10 MN 12.

[18] This was the express understanding of the Commission in 1966, see Commentary to Art 18, 207 para 18: "Paragraph 1 of this article covers cases where a reservation is expressly or impliedly authorized by the treaty; in other words, *where the consent of the other contracting States has been given in the treaty*. No further acceptance of the reservation by them is therefore required." (emphasis added).

reservations refer does not apply between these two States while their general contractual relationship is left untouched (→ Art 21 MN 26 *et seq*).

The general rule emanating from Art 20 para 4 is that the reserving State's status as a party to the treaty depends on the reactions by the other parties. At least the **tacit consent** based on Art 20 para 5 and para 4 lit b of one other party is required for the reserving State to become a party to the treaty in question.[19] If all other parties object to the reservation and also express their objection to the treaty entering into force with regard to reserving State, then the reserving State will not become a party to the treaty. In that very fundamental sense the principle of consent is still required, even if it has been considerably softened by the effects of the presumptions contained in Art 20 para 4 lit b and para 5. 9

D. The Notions of Acceptance and Objection

I. Acceptance

The VCLT does not define the notion of acceptance in a positive manner. It can be deduced from Art 20 para 5, however, that **acceptance means the absence of an objection**.[20] Acceptance can either be formally expressed or it can be given under the conditions set out in Art 20 para 5, *ie* tacitly after the expiration of a 12 months period (→ MN 52 *et seq*). 10

Express acceptance is extremely rare. Examples are the German acceptance of a French reservation, communicated on 7 February 1979 to the 1931 Convention providing a Uniform Law for Cheques,[21] or declarations and communications by the United States made in reaction to reservations formulated by Bulgaria and the Soviet Union to Art 21 para 2 and para 3 of the 1954 Convention concerning Customs Facilities for Touring.[22] Interestingly, the German communication was dated 20 February 1980, implying that the French reservation had already been accepted tacitly on the basis of Art 20 para 5 as of 8 February 1980. 11

Some authors **distinguish between implicit and tacit acceptance**. According to this distinction, implicit acceptance refers to the situation of accession where the acceding State, conscious of an existing reservation, deposits its instrument of ratification without objecting to the reservation. Under these circumstances, the positive act of ratification or accession includes the acceptance of the reservation in question. Hence, acceptance is considered to be 'implicit' in that act.[23] Tacit 12

[19] *Giegerich* (n 5) MN 14.

[20] SR *A Pellet* 12th Report on Reservations to Treaties, UN Doc A/CN.4/584 para 186.

[21] Multilateral Treaties Deposited with the Secretary-General (2005) UN Doc ST/LEG/SER.E/23 Vol II 581–582 (note 4) (ch II.11).

[22] *Ibid* Vol I 595 (notes 15, 16 and 19) (ch XI.A.6).

[23] *DW Greig* Reservations: Equity as a Balancing Factor? (1995) 15 AustYIL 21, 120; *F Horn* Reservations and Interpretative Declarations to Multilateral Treaties (1988) 125–126; *D Müller* in *Corten/Klein* Art 20 MN 35–36.

acceptance, by contrast, is considered to refer to the situation where those who are already parties to the treaty remain silent for the period of 12 months mentioned in Art 20 para 5. Whereas in the first case, acceptance is attached to a positive act (ratification or accession), in the second situation, acceptance is inferred from the protracted silence. The distinction is convincing from a doctrinal and systematic point of view. Since the legal consequences of both situations are nevertheless the same,[24] the ILC was right in not including it into its Draft Guidelines.

13 While implicit or tacit acceptance by definition cannot and need not fulfill any **requirements of form**, express acceptance has to be formulated in writing (Art 23 para 1, → Art 23 MN 6).[25]

14 **Acceptance once expressed cannot be altered at a later stage**. The ILC rightly underlined the serious threat for legal security that could ensue from such a possibility:

> "The dialectical relationship between objection and acceptance, established and affirmed by Art 20, paragraph 5, of the Vienna Conventions, and the placement of controls on the objection mechanism with the aim of stabilizing the treaty relations disturbed, in a sense, by the reservation necessarily imply that acceptance (whether tacit or express) is final."[26]

Hence, Draft Guideline 2.8.12 simply states: "Acceptance of a reservation cannot be withdrawn or amended."[27]

15 An important question is whether reservations that are invalid under the conditions set out in Art 19 may be accepted. In 2009, the Commission, in principle, followed the proposal by SR *Pellet* not to distinguish between the different grounds of non-permissibility and to consider all reservations formulated in spite of a prohibition are impermissible.[28] In 2010, it also opted for nullity as a legal consequence of the impermissibility of a reservation under Art 19.[29] On the basis of this approach, a reservation that is impermissible under Art 19 cannot be turned into a permissible reservation through acceptance by the other contracting States. This is a logical consequence of the concept of nullity. If the reservation is inexistent, it cannot be accepted. This is expressly spelled out in Draft Guideline 3.3.2 according to which "[a]cceptance of an impermissible reservation by a contracting State or a contracting organization shall not cure the nullity of the reservation."[30] It follows that **"acceptance" in the technical sense** of Art 20 of a reservation, which is impermissible, and hence invalid, under Art 19, **is not possible**. This is a necessary consequence of the

[24] ILC, Report of the ILC on the Work of its Sixtieth Session, UN Doc A/63/10, 246 *et seq* (2008).

[25] SR *Pellet* has emphasized this requirement by including into Draft Guideline 2.8.4. "The express acceptance of a reservation must be formulated in writing." *Pellet* XII (n 20) para 234.

[26] ILC, Report of the ILC on the Work of its Sixty-first Session, UN Doc A/64/10, 253 (2009).

[27] For all Draft Guidelines mentioned in this commentary → Annex to Art 23.

[28] Draft Guideline 3.3.

[29] Draft Guideline 4.5.1; for details → Art 19 MN 108.

[30] For the commentary, see ILC, Report of the ILC on the work of its Sixty-second session, UN Doc A/65/10, 81–83 (2010).

decision to follow the approach suggested by the permissibility school (→ Art 19 MN 49 *et seq*).

Irrespective of this position, an "acceptance" of an impermissible reservation by all other parties may, under certain circumstances, be interpreted as an amendment to the treaty in question. In fact, the contracting States may, through collective action, open the possibility for an otherwise impermissible reservation. This possibility follows from the principle of consent and is a consequence of the autonomy of the parties over the treaty, expressed in Art 39 VCLT. In its Draft Guidelines, the ILC paved the way for the **collective acceptance of an otherwise impermissible reservation** outside the procedure of treaty amendment. According to Draft Guideline 3.3.3, a contracting State or a contracting organization may request the depositary to expressly inform all other parties of an impermissible reservation without objecting to it. If, on the basis of this information, none of the other contracting States objects to the reservation, the reservation "shall be deemed permissible."[31] Conceptually, the consent by the other parties must be seen as a modification of the original treaty, which enables the reserving State to avail itself of the otherwise impermissible reservation. It should be noted that the formulation "shall be deemed permissible" establishes a mere presumption of permissibility. This leaves open the possibility that a treaty monitoring body or an international court or tribunal, which is competent to decide on the permissibility of reservations, may nevertheless consider the reservation impermissible.[32] **16**

II. Objection

1. General Considerations

The **VCLT does not define the notion of objection either**. In its ongoing preparation of a Guide to Practice the ILC defined the notion of objection as follows: **17**

> "'Objection' means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization."[33]

It can easily be seen that the **definition is modeled along the definition of reservations given in Art 2 para 1 lit d**.[34] Against this background, it becomes clear that the possibility to formulate an objection is the instrument in the hands of the other parties to counter the formulation of a reservation (→ MN 1). **18**

[31]For the commentary, see ILC Report 2010 (n 30) 83–86.

[32]*Ibid* 85.

[33]Draft Guideline 2.6.1; for the commentary of the ILC see Report of the ILC on the Work of its Fifty-seventh Session, UN Doc A/60/10, 186–202 (2005).

[34]ILC Report (n 34) 186 *et seq* (2005).

19 Just as the terms 'treaty' or 'reservation' an 'objection' does not require a specific designation or terminology. According to the definition given by the ILC, the single decisive factor is the **intention to modify the effects** of a reservation. In practice this intention is in fact voiced in quite diverse terms. In some cases, a State merely tries to clarify and limit the meaning of a reservation (which can be read as a 'conditional acceptance' rather than an objection[35]). Sometimes, objections expressly use the words 'to object' or 'objection' (or corresponding terms such as 'to oppose' or 'opposition' or 'to refuse' or 'refusal'). Under certain circumstances, the objecting States refer to legal consequences, stating either that the reservation is 'impermissible', 'inadmissible', 'prohibited', 'incompatible with object and purpose' or 'void'.[36] Although the last terms refer to the conditions set out in Art 19, they also reveal the intention to object to the reservation as provided for in Art 20.

20 The **objection does not have to be justified by specific reasons**. In consequence, objections may be formulated if the objecting State considers the reservation, impermissible under Art 19 or if it simply believes the reservation to run counter to its own interests. This principle is expressed in Draft Guideline 2.6.3, according to which "[a] State or an international organization may formulate an objection to a reservation irrespective of the permissibility of the reservation."[37] Similarly, a State is free to oppose the entry into force of the treaty *vis-à-vis* the reserving State.[38]

21 The **ILC broadened the notion of "objection"** and includes unilateral statements whereby a State opposes the late formulation of a reservation or the widening of the scope of an existing reservation.[39]

22 In its terminology, the ILC distinguishes between **'normal' objections** and **'qualified' objections**. The distinction relates to Art 20 para 4 lit b, which contains a presumption that the treaty will enter into force between the reserving State and the objecting State, if the objecting State does not express its intention to the contrary. Based on this distinction, 'normal' objections are objections without such an additional statement, while 'qualified' reservations refer to situations where the objecting State is opposed to the entry into force of the treaty (→ MN 47 *et seq*).

2. Authors of Objections

23 It follows immediately from Art 20 para 4 lit b, which speaks of "objections by a contracting State", that contracting States may formulate objections. A much more

[35] "To the extent that the reservation is intended to [...] the Government of X objects to the reservation."; for similar examples, see ILC Report 2005 (n 34) 192 *et seq*.

[36] For examples, see *ibid* 198.

[37] For the commentary, see Report of the ILC on the work of its Sixty-second session, UN Doc A/65/10, 73–78 (2010).

[38] Draft Guideline 2.6.4; for the commentary see ILC Report 2010 (n 37), 78–81.

[39] Draft Guideline 2.6.2, generally concerning "late" reservations → Art 19 MN 53 *et seq*; for details see ILC Report 2005 (n 34) 202 *et seq*.

difficult question is if **States that have not yet become parties to the treaty may also formulate objections**. The ILC was divided on this point. Some members of the Commission were opposed to such 'objections' on the grounds that non contracting States and contracting States should not be treated similarly with regard to objections. The majority, by contrast, argued that nothing in the Convention prevented States, which are entitled to become parties, to voice the position regarding certain reservations already before they actually become parties to the treaty. The majority could rely on State practice according to which non contracting States often formulate objections[40] and on the ICJ, which had taken the same view in its Advisory Opinion concerning the Genocide Convention.[41] There, the ICJ states that "an objection to a reservation made by a State which is entitled to sign or accede, but which has not yet done so, is without legal effect." This corresponds to the notion of 'conditional objection' which the ILC introduced and which is characterized by the fact that the legal effects of the objection can only be produced when the condition is met (→ MN 24), in this case when the objecting State becomes a party to the treaty. These principles are contained in Draft Guideline 2.6.5, which reads:

> "An objection to a reservation may be formulated by:
> (i) Any contracting State and any contracting international organization; and
> (ii) Any State and any international organization that is entitled to become a party to the treaty in which case such a declaration does not produce any legal effect until the State or the international organization has expressed its consent to be bound by the treaty."

3. Conditional Objections

A look at State practice reveals that States use what can be called **'preemptive' objections**, *ie* objections relating to possible future reservations that have not yet been made.[42] The ILC decided to address such objections as **'conditional' objections** in view of the fact that they can only produce legal effects on the condition that a corresponding reservation is actually made.[43] Without the condition being met, such objections cannot produce legal effects. This is spelled out in Draft Guideline 2.6.14, which reads: **24**

> "An objection to a specific potential or future reservation does not produce the legal effects of an objection."[44]

[40] See the material referred to in ILC Report 2008 (n 24) 191 *et seq*.

[41] ICJ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 30.

[42] For examples of practice, see ILC Report 2008 (n 24) 218 *et seq*.

[43] ILC Report 2008 (n 24) 220.

[44] For the commentary, see *ibid* 218–221.

E. Elements of Art 20

I. Acceptance Not Required (para 1)

25 Art 20 para 1 needs little explanation. It has already been mentioned that the drafters in 1966 considered the solution of Art 20 para 1 as flowing directly from the principle of consent. The provision can be seen as reflecting **anticipated acceptance by the treaty itself**. Consequently, no further acceptance is required and, conversely, objections are excluded.[45] The latter point is underlined by Draft Guideline 2.8.12 according to which "[a]cceptance of a reservation cannot be withdrawn or amended."[46]

II. 'Plurilateral Treaties' (para 2)

26 Art 20 para 2 addresses a specific situation in which, in contrast to the new general rule of flexibility, the traditional unanimity requirement is still maintained. The provision has its roots in the concept of 'plurilateral treaties', which was discussed in the ILC in the 1950s and 1960s. Although 'plurilateral treaties' were finally not maintained as a distinct category, it was nevertheless felt that **"treaties drawn up between very few States" should be subject to the unanimity rule**.[47] The 1962 Draft relied solely on the limited number of States,[48] which however, was considered to be too vague and imprecise as a single criterion. In consequence, the 1965 Draft added "the object and purpose of the treaty and the circumstances of its conclusion" as further elements to be considered when determining whether or a reservation should be accepted by all other parties.[49]

27 The notion of "limited number of negotiating States" **can hardly be turned into a concrete figure**.[50] Therefore, the limited number of negotiating States has to be viewed jointly with the two other criteria mentioned in the provision: "the object and purpose of the treaty" and the "application of the treaty in its entirety between all parties" as an "essential condition". In fact, the decisive element of the definition must be seen in the last element. Both, the number of negotiating parties and the object and purpose of the treaty must be seen as indicators for the "application of the treaty in its entirety between all parties."[51]

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[45] This interpretation is confirmed by the wording of Art 20 para 4, which deals with objections and is expressly limited to "cases not falling under the preceding paragraphs." See *Villiger* Art 20 MN 4.

[46] For a commentary, see ILC Report 2009 (n 26) 252 and *Pellet* XII (n 20) paras 271 *et seq*.

[47] See [1965-II] YbILC 25.

[48] [1962-II] YbILC 176 (Art 20 para 3 of the Draft).

[49] [1965-II] YbILC 162 (Art 19 para 2 of the Draft).

[50] But see *R Szafarz* Reservations to multilateral treaties (1970) 3 Polish YIL 304 who mentions the number twelve.

[51] *R Kühner* Vorbehalte zu multilateralen völkerrechtlichen Verträgen (1986) 162.

Against this background, it becomes clear that the **'object and purpose'-formula as used in Art 20 para 2** serves a purpose, which is different from that followed in the context of Art 19 lit c. Whereas in the context of the latter provision, the 'object and purpose'-formula serves as a test for assessing the permissibility of a reservation (→ Art 19 MN 66 *et seq*), Art 20 para 2 presupposes the permissibility of the reservation concerned. Here, the "object and purpose" of the treaty is a tool in order to find out whether or not the reservation in question requires acceptance by all other parties. 28

It has been suggested that the provision is contradictory in itself since, if really the application of the treaty "in its entirety" was an essential condition, the logical consequence would be to prohibit reservation completely.[52] From a strictly literal point of view, this criticism may be correct. It should be noted, however, that the perspective of the drafters was the modification of the traditional unanimity rule. The new flexible system introduces the possibility of incongruent bilateral treaty relations depending on whether or not a State objected to a reservation (→Art 21). The central purpose of Art 20 para 2 must be seen in the desire to **maintain the unanimity rule** for treaties where such a patchwork of different bilateral relations is inacceptable in view of their object and purpose. Such treaty relations have been characterized as "absolutely interdependent".[53] Concrete examples mentioned during the negotiations were treaties of economic integration such as the European Union (then European Communities), treaties between riparian States relating to the development of a river basin or treaties relating to the building of a hydroelectric dam, scientific installations, *etc*[54] 29

An important issue relates to the **interplay of Art 20 paras 2 and 5**. The main purposes of Art 20 para 5 are clarity and legal certainty by limiting the period of time during which objections may be raised. It is clear from the express wording of Art 20 para 5 that, in principle, tacit acceptance through the lapse of the period of 12 months is possible. In certain situations, this could, however, lead to consequences, which put into question the stability and clarity of treaty relations. If States that are entitled to become parties to a treaty but have not yet done so could still object on the date at which they, finally, become a party to the treaty, the unanimity requirement in Art 20 para 2 would prevail over the presumption established by Art 20 para 5. The reason is that in such a situation even 12 months after the notification of a reservation, it is not definitely established that the reservation would be accepted by "all the parties". The 1962 Draft dealt with the problem in the following manner: 30

> "The consent, express or implied, of all the States participating in the adoption of the text of a plurilateral treaty is necessary to establish the admissibility of a reservation not specifically authorized by the treaty, and to constitute the reserving State a party to the treaty; provided that the consent of a State which after the expiry of twelve months from the

[52] *PH Imbert* Les Réserves aux traités multilatéraux (1979) 115; *Kühner* (n 51) 163.

[53] *B Simma* Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge (1972) 63.

[54] UNCLOT II 22 para 16 and 350 para 29.

> date of lodging an objection has not yet executed a definitive act qualifying it to become a party to the treaty shall be dispensed with, and provided that, if the treaty is in force and not less than four years have elapsed since the adoption of its text, the consent only of the parties to the treaty shall be required."[55]

31 This provision addressed two problematic situations: the first scenario relates to a **State, which objects to a reservation but then fails to ratify the treaty itself**. Should such an objection of a non-party indefinitely exclude the participation of the reserving State? The second scenario deals with the already mentioned question of until when a State that might possibly become a party to a treaty could voice an objection to a reservation made by another State. The suggestion made by SR *Waldock* in 1962[56] was finally sacrificed to the general goal of making the provisions clearer and less detailed.[57]

32 Of the two situations just mentioned the current Guide to Practice only addresses one. Draft Guideline 2.8.2 states that for the purposes of treaties requiring unanimous acceptance **an acceptance, once obtained, is final**. This implies that "wherever unanimity remains the rule, once a State or international organization accedes to the treaty, it may no longer validly object to a reservation that has already been unanimously accepted by the States and international organizations that are parties to the treaty."[58] The Commentary of the ILC stresses, however, that this does not imply that a State that is not yet a party to treaty may never object to a reservation. The ILC refers to Draft Guideline 2.6.5, which, although the ILC was divided on that point, clarifies that also States that are entitled to become parties to a treaty, but have not yet done so, are entitled to formulate objections (→ Annex to Art 23).

33 However, no solution seems to have been found for the **problem of legal clarity** that arises in this context if in case of a plurilateral treaty under Art 20 para 2, a State after having formulated an objection does not become a party to the treaty. As can be seen from the 1962 Commentary, the early drafts suggested different solutions:

> "The Commission recognized in 1951 (A/1858, chapter II) that it would be an abuse if a signatory State were to object to another State's reservation and then refrain from entering into any commitment itself to be bound by the treaty. The rule that the Commission suggested was that an objection should be disregarded if after the expiry of twelve months the objecting State had not itself ratified or otherwise accepted the treaty."[59]

34 This proposal of another 12 months period was modified first by *Fitzmaurice* who suggested a period of 5 years starting with the entry into force of the treaty, and *Waldock* who opted for 4 years starting with the adoption of the text.[60] Since these solutions were suggested *de lege feranda* and did not find their way into the final

[55] Art 18 para 4 lit a cl i of the 1962 Draft, [1962-II] YbILC 61.

[56] See the Commentary to Art 18 of the 1962 Draft, [1962-II] YbILC 68.

[57] *D Müller* in *Corten/Klein* Art 20 MN 104.

[58] ILC Report 2009 (n 26) 231.

[59] [1962-II] YbILC 68.

[60] *Ibid.*

text, they cannot be used to solve the problem under the VCLT as it currently stands. What remains is the general argument of abuse, which the Commission already used in 1951. The best solution *de lege lata* under the VCLT is to require the objecting State to produce the legal effects of its objection **within the period of twelve months of Art 20 para 5**. It is not disputed that an objection formulated by a State that has not yet expressed its consent to be bound by the treaty only produces legal effects upon ratification, accession or approval of the treaty.[61] Therefore, in order to maintain the benefits of its objection, the objecting State must express its consent to be bound by the treaty within the period of 12 months provided for in Art 20 para 5. Admittedly, this solution somewhat transforms the function of the 12 months period of Art 20 para 5, which, in principle, deals with tacit acceptance and not with express objections. However, given the protracted uncertainty, which would otherwise ensue, this seems to be the most plausible solution.

Irrespective of the solutions just suggested, it is certainly correct to state that in view of the important open issues, it is **highly advisable to include into plurilateral treaties specific regulations dealing with reservations**. In doing so, tailor-made solutions for each plurilateral regime may be established and conflicts avoided. **35**

III. 'Constituent Treaties' (para 3)

Art 20 para 3 deals with another specific situation, namely treaties that are constituent documents of an international organization. It should be noted at the outset that Art 5 expressly acknowledges the applicability of the Convention to treaties, which are constituent instruments of international organizations (→ Art 5 MN 1). Against this background, in principle, the general provisions relating to reservations would be applicable. However, it was already clear in the 1962 Draft that the specific situation of such constituent instruments would require a different treatment.[62] Nevertheless, strong criticism was voiced by some States feeling that the competence of the international organization in that area would be incompatible with their sovereignty.[63] Today, there is broad consensus that constituent documents of **international organizations cannot be automatically subjected to the flexible system of dealing with reservations** established by the VCLT**.** In fact, it is difficult to see how international organizations with their distinct international legal personality and the necessity to regulate constitutional issues of internal governance in the founding **36**

[61]ILC Report 2008 (n 24) 193.

[62]Art 18 para 4 lit c of the 1962 Draft: "In the case of a plurilateral or multilateral treaty which is the constituent instrument of an international organization, the consent of the organization, expressed through a decision of its competent organ, shall be necessary to establish the admissibility of a reservation not specifically authorized by such instrument, and to constitute the reserving State a party to the instrument." ([1962-II] YbILC 61; see the corresponding commentary *ibid* 68 para 20).

[63]Notably the Soviet Union: "Paragraph 3 of the Commission's Art 17 should also be deleted, since the sovereign right of States to formulate reservations could not be made dependent on the decisions of international organisations." UNCLOT I 107.

document, could operate on the basis of a patchwork of different bilateral legal relationships among their members. Against this background "it is only logical that States or member organizations should take a collective decision concerning acceptance of a reservation [. . .]."[64] In consequence, the main purpose of Art 20 para 3 is to exempt founding documents of international organizations from the otherwise applicable general system established by para 4.[65]

37 However, important issues remain unresolved under the provision of Art 20 para 3. The most obvious open issue relates to **international organizations *in statu nascendi***. If the organization in question has not yet come into being because the constituent document has not yet entered into force, there is no organization yet, and hence there are no organs that could decide on the acceptance of a reservation. It is sometimes suggested in literature that the provision of Art 20 para 3, by its very nature, could not apply to such situations.[66] However, this position is hardly convincing in view of the fact that the problem was seen by the drafters.[67] The practice of the Secretary-General as depositary tends into the direction to receive unanimous acceptance from all States that are already parties to the constituent instrument.[68] The ILC sees a major advantage in this approach, which resembles the unanimity requirement applied under Art 20 para 2, in the fact that the reserving State is spared an intermediate and uncertain status, which under the Austrian proposal would last until the competent organ of the organization has been established and been put into a position to decide on the reservation.[69] The price that has to be paid for this increased degree of legal certainty is that, in contrast to possible decisions by majority under the rules regulating the decision process in the competent organ, unanimity of the States Parties is required. However, this disadvantage should not be overestimated since the reserving State may always choose to wait until the organization has come into existence before it presents its application for membership and the corresponding reservation. On the basis of these considerations, the ILC formulated Draft Guideline 2.8.10:[70]

[64] ILC Report 2009 (n 26) 241.

[65] *D Müller* in *Corten/Klein* Art 20 MN 114.

[66] *T Schweisfurth* Völkerrecht (2006) 164 para 53.

[67] It was in fact Austria that had presented an amendment which would have solved the problem: "When the reservation is formulated while the treaty is not yet in force, the expression of the consent of the State which has formulated the reservation takes effect only when such competent organ is properly constituted and has accepted the reservation." A/CONF.39/C.1/L.3, UNCLOT III 135.

[68] See the analysis by *MH Mendelson* Reservations to the Constitutions of International Organizations (1971) 45 BYIL 137 *et seq*, 154 *et seq*, 162 *et seq*.

[69] ILC Report 2009 (n 26) 248.

[70] It should be noted that for reasons of a sufficiently broad participation in the assessment of the reservation, the ILC referred to the signatories and not to the actual States Parties, ILC Report 2009 (n 26) 249.

> "In the case set forth in guideline 2.8.7 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation by the end of a period of 12 months after they were notified of that reservation. Such a unanimous acceptance once obtained is final."[71]

38 The VCLT deliberately leaves open which **organ in an international organization is competent to assess the permissibility of reservations to its constituent document**. This omission is compelling since it is, in accordance with Art 5, a matter to be determined by the rules of the organization. Since, however, quite often the internal rule does not contain any provision for that specific situation, the ILC adopted Draft Guideline 2.8.8, which sets out different possibilities without determining a hierarchy among them:

> "Subject to the rules of the organization, competence to accept a reservation to a constituent instrument of an international organization belongs to the organ competent to decide on the admission of a member to the organization, or to the organ competent to amend the constituent instrument, or to the organ competent to interpret this instrument."

39 Furthermore, the **modalities of acceptance by an international organization** need clarification. Again, the VCLT is mainly silent on that point. However, one prerequisite can be derived from the formulation of Art 20 para 5. Since that provision explicitly refers to Art 20 paras 2 and 4, it necessarily follows that the acceptance of a reservation to the founding document of an international organization cannot be tacit. There is, however, practice according to which the competent organ of the organization, without formally ruling on the reservation, admitted the reserving State to participate in the work of the organization.[72] Against this background, the ILC decided to accept an implicit acceptance by admitting the reserving State to the organization and adopted Draft Guideline 2.8.9 para 1, if the rules of the organization permit such a procedure.

40 Finally, **individual reactions by Member States of an international organization to reservations** to the founding document need to be addressed. According to the ILC, the logical consequence of Art 20 para 3 is that acceptance by individual Member States is not required for the reservation to become effective. This principle is spelled out in Draft Guideline 2.8.9 para 2.

41 While this Draft Guideline settles the issue of acceptance by individual States, it **does not deal with possible rejections**. In fact, during the Vienna Conference, the United States presented an amendment to Art 17 para 3 of the then existing draft according to which acceptance by the competent organ of the organization "shall not preclude any Contracting State from objecting to the reservation."[73] This amendment was first adopted by a thin majority, but later deleted when it became

[71] ILC Report 2009 (n 26) 246 *et seq*; Draft Guideline 2.8.7 reproduces the text of Art 20 para 3; the ILC suggests that the other rules on acceptance continue to apply which notably means that the 12 months period provided for in Art 20 para 5 is applicable, *ibid* 249.

[72] *Mendelson* (n 68) 163.

[73] UN Doc A/CONF.39/C.1/L.127, UNCLOT III 135.

clear that the question of legal effects of such an objection would be a thorny issue.[74] The suggestion now adopted by the ILC is to accept individual rejections for the purposes of a **'reservations dialogue'**, while at the same time clarifying, in the interest of legal security, that such rejections could not produce any legal effects.[75]

IV. Legal Effects (para 4)

42 As has already been mentioned, Art 20 para 4 is **"at the heart" of the flexible system adopted by the Vienna Convention** with regard to reservations.[76] In fact, in providing for bilateral treaty relationships, para 4 is the provision, which most clearly indicates the departure from the unanimity principle.

1. Legal Effects of Acceptance (lit a and lit c)

43 Art 20 para 4 lit a sets out the **general principle of bilateral treaty relations**, depending on whether or not a State has accepted a reservation. The provision has to be read in conjunction with the possibility of tacit acceptance allowed for under Art 20 para 5. It follows as a general principle that in case of (express or tacit) acceptance, treaty relations between the reserving and the accepting State are created.

44 It is reasonable to **treat Art 20 para 4 lit a and lit c together**.[77] In fact, Art 20 para 4 lit c draws the logical consequence from the principle set out in Art 20 para 4 lit a, namely that at least one acceptance is necessary and sufficient in order to make the reserving State a party to the treaty in question. The function of Art 20 para 4 lit c is to determine the exact point in time at which the consent to be bound becomes effective: the moment at which at least one other State accepts the reservation.[78]

45 While this conclusion is the logical consequence of a systematic interpretation of Art 20 para 4 lit a and lit c, it is **not confirmed in practice**. In fact, the UN Secretary-General, in his capacity as a depositary of multilateral treaties, refuses to adopt a position on the validity or the effects of a reservation. In consequence, an instrument of ratification that includes a reservation is, for the purposes of determining the point in time at which the ratification takes effect, treated as if it was deposited without the reservation:

[74] For reference, see ILC Report 2009 (n 26) 250 *et seq*.

[75] Draft Guideline 2.8.11.

[76] *Villiger* Art 20 MN 9.

[77] *Kühner* (n 51) 157.

[78] *Villiger* Art 20 MN 16; *Kühner* (n 51) 159.

> "Since he is not to pass judgement, the Secretary-General is not therefore in a position to ascertain the effects, if any, of the instrument containing reservations thereto, inter alia, whether the treaty enters into force as between the reserving State and any other State, a fortiori between a reserving State and an objecting State if there have been objections. As a consequence, if the final clauses of the treaty in question stipulate that the treaty shall enter into force after the deposit of a certain number of instruments of ratification, approval, acceptance or accession, the Secretary-General as depositary will [. . .] include in the number of instruments required for entry into force all those that have been accepted for deposit, whether or not they are accompanied by reservations and whether or not those reservations have met with objections."[79]

This **position has been criticized in literature**[80] and the ILC has backed the strict application of Art 20 para 4 lit c. The ILC is of the opinion that "[a]ccording to the terms of article 20, paragraph 4 (c), of the Vienna Conventions, the author of a reservation does not become a contracting State or organization until at least one other contracting State or other contracting organization accepts the reservation, either expressly – which seldom occurs – or tacitly on expiration of the time period set by article 20, paragraph 5 [. . .]."[81] It is true that this position will in most cases lead to a delay of 12 months, because express acceptance rarely occurs. However, this delay is the consequence of the decision of the reserving State to formulate a reservation. Hence the (sometimes undesired) temporal consequence should be accepted.[82] **46**

2. Legal Effects of Objection (para 4 lit b)

While Art 20 para 4 lit a and lit c deal with acceptance, Art 20 para 4 lit b deals with objections. It addresses the issue of whether the objection of another State Party to a reservation precludes the entry into force of the whole treaty as between the two parties. As is set out in the provision, this is not the case if the objecting State does not expressly state its contrarian intention (**'qualified objection'**). Thus, as a rule, the treaty in question enters into force in between the reserving State and the objecting state, however without the provision to which the reservation and the objection relate (→ Art 21 MN 28). **47**

It should be noted that the presumption just mentioned was a matter of intensive debate during the preparation of the VCLT in the ILC and at the Vienna Conference. The Final Draft operated on the basis of a **reverse presumption**, namely that in case of an objection no treaty relations would be created unless a contrary intention was expressed by the objecting State.[83] A similar position had **48**

[79] Summary of Practice para 184.

[80] *D Müller* in *Corten/Klein* Art 20 MN 48 with further references.

[81] ILC Report 2010 (n 37), 129.

[82] Draft Guideline 4.2.1; for the commentary, see ILC Report 2010 (n 37) 126–130.

[83] Art 17 para 4 lit a of the Final Draft read: "An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State," Final Draft 202.

already been taken by the ICJ in its Advisory Opinion concerning the Genocide Convention.[84] The presumption was reversed at a rather late stage during the conference,[85] a decision that is sometimes criticized in literature,[86] but has received broad acceptance today.

49 In its ongoing debate on reservations, the ILC did not question the presumption as such, but merely adopted a Draft Guideline that deals with the **point in time for expressing a contrary intention**. Draft Guideline 2.6.8 reads:

> "When a State or international organization making an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them."

50 This Draft Guideline first **urges for legal clarity** in that it demands that the objecting State shall "definitely" express its intention. Formulations used in practice are "the Government of X [. . .] does not deem any State which has made or will make such reservation a party to the Convention",[87] "X will not be bound by the agreement in its relations to Y"[88] or the statement that the Government X does "not accept the entry into force of the Convention as between X and Y".[89]

51 Furthermore, Draft Guideline 2.6.8 clarifies the **exact point in time at which the intention to oppose the entry into force of the treaty must be expressed**. The ILC convincingly deduces the solution to this issue from consideration of legal security. Since in the absence of a clear expression to the contrary, the treaty enters into force between the reserving and the objecting State, it should not be possible to change this important legal consequence retroactively.[90] The only exception accepted to this general principle relates to situations where the treaty did not enter into force for other reasons, *eg* lack of necessary number of ratification. In such situations the Commission did not see any reasons to prevent the objecting State from precluding the entry into force on the basis of Art 20 para 4 lit b at a later stage. Hence the formulation "before the treaty would otherwise enter into force." In consequence, the intention to preclude the entry into force must be voiced at the latest before the entry into force of the treaty.

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[84] *Genocide Convention* (n 41) [1951] ICJ Rep 26.

[85] UNCLOT II 35 para 79.

[86] *Kühner* (n 51) 182.

[87] Multilateral Treaties Deposited with the Secretary-General (2006) UN Doc ST/LEG/SER.E/25, Vol I 132–133 (ch IV.1).

[88] *Ibid* Vol I 899 (ch XI.B.22).

[89] *Ibid* Vol II 416 (ch XXIII.B.1).

[90] ILC Report 2008 (n 24) 199.

V. Acceptance Through Non-objection (para 5)

Art 20 para 5 establishes a presumption of acceptance after the expiry of the time period mentioned in the provision. Thus, the main function of the provision is to provide for **legal clarity when other parties to a treaty remain silent**. In such a situation, their acceptance is presumed after 12 months.[91] **52**

The presumption established by Art 20 para 5 has an **indirect consequence on time limits for filing objections**. Since after the expiry of 12 months, acceptance is presumed, objections must be filed within that period in order to become effective. This conclusion is drawn in Draft Guideline 2.6.13. **53**

The **period of twelve months is subject to debate in literature**. It is sometimes criticized as too short.[92] This criticism requires several remarks: First, as can be clearly derived from the wording "unless the treaty otherwise provides", the solution provided for in the VCLT is residual and can thus be amended if the parties of a treaty consider it to be impractical. Second, the period is spelled out expressly in the Convention. Hence, changing the period could only be achieved by amending the Convention itself. The uncertainties concerning the period must, however, lead to the conclusion, that it has not achieved the status of customary law. It follows that wherever the VCLT is not applicable, the presumption contained in Art 20 para 5 cannot be applied as a rule of customary international law.[93] **54**

Art 20 para 5 and Draft Guideline 2.6.13 distinguish two separate situations. The first involves **States, which are already parties to the treaty in question**. In this situation, the period of 12 months runs from the date of receipt of the notification of the reservation. The second situation concerns **States that have not yet become a party to the treaty in question when they are notified a reservation**. In this situation, the period of 12 months only starts at the moment when they express their consent to be bound. This period may reach considerably beyond the 12 months starting to run with the notification of a reservation for States, which are already parties to the treaty. However, the slight insecurity resulting from this construction should not be overestimated. In fact, the second situation presupposes that the treaty in question has already entered into force as between the then already existing parties. Possible objections by a newly acceding State, therefore, only affect the bilateral treaty relations between the reserving State and the objecting State. There is no reason why the reserving State should have a legitimate expectation that new parties would not raise objections.[94] **55**

[91] This is spelled out explicitly in Draft Guideline 2.8.1 on "Tacit acceptance of reservations". For the commentary, see the ILC Report 2009 (n 26) 225–229.

[92] *Aust* 155; *Villiger* Art 20 MN 17.

[93] ILC Report 2008 (n 24) 215; *D Müller* in *Corten/Klein* Art 20 MN 16.

[94] Generally, on the problem of equality of treatment of the two situations, see ILC Report 2008 (n 24) 217 with further references.

56 It is a logical consequence of the presumption contained in Art 20 para 5 that objections, which are formulated after the expiry of the period of 12 months (**'late objections'**), cannot produce the legal effects of objections meeting the conditions of Art 20 para 4 lit b and para 5. It follows that such objections may be considered as an element in assessing whether a reservation is valid under the criteria contained in Art 19,[95] but they cannot be considered as objections within the context of Art 20.[96] Within the ILC, a certain debate existed on whether late objections should be called "objections" at all. In view of its general approach to define "reservations" and "objections" according to the intentions of the respective author and not based on the actual legal effects, the majority of the Commission has voted in favour of the terminology "objection".[97] The debate is relevant with regard to conceptional coherence and clarity. Apart from that, it does not have practical legal effects.

57 In the context of the period set by Art 20 para 5, the question arises if a State may, within that period **alter the scope of an objection**, which it has already made. It is clear that narrowing the scope does not cause any legal problems. The answer is, however, less clear with regard to changes that widen the scope of existing objections. The ILC was divided on the issue. While some members relied on the lack of State practice on the matter and had fears for legal security if the objecting State was free to alter its objection, others considered that the period of 12 months was sufficient to protect the interests of the reserving State. According to this view, there is no legitimate expectation that existing objections would remain unaltered until the 12 months have lapsed.[98] The Commission finally reached a compromise according to which a State cannot retroactively alter its decision under Art 20 para 4 lit b not to prevent the entry into force of the treaty as between itself and the reserving State. This solution is sound in view of the fact that a retroactive change of a treaty bond would seriously undermine legal security. This solution is embodied in Draft Guideline 2.7.9.

Selected Bibliography

See the bibliography attached to the commentary on Art 19.

[95] On this function of "objections", generally → MN 18.

[96] This consequence is explicitly spelled out in Draft Guideline 2.6.15; for details, see the commentary in ILC Report 2008 (n 24) 224–225.

[97] ILC Report 2008 (n 24) 224 *et seq*.

[98] *Ibid* 241 *et seq*.

Article 21

Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Contents

A. Function and Structure

Art 21 does not explicitly state whether it relates to all reservations or only to permissible reservations, *ie* reservations which have been made in accordance with Arts 19, 20 and 23. In fact, the question of how impermissible reservations should be dealt with is the most difficult issue relating to reservations (→ Art 19 MN 103 *et seq*). As explained in the commentary to Art 19, impermissible reservations must **1**

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be considered null and void (→ Art 19 MN 105 *et seq*). The necessary consequence for the interpretation of Art 21 is that the provision only deals with the **legal effects of reservations permissible reservations**.

2 In contrast to all other provisions dealing with reservations, Art 21 did not create major controversies during the negotiations.[1] The provision is structured according to the basic characteristics of reservations as contained in the definition of Art 2 para 1 lit d of the Convention, namely that "it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." It follows logically from this definition that the basic legal effect of a permissible reservation consists in **a modification of legal obligations** stemming from the treaty, which is the object of the reservation. Accordingly, Art 21 distinguishes the relationship between the reserving State and the other parties to the treaty, which is dealt with in para 1 from the *inter se* relationship between all other parties regulated in para 2. Art 21 para 3 addresses the specific question of the entry into force of the treaty in case of objections to a reservation, *ie* it deals with the effects of objections.

B. Negotiating History

3 As has already been indicated, the provisions of Art 21 have been adopted without any significant difficulties. The early reports by *Brierly* and *Lauterpacht* did not contain any specific provision dealing with the effects of reservations. It was the 1956 Draft presented by *Fitzmaurice* which included for the first time a provision which largely resembles today's text of Art 21 paras 1 and 2.[2] Apparently, **the purpose of the provision and its interpretation were considered self-evident**. The commentary by *Fitzmaurice* states laconically: "It is considered useful to state these consequences, but they require no explanation."[3] As a comparison with the current wording shows, the text underwent no significant changes. It was included as Draft Art 18 para 5 in the Draft Articles presented by *Waldock*[4] and became Art 19 following the reorganization of the articles on reservations (→ Art 19

[1] *Villiger* Art 21 MN 1.

[2] "Article 40. Reservations (legal effects if admitted).
If a reservation is admitted in accordance with the preceding articles, its effect is:
(a) To permit the reserving State to derogate from the provisions of the treaty to the extent, or in the manner, indicated in the reservation, but no more – the terms of the reservation being construed strictly for this purpose;
(b) To permit a similar derogation on the part of the other parties to the treaty in their relations with the reserving State, which cannot claim from them a greater degree of compliance with the treaty than it undertakes itself.
2. A reservation admitted for one party to a treaty only affects relations between the reserving State and each of the other parties and has no effect on the relations of the other parties inter se." *Fitzmaurice* I 115 *et seq*.

[3] *Ibid* 127.

[4] *Waldock* I 61 *et seq*.

MN 35 *et seq*) in 1966.[5] The 1966 Commentary states that the rules, "which appear not to be questioned, follow directly from the consensual basis of the relations between parties to a treaty. A reservation operates reciprocally between the reserving State and any other party, so that it modifies the treaty for both of them in their mutual relations to the extent of the reserved provisions. But it does not modify the provisions of the treaty for the other parties, inter se, since they have not accepted it as a term of the treaty in their mutual relations."[6] The provision does not seem to have raised any further debate or commentary either in the ILC or at the Vienna Conference.

With regard to the **negotiating history of para 3,** it should be noted that under the traditional unanimity rule, no such provision was necessary. In fact, under these circumstances, one single objection did dispose the reservation of its legal effects. Consequently, the 1956 Draft by *Fitzmaurice*, which was still based on the unanimity rule (→ Art 19 MN 29), did not contain any provision resembling para 3. The first report by *Waldock* did not contain such a provision either. The reason for this omission must be seen in the fact that, according to *Waldock*'s concept, an objection to a reservation automatically prevented the entry into force of the treaty as between the objecting State and the reserving State.[7] When, however, the ILC changed this automatic consequence into a mere presumption (→ Art 20 MN 6), the question arose as to the legal consequences of an objection when the treaty enters into force also between the reserving and the objecting States. The issue was first addressed in observations made by the United States, which suggested that the text deals with the "unusual" situation that the objecting State considers itself in treaty relations with the reserving State. It proposed the following new paragraph[8]: **4**

> "Where a State rejects or objects to a reservation but considers itself in treaty relations with the reserving State, the provisions to which the reservation applies shall not apply between the two States."

While accepting the necessity to regulate the question, SR *Waldock* had **doubts as to whether the entry into treaty relations could be decided by the objecting State alone** without giving any voice to the reserving State which, in turn, might not wish to enter into treaty obligations with an objecting State. Against this background, Waldock proposed the following alternative wording: **5**

> "Where a State objects to the reservation of another State, but the two States nevertheless consider themselves to be mutually bound by the treaty, the provision to which the reservation relates shall not apply in the relations between those States."[9]

The **members of the ILC were split over the issue**, some highlighting the fundamental value of the principle of consent in treaty relations, others believing **6**

[5] *Waldock* I 208 *et seq*.

[6] *Ibid* 209.

[7] Art 19 para 4 lit c of the 1962 Draft, *Waldock* I 62.

[8] *Waldock* IV 55.

[9] *Ibid*.

that the objection could produce the effects unilaterally.[10] The ILC finally adopted unanimously the following text, which leaves the issue open:

> "When a State objecting to a reservation agrees to consider the treaty in force between itself and the reserving State, the provision to which the reservation relates does not apply as between the two States to the extent of the reservation."[11]

7 At the **Vienna Conference,** the basic principles underlying para 3 were accepted. However, since the presumption in Art 20 para 4 lit b was reversed (→ Art 20 MN 8), the text of Art 21 had to be adapted accordingly.[12]

C. Elements of Article 21

I. The 'Establishment' of a Reservation (Chapeau)

8 The chapeau of Art 21 uses the term "established" reservation, however without defining when a reservation must be considered to be established. The rather **general reference to Arts 19, 20 and 23** does not in itself provide for an adequately precise definition. However, it permits to discern the necessary criteria.

1. Permissibility (Art 19)

9 The **reference to Art 19 contained in the chapeau** must be interpreted as requiring the permissibility of the reservation under that provision.[13] In consequence, reservations, which are impermissible under Art 19, cannot be considered to be "established" within the meaning of Art 21.

2. Formal Validity (Art 23)

10 Furthermore, it can be derived from the reference to Art 23 in the chapeau that the **formal requirements** for reservations contained in that provision must be complied with, in order that a reservation can be considered to be "established".[14] The reference is imprecise in so far as it also includes Art 23 paras 3 and 4, which deal with withdrawal of reservations and objections and issues of formal confirmation, both of which have no effect on the establishment of a reservation. The reference must therefore be interpreted as being limited to Art 23 paras 1 and 2.[15]

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[10] [1965-I] YbILC, 171 *et seq* and 271 *et seq*.

[11] *Ibid* 284.

[12] See the detailed description and the references presented by *D Müller* in *Corten/Klein* Art 20 MN 10 fn 31.

[13] ILC, Report of the ILC on the Work of its Sixty-second Session, UN Doc A/65/10, 114 (2010).

[14] *Ibid*.; as for the formal details, see Art 23 MN 6 *et seq*.

[15] Report of the ILC 2010 (n 13) 113.

3. Consent

A third consequence results from the reference to Art 20. The reference may be generally interpreted as implying that for a reservation to be established "with regard to another party", the consent of that party is required. The ILC included the requirement of consent in its Draft Guideline 4.1 according to which "[a] reservation formulated by a State or an international organization is established with regard to a contracting State or a contracting organization if it is permissible and was formulated in accordance with the required form and procedures, *and if that contracting State or contracting organization has accepted it*."[16] It may be thus generally said that Art 21 **para 1 only applies to situations where no objection has been made.**[17] In this context, the presumption in Art 20 para 5 has to be taken into account. On the basis of this provision the acceptance of a reservation is presumed after a period of 12 months. In consequence, 'objections', which are filed after the lapse of that period (so called 'late objections'), cannot produce the legal effects of an objection. It follows logically that Art 21 para 1 is applicable to such situations (→ Art 20 MN 52). **11**

Thus, the different situations addressed in Art 20 must be taken into account. Where the **treaty itself authorizes the reservation in question**, no further acceptance is required (Art 20 para 1). In consequence, such a reservation is "established" without any subsequent acceptance by the other contracting parties, unless the treaty provides otherwise.[18] **12**

By contrast, in the situation referred to in **Art 20 para 2**, *ie* when a treaty in view of the limited number of contracting parties and given its object and purpose requires to be applied in its entirety between all contracting parties, the acceptance of all contracting parties is required.[19] **13**

Finally, in the situation addressed in Art 20 para 3, reservations to the **constituent document of an international organization** need to be accepted in conformity with the requirements of that provision.[20] **14**

II. Legal Effects of Acceptance (para 1)

1. General Effects

Art 21, para 1 presupposes that the reserving State becomes at least a **contracting State to the treaty in question** within the meaning of Art 2 para 1 lit f VCLT. **15**

[16]For all Draft Guidelines mentioned in this commentary → Annex to Art 23; for the commentary to Draft Guideline 4.1, see ILC Report 2010 (n 13) 112–116.

[17]*D Müller* in *Corten/Klein* Art 21 MN 19.

[18]Draft Guideline 4.1.1; for the commentary, see ILC Report 2010 (n 13) 116–121.

[19]Draft Guideline 4.1.2; for the commentary, see *ibid* 121–124.

[20]Draft Guideline 4.1.3; for the commentary, see *ibid* 124 *et seq*; for the details of the requirements under Art 20 para 3, see Art 20 MN 36 *et seq*.

This effect follows logically from Art 20 para 4 lit a and c (→ Art 20 MN 43 *et seq*). It is also spelled out in Draft Guideline 4.2.1.[21] As "contracting State", the reserving State is to be included in the number of contracting States required for the entry into force of the treaty if the treaty contains such a requirement.[22] If the treaty is already in force, the reserving State becomes a "party" within the meaning of Art 2 para 1 lit g VCLT.[23]

2. Relations of the Reserving State Towards the Accepting State (para 1 lit a)

16 As the negotiation history shows, the legal effects of Art 21 para 1 are quite obvious and require little comment. The purpose of the provision is to simply state what is in fact already an intrinsic element of the definition of reservations, namely that the **legal relations between the reserving State and those States which have not objected to the reservation** are determined by the reservation. This is actually a consequence, which follows "directly from the consensual basis of the relations between parties to a treaty."[24]

17 It is interesting to note, however, that a **difference in wording exists with regard to the definition of reservations in Art 2, para 1 lit d**. While the definition speaks of the intention "to exclude or to modify the legal effects of certain provisions of the treaty", Art 21 para 1 seems to assume that permissible reservations, which have not met an objection, modify "the treaty". Given the fact that a unilateral statement cannot as such amend the treaty, the approach suggested in the wording of Art 2 para 1 lit d is preferable. However, the issue, although being of some theoretical relevance,[25] does not have practical consequences.

18 It should also be noted that the relative character of treaty relations leads to the consequence that **obligations stemming from other sources**, *ie* other treaties or customary international law are not affected by a reservation.[26] With regard to customary law this has been spelled out expressly in Draft Guideline 3.1.8.[27]

[21] For the commentary, see the ILC Report 2010 (n 13), 126–130.

[22] Draft Guideline 4.2.2; for the commentary, see the ILC Report 2010 (n 13), 130–132.

[23] Draft Guideline 4.2.3; for the commentary, see *ibid* 132 *et seq*.

[24] See the text at n 6; this obvious consequence is also laid down in Draft Guideline 4.2.4; for a commentary of this Draft Guideline, see ILC Report 2010 (n 13) 133–144.

[25] See the position taken by SR *A Pellet* on the matter in 3rd Report on Reservations to Treaties, UN Doc A/CN.4/491, para 154.

[26] *D Müller* in *Corten/Klein* Art 21 MN 27 *et seq*.

[27] See in that regard the details discussed in the commentary to Art 19 → Art 19 MN 94 *et seq*.

3. Relations of the Accepting State Towards the Reserving State (para 1 lit b)

Art 21 para 1 lit b introduces the **general principle of reciprocity** into the law on reservations. The reservation, once accepted, not only works in favour of the reserving State, but also for any accepting State. This may be seen as another expression of the principle of consent in treaty law.[28] It also has the positive side effect that it may work as a balance against the excessive formulation of reservations. Each reserving State knows in advance that it will lose itself the benefits of the provision or the provisions to which it formulates reservations. **19**

There are, however, **important exceptions to the principle of reciprocity,** which are not well reflected in the rather categorical formulation of the provision. There are basically two types of exceptions. The first relates to the nature of the reservation; the second relates to the nature of the treaty to which the reservations are formulated. **20**

a) Nature of the Reservation

Certain reservations are so narrowly tailored to meet the specific situation of the reserving State that their reciprocal application is excluded. The most prominent example of this type is **reservations related to the territorial applicability of the treaty** in question.[29] Sometime other than geographical factors may individualize a reservation to an extent which excludes its reciprocal invocation. **21**

> Examples mentioned in literature are an Egyptian reservation to the 1966 Load Line Convention relating to the specific situation of the Suez Canal Authority[30] or the Austrian reservation relating to Art 3 of Protocol No 4 to the ECHR dealing with measures taken against the family of the former Monarchs.[31] Such reservations, by their very nature, cannot operate reciprocally.

[28] Final Draft, Commentary to Art 19, 209 para 1.

[29] *B Simma* Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge (1972) 61; *PH Imbert* Les Réserves aux traités multilatéraux (1978) 258.

[30] "Nothing in this Convention should in any way, affect any of the rules and regulations promulgated by the Suez Canal Authority. In case of any contradiction between them the latter shall prevail." (http://www.minbuza.nl/en/Key_Topics/Treaties/Search_the_Treaty_Database?isn=003664#voorbehoud) (last visited 11 January 2011).

[31] "Protocol No. 4 is signed with the reservation that Article 3 shall not apply to the provisions of the Law of 3 April 1919, StGBl. No. 209 concerning the banishment of the House of Habsbourg-Lorraine and the confiscation of their property, as set out in the Act of 30 October 1919, StGBl. No. 501, in the Constitutional Law of 30 July 1925, BGBl. No. 292, in the Federal Constitutional Law of 26 January 1928, BGBl. No. 30, and taking account of the Federal Constitutional Law of 4 July 1963, BGBl. No. 172." (http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=046&CM=8&DF=20/09/2010&CL=ENG&VL=1) (last visited 11 January 2011).

b) Nature of the Treaty

22 Furthermore, certain treaties, because of their content, do not lend themselves to apply the principle. The most obvious example of this category is **human rights treaties**. Here, the rights granted are not based on a synallagma between the parties to treaty, but they are granted in the interest of third parties, *ie* the individuals concerned.[32] In such a structure, there is no place for the principle of reciprocity. The Human Rights Committee expressed the idea in its General Comment No 24 in the following words:

> "Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction."[33]

23 The idea behind this exception to the principle of reciprocity may be generalized. In this context, the distinction between *traités-contrats* and *traités-lois* may be of some relevance.[34] Wherever the purpose of the treaty goes beyond regulating purely bilateral *inter se* relations between the parties, the reciprocity principle may easily compromise the object of the treaty. This is notably the case when **the obligations contained in the treaty form an inseparable whole,** which cannot be divided into bilateral parts.[35] Apart from human rights treaties, this applies for treaties within the area of international environmental law or arms control.[36] The principle is spelled out in Draft Guideline 4.2.5.[37]

III. Relations Between All Other States (para 2)

24 Art 21 para 2 states a logical, probably even obvious consequence of the relative treaty relations, which are generated by a reservation according to Art 21 para 1. Only the bilateral relations between the reserving State and each single accepting State are modified as required by the reservation. This implies that the *inter se* relations between all other States remain unaffected, a consequence which has been appropriately described as the "**rule of the relativity of the legal effects**" of reservations.[38] In other words: the reservation only produces effects when the reserving State is involved. There may, of course, be more than one State having

[32] *T Giegerich* Treaties, Multilateral Reservations to MPEPIL (2008) MN 31; *B Simma* (n 29) 161 *et seq*.

[33] General Comment No 24, UN Doc CCPR/C/21/Rev.1/Add.6, para 8.

[34] *L Lijnzaad* Reservations to UN-Human Rights Treaties – Ratify and Ruin? (1995) 66 *et seq*.

[35] *B Simma* (n 29) 155.

[36] *F Horn* Reservations and Interpretative Declarations to Multilateral Treaties (1988) 164–165.

[37] For the commentary see the ILC Report 2010 (n 13) 144–147.

[38] *JM Ruda* Reservations to Treaties (1975) 146 RdC 95, 197.

formulated a reservation. But this does not affect the general principle. It simply becomes necessary to look at each reservation separately.[39]

25 The application of Art 21 para 2 may become doubtful when a reservation has been accepted by all other parties. This is notably the case of **treaties with only a limited number of negotiating States** as mentioned in Art 20 para 2. This provision requires that all negotiating States have to accept the reservation. However, such universal acceptance of the reservation must be distinguished from a formal amendment of the treaty. While the latter affects the treaty relations between all participating parties, the former merely renders the reservation opposable in the bilateral relations with the reserving State.[40] It follows that even in situations where a reservation has been accepted by all other States, the principle of relativity of treaty relations enshrined in Art 20 para 2 applies. Similar arguments relate to the founding treaties of international organizations mentioned in Art 20 para 3.[41]

IV. Legal Effects of Objection (para 3)

1. General Remarks

26 In conformity with the general departure of the law on reservations from the unanimity principle (→ Art 19 MN 34), Art 21 para 3 spells out that an objection only produces **relative effects as between the reserving and the objecting State**. Under the unanimity rule, one single objection would have precluded the reserving State from becoming a party to the treaty (→ Art 19 MN 9). With departure from the unanimity rule, a solution was required regarding the relationship between the reserving and the objecting States. This solution is presented by Art 20 para 3, which must be read in close conjunction with Art 20 para 4 lit b and the presumption of this provision that, unless otherwise declared, an objection does not preclude the entry into force of the treaty in question between the reserving and the objecting States (→ Art 20 MN 47 *et seq*). This consequence is spelled out in Draft Guidelines 4.3.2. and 4.3.4.[42] There is one exception to the principle just mentioned. As has already been indicated (→ MN 13), in the situation of Art 20 para 2, *ie* treaties which in view of their limited number of contracting parties and their object and purpose require to be applied in their entirety by all parties, acceptance by all contracting States and organizations is required. In consequence, in such a

[39] *D Müller* in *Corten/Klein* Art 21 MN 39.

[40] Final Draft, Commentary to Art 19, 209 para 1: "A reservation operates reciprocally between the reserving State and any other party, so that it modifies the treaty for both of them in their mutual relations to the extent of the reserved provisions. But it does not modify the provisions of the treaty for the other parties, *inter se, since they have not accepted it as a term of the treaty in their mutual relations*." (emphasis added).

[41] *D Müller* in *Corten/Klein* Art 20 MN 43 *et seq*.

[42] For the commentary see the ILC Report 2010 (n 13) 150 *et seq*.

situation, one single objection precludes the entry into force of the treaty for the reserving State.[43]

27 It should be noted that, at a rather late stage of the negotiating history, the **provision profoundly changed its meaning, which is due to the reversal of the presumption contained in Art 20 para 4**. In its initial version, the presumption was that the treaty would *not* enter into force, unless a contrary intention is declared by the objecting State (for details → Art 20 MN 48). Under this system, the entry into force of the treaty between the reserving and the objecting State was considered to be a "special" case which – "for the sake of completeness" – was included into the draft.[44] With the reversal of the presumption, the "special" case became the rule.

2. Inapplicability of the Provisions Concerned

28 The ordinary effect of an objection as envisaged by para 3 is that the provisions to which the reservation relates "do not apply [. . .] to the extent of the reservation." The idea behind this solution is to **preserve the uncontroversial parts of the treaty** and exclude the controversial issues, *ie* the ones to which reservation and objection relate. However, the question arises whether this solution, at least in some cases, levels the differences between objection and acceptance.[45] This is notably true with regard to reservations, which aim at the exclusion of certain provisions of the treaty. In this case, acceptance leads to the inapplicability of the respective provision for reasons of the reservation and an objection leads to the same effect for reasons of Art 21 para 3.[46] However, in all situations, where the reservation does not aim at excluding the application of a certain provision of the treaty, the effects of acceptance and objection are not identical. For example, when the reservation relates to a specific form of interpretation, acceptance makes this interpretation binding as between the reserving and the accepting State. An objection will, however, lead to the inapplicability of the provision in question as between these two States.[47] The consequences of this approach are spelled out in detail in Draft Guideline 4.3.5.[48]

29 It should be noted, however, that in cases where the treaty provision to which reservation and objection relate is identical to a **corresponding norm belonging to**

[43]Draft Guideline 4.3.3; for the commentary, see the ILC Report 2010 (n 13), 151.

[44]Final Draft, Commentary to Art 19, 209 para 2.

[45]The problem was already seen during the ILC debates in the 1960s, [1965-I] YbILC, 271 para 5.

[46]*Imbert* (n 27) 157; *Ruda* (n 38) 199; *Horn* (n 36) 173; *JK Koh* Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision (1982) 23 Harvard ILJ 71, 102 *et seq*; *D Müller* in *Corten/Klein* Art 20 MN 57.

[47]See notably the Arbitral Award in *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (United Kingdom v France)* 18 RIAA 3, para 61 (1977).

[48]For the commentary, see the ILC Report 2010 (n 13) 155–166.

customary international law, the customary norm will apply even if the treaty norm is inapplicable due to Art 21 para 3.[49]

> This consequence was expressly declared in a Swedish objection to a reservation by Qatar relating to the protection of the consular bag:
>
> "The Government of Sweden therefore objects to the reservations to article 35, paragraph 3, of the Vienna Convention on Consular Relations made by the Government of Qatar. This objection shall not preclude the entry into force of the Convention between Sweden and Qatar. Furthermore, the Government of Sweden takes the view that article 35, paragraph 3, remains in force in relations between Sweden and Qatar by virtue of international customary law."[50]

The principle has also been included in Draft Guideline 4.4.2 on the "Absence of effect on rights and obligations under customary international law",[51] Draft Guideline 4.4.3 on the "Absence of effect on a peremptory norm of general international law (*ius cogens*)"[52] and – with regard to **other treaty obligations** – in Draft Guideline 4.4.1 on the "Absence of effect on rights and obligations under another treaty".[53]

3. Extensive Effects

State practice went beyond the solution provided for in Art 21 para 3. The reasons for this development may be understood when conceiving the effects of objections on a scale, ranging from the **'minimum effect'** contained in Art 21 para 3 (namely that the provision to which reservation and objection relate does apply) to the **'maximum effect'** (*ie* the possibility for the objecting State to exclude the entry into force of the treaty as provided for in Art 20 para 4 lit b). But are there possibilities in between, so-called **'intermediate effects'**? It was, in fact, the VCLT which added to the existing State practice in the area. When reservations were formulated regarding the dispute settlement clause in Art 66, several States objected and claimed that not only was Art 66 inapplicable, but also the provisions in Arts 53 and 64, which are expressly referred to in Art 66.[54] **30**

[49] *D Müller* in *Corten/Klein* Art 20 MN 60.

[50] Multilateral Treaties Deposited with the Secretary General (2009) UN Doc ST/LEG/SER.E/26, Vol I 129 (ch III.6).

[51] For the commentary, see the ILC Report 2010 (n 13) 171–174.

[52] For the commentary, see *ibid* 174 *et seq*.

[53] For the commentary, see *ibid* 170 *et seq*.

[54] See for example the objection formulated by the United States to a corresponding Tunesian reservation: "The United States of America objects to the reservation by Tunisia to paragraph (a) of Article 66 of the Vienna Convention on the Law of Treaties regarding a dispute as to the interpretation or application of Article 53 or 64. The right of a party to invoke the provisions of Article 53 or 64 is inextricably linked with the provisions of Article 42 regarding impeachment of the validity of a treaty and paragraph (a) of Article 66 regarding the right of any party to submit to the International Court of Justice for decision any dispute concerning the application or the interpretation of Article 53 or 64. Accordingly, the United States Government intends, at such time as it becomes a party to the Convention, to reaffirm its objection to the Tunisian reservation

31 The **possibility to enter such objections is sometimes put into question** based on the argument of a lacking consent. For these reasons, it is sometimes argued that such extended objections are, in fact, new reservations.[55] However, this argument seems difficult to be maintained in view of the fact that the intermediate effect ranges in between of the maximum effect possible under Art 20 para 4 lit b and the minimum effect provided for in Art 21 para 3, both of which are possible under the VCLT.[56]

32 If one accepts this argument, the **question of possible limits** arises. It seems quite obvious that an objection to a reservation cannot be (ab)used to create effects which have no relations whatsoever with the original reservation. Hence, what is required is a sufficient link (such as the one established by the text of Art 66 to Art 53 and Art 64) to the further provisions, which the objecting State also wants to exclude from being applied between itself and the reserving State.[57] In its Draft Guidelines, the ILC decided that, in view of the fact that objections with intermediate effect have the character of "counter-reservations", the reserving State should be granted the possibility to oppose the entry into force of the treaty between itself and the objecting State within a period of 12 months, which is derived by analogy from Art 20 para 5 VCLT.[58]

33 Finally, there is a debate relating to what is sometimes called a **'super maximum effect'.**[59] This debate relates to practice relating to human rights treaties where notably some Scandinavian countries have started entering 'objections' in which they state that according to their position, the reservation in question does not produce legal effects and that, hence, the reserving State is bound by the treaty in its entirety. For example, Sweden objected to a reservation formulated by Oman to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict of 25 May 2000 by stating:

> "The Government of Sweden therefore objects to the aforesaid reservation made by the Government of Oman to the Optional Protocol to the Convention of the Rights of the Child in Armed Conflicts and considers the reservation null and void. This objection shall not preclude the entry into force of the Optional Protocol between Oman and Sweden. The Optional Protocol enters into force in its entirety between Oman and Sweden, without Oman benefiting from its reservation."[60]

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and declare that it will not consider that Article 53 or 64 of the Convention is in force between the United States of America and Tunisia." *ibid* Vol III 535 (ch XXIII.1).

[55] *J Sztucki* Some Questions Arising from Reservations to the Vienna Convention on the Law of Treaties (1977) 20 GYIL 297.

[56] *D Müller* in *Corten/Klein* Art 20 MN 67.

[57] Draft Guideline 4.3.6, para 1; for the commentary, see the ILC Report 2010 (n 13), 166–168.

[58] Draft Guideline 4.3.6, para 2; see the ILC Report 2010 (n 13) 168.

[59] SR *A Pellet* 8th Report on Reservations to Treaties, Addendum, UN Doc A/CN.4/535/Add.1, para 96.

[60] Multilateral Treaties Deposited with the Secretary General (2009) (n 50) Vol I 440 (ch IV.11B).

Similar 'objections' have been made by other governments in the human rights context.[61] A closer analysis reveals, however, that these 'objections' even if formally labeled as such, must rather be seen as an expression by the respective States Parties to the conventions in question that they consider the reservation in question to be **incompatible with the object and purpose of the treaty**. Therefore, such statements should be taken into account when assessing the permissibility of the reservation in question from the perspective of Art 19 lit c (→ Art 19 MN 132). However, given the fact that an objection requires a valid reservation, the respective statements cannot be formally considered to constitute 'objections'. Conversely, in the situation of a permissible and valid reservation, objections with the intention of creating the super-maximum effect just described are clearly incompatible with the principle of consent in treaty relations. This is spelled out in Draft Guideline 4.3.7.[62] **34**

Selected Bibliography

See the bibliography attached to the commentary on Art 19.

[61] *B Simma* Reservations to Human Rights Treaties: Some Recent Developments in *Hafner et al* (eds) Festschrift Seidl-Hohenveldern (1998) 659, 667 *et seq*; *Pellet* 8th Report, Addendum (n 55) para 96.

[62] For the commentary, see the ILC Report 2010 (n 13) 169 *et seq*.

Article 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Contents

A. Function and Structure

Art 22 deals with the withdrawal of reservations and of objections to reservations. Withdrawal of reservations was formerly unusual, but with accession of many States to independence and with the political changes in Eastern Europe in the 1990s, the **withdrawal of reservations has become more frequent.**[1] In principle, there is broad consensus that both reservations and objections are unilateral acts, which, in consequence, may be revoked without requiring the consent of any other party to the treaty. **1**

[1] See SR *A Pellet 7*th Report on Reservations to Treaties, Addendum 2, UN Doc A/CN.4/526/Add.2, para 63.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*, DOI 10.1007/978-3-642-19291-3_24, © Springer-Verlag Berlin Heidelberg 2012

2 Art 22 is of **residual character**. The residual character of the provision is underlined by the introductory phrase of Art 22 para 1, according to which a treaty may "otherwise provide". There is consensus that the introductory phrase is superfluous since the procedural rules contained in the VCLT are all of residual character and may be adapted to the specific needs of a certain treaty.[2] The phrase may be historically explained. It was not included in the first draft of the provision in 1962[3] and introduced by SR *Waldock* in 1966 following a suggestion made in the Drafting Committee.[4] In its current deliberations, the ILC decided to keep the wording for the purposes of its Draft Guideline 2.5.1.[5] It considered that the fact that the introductory phrase is superfluous is not a sufficient cause for modifying the wording chosen by the Convention.[6]

B. Negotiating History

3 The provisions contained in **Art 22 did not give rise to major controversies either in the ILC or at the Vienna Conference**. In fact, the early drafts by *Brierly* and *Lauterpacht* did not deal with the possibility to withdraw reservations or objections to reservations. The issue of withdrawal of reservations was first addressed in the 1956 report by *Fitzmaurice*[7] and later taken up in Draft Art 17 para 6 of the draft articles submitted by *Waldock* in 1962.[8] *Waldock* also suggested a provision concerning the withdrawal of objections.[9] *Waldock*'s proposal was amended considerably first by the Drafting Committee and later by *Fitzmaurice*.[10] The modification basically included a provision which dealt with the legal effects of

[2] → Art 1 MN 2.

[3] → n 8.

[4] [1965-I] YbILC, 174, paras 45 and 272 *et seq*.

[5] For all Draft Guidelines mentioned in this commentary → Annex to Art 23.

[6] ILC, Report of the ILC on the Work of its Fifty-fifth Session, UN Doc A/58/10, 200 (2003).

[7] *Fitzmaurice* I 116.

[8] "A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty." *Waldock* I 61.

[9] Draft Art 19 para 5: "A State which has lodged an objection to a reservation shall be free to withdraw it unilaterally, either in whole or in part, at any time. Withdrawal of the objection shall be effected by written notification to the depositary of the instruments relating to the treaty, and failing any such depositary, to every State which is or is entitled to become a party to the treaty." *Waldock* I 62.

[10] For details, see ILC Report 2003 (n 6) 192 *et seq*.

withdrawal of reservations,[11] which was dropped again in 1966.[12] Also, any reference to the withdrawal of objections was abandoned. The Vienna Conference reintroduced the withdrawal of objections and specified the requirement of a written notice in Art 23 para 4.[13]

C. Elements of Article 22

I. Withdrawal of a Reservation (para 1)

1. The Unilateral Character of "Withdrawal"

In the older literature,[14] the position was taken that the acceptance of a reservation leads to a specific form of contractual obligations between the reserving and the accepting State, which precludes the unilateral withdrawal of a reservation. According to this position, an accepted reservation can only be withdrawn with the consent of the accepting state. However, throughout the negotiation process, the **unilateral character of the withdrawal of a reservation was never put into question** and it may today be considered to be part of customary international law.[15] During its ongoing debates on the reservations to treaties, the ILC confirmed this position and adopted Draft Guideline 2.5.1., which reproduces the wording of Art 22 para 1.[16] **4**

2. Partial Withdrawal

The possibility to withdraw reservations seems to have the inevitable logic consequence that the partial withdrawal of a reservation must also be considered possible. If the modification of a reservation merely reduces its scope, there seem to be no reasons to assume that such a modification should be prevented by the VCLT if it allows for the complete withdrawal of reservations. However, the **practice of the UN Secretary-General** followed a more restrictive approach arguing that limiting **5**

[11] "Upon withdrawal of a reservation the provisions of article 21 cease to apply." *Waldock* I 181.

[12] Draft Art 20 read:

> "1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.
> 2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative only when notice of it has been received by the other contracting States."

[13] UN Doc A/CONF.39/L.18, UNCLOT III 267; UNCLOT II 38, 1.

[14] See the references by *JM Ruda* Reservations to Treaties (1975) 146 RdC 95, 201 and *R Kühner* Vorbehalte zu multilateralen völkerrechtlichen Verträgen (1986) 230 n 673.

[15] ILC Report 2003 (n 6) 197–199; *Kühner* (n 14) 229 *et seq*.

[16] For the commentary to this draft guideline, see ILC Report 2003 (n 6) 190 *et seq*.

the scope of an existing reservation amounted to an (admissible) complete withdrawal and a (problematic) new reservation.[17]
This approach does not sufficiently take into consideration that a partial withdrawal must be considered a minus as compared to a complete withdrawal. Therefore**, whenever the modification of a reservation results in a limitation of its original scope, it must be subjected to the legal regime of withdrawal**. Furthermore, the partial withdrawal of reservations is sometimes expressly addressed in the treaty itself. The 1957 Convention on the Nationality of Married Woman is an example in place. Art 8 para 3 provides:

> Any State making a reservation in accordance with paragraph 1 of the present article may at any time withdraw the reservation, in whole or in part, after it has been accepted, by a notification to this effect addressed to the Secretary-General of the United Nations. Such notification shall take effect on the date on which it is received.[18]

6 The foregoing considerations have led the ILC to adopt **Draft Guideline 2.5.10 on the "Partial withdrawal of a reservation"**, which reads:

> "The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.
> The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions."

3. Form of Withdrawal

7 The form of withdrawal is regulated in Art 23 para 4, which requires the **withdrawal to be made in writing**. This is restated in Draft Guideline 2.5.2.[19] It should be noted that the requirement of a written form was already contained in the 1956[20] and 1962 drafts,[21] but not in the Final Draft.[22] At the Vienna conference, this was felt to need correction in view of the fact that both, the reservation itself and an acceptance or objection to it, required a written form.[23] Under such circumstances, it seemed incoherent not to require the same form for the withdrawal of a reservation.

8 Irrespective of the clear wording in Art 23 para 4, the question may be asked whether under specific circumstances, an **implicit withdrawal** should be accepted.

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[17] See the 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, para 206.

[18] 309 UNTS 65.

[19] It reads: "The withdrawal of a reservation must be formulated in writing."

[20] Draft Art 40 para 3 read in the relevant part: "A reservation, though admitted, may be withdrawn by formal notice at any time. [. . .]." *Fitzmaurice* I 116.

[21] Draft Art 17 para 6 read in the relevant part: "Withdrawal of the reservation shall be effected by written notification [. . .]." *Waldock* I 61.

[22] Final Draft, Art 20, 209.

[23] Final Draft, Art 18 para 1, 208.

The ILC dealt extensively with this question. It considered the situation of a subsequent treaty between the same parties of an already existing treaty with provisions identical to those contained in an already existing treaty, but without a reservation that was made regarding the first treaty. However, even in that situation, it convincingly considered that the two treaties were distinct instruments and that no conclusions could be drawn from the position of the States in the second treaty relating to the reservation made in the first treaty.[24] Similarly, the expiry of time limits, which may be posed on reservations either by the treaty in question or by a given reservation itself,[25] does not result in a withdrawal. Under such circumstances, the reservation ceases to produce legal effects after the expiry of the time limit, but not because the reservation has been withdrawn, but because of the legal effects of the time limit.[26]

Another issue that was discussed within the ILC relates to **public announcements of a government that it intended to withdraw a reservation**. While the majority within the ILC considered such an intention to be legally irrelevant from the perspective of the law of treaties as long as no written notification has been made, the Chinese member *Hanqin Xue* suggested that in such situations, an analogy to Art 18 should be made.[27] However, this analogy is not convincing since the public announcement of the intention to withdraw a reservation does not enjoy the same formality as the signature of a treaty. Hence, the two situations cannot be equated. **9**

The ILC has taken a similar stance towards what has been called "**forgotten reservations**", *ie* reservations relating to domestic law, which in the meantime has been amended and thus rendered the reservation inoperative.[28] Here, the national and the international legal situations need to be kept separate. While nationally, the reason for the reservation may have been abolished, this does not automatically change the international legal situation and a State may have good reasons to keep the possibility to amend the national law again in a way which would require the reservation in order to avoid a treaty reservation. In consequence, purely domestic activities cannot be interpreted as an implicit withdrawal of a reservation. It should be added that, under specific circumstances, relying on a still operative and valid reservation may nevertheless raise issues of good faith.[29] However, this does not affect the existence of the reservation and hence cannot amount to an "implicit" withdrawal. **10**

[24]ILC Report 2003 (n 6) 203.

[25]See for instance Art 14, para 2 of the 1975 European Convention on the Legal Status of Children Born out of Wedlock ETS 85.

[26]ILC Report 2003 (n 6) 205.

[27][2002-I] YbILC 175.

[28]ILC Report 2003 (n 6) 206.

[29]ILC Report 2003 (n 6) 206.

4. Incentives for Withdrawal

11 Reservations are generally considered to be problematic with regard to the integrity of multilateral treaties (→ Art 19 MN 2). Therefore, there exists a **general interest in reducing the number of reservations**. This is most obvious with regard to international human rights treaties where the monitoring bodies frequently call for the amendment or withdrawal of reservations.[30] The ILC decided to endorse these appeals by adopting a corresponding Draft Guideline on the "Periodic review of the usefulness of reservations" (Draft Guideline 2.5.3). It reads:

> "States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose. In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated."

12 As the clear wording indicates, the Draft Guideline can only be understood as a recommendation and certainly not as a legally binding obligation upon States. However, irrespective of this **purely recommendatory character**, the practical importance of such a periodic review should not be underestimated. It may help to discover 'forgotten reservations'.

5. Procedure for Withdrawal

13 The Convention does not deal with **procedural aspects of the withdrawal** of reservations, notably the question of who is competent to withdraw a reservation. The general approach taken by the ILC both with regard to the formulation of reservations and concerning their withdrawal is to build on an analogy with the provisions governing the expression of consent to be bound by a treaty.

a) Competent Authority

14 This lacuna is closed by Draft Guideline 2.5.4, which, relying on the concept of *actus contrarius*, draws on an **analogy to the procedure to be followed when formulating a reservation**. With regard to the formulation of reservations, the procedure is largely modeled along the principles governing the expression of consent of a State to be bound by a treaty.[31] Given the fact that the withdrawal of a reservation enlarges the commitment of the respective State to the treaty in question, it has consequences which are similar to those of entering a treaty obligation. For this reason the UN Secretariat had required full powers for a person

[30] *Ibid* 207 n 369.

[31] As for the reasons for this approach, see ILC Report 2003 (n 6) 71 *et seq*.

to be entitled to withdraw a reservation. The ILC followed this practice and adopted Draft Guideline 2.5.4, which reads:

> "1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:
>
> (a) That person produces appropriate full powers for the purposes of that withdrawal; or
> (b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.
>
> 2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:
>
> (a) Heads of State, heads of Government and Ministers for Foreign Affairs;
> (b) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;
> (c) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization."

15 The question arises whether the power to withdraw a reservation should also be accorded to **Permanent Representatives of a State to an international organization, which is the depositary of a multilateral treaty, or to ambassadors of a State accredited to the depositary state**. While such an approach would have had the advantage of facilitating the withdrawal of reservations, it would have departed from the *actus contrarius* principle and, since the withdrawal of a reservation is closer to the conclusion of a treaty than the formulation of a reservation, it would have broadened the possibility for entering into contractual obligations beyond the persons mentioned in Art 7 VCLT.

b) Violation of Internal Rules Regarding the Withdrawal of Reservations

16 In the context of the expression to be bound by a treaty, claims invoking a violation of internal law are excluded by **Art 46 VCLT** except in cases of "manifest" violations and relating to fundamentally important rules of domestic law. This approach has been taken up regarding the formulation and withdrawal of reservations. The result is Draft Guideline 2.5.5 on the "Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations":

> "The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization. A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal."

c) Communication of Withdrawal of a Reservation

17 The withdrawal of a reservation needs to be **formally communicated to the other parties to the treaty in question**. The Vienna Convention does not explicitly address the issue, just as it does not deal with the communication of reservations. However, there seems to be no doubt, both from the *travaux préparatoires* in the ILC[32] and from the practice of the UN Secretary-General as the most important depositary,[33] that the communication must be channeled through the depositaries.[34] Since the ILC had already adopted respective Draft Guidelines concerning the formulation of reservations (Draft Guidelines 2.1.5, 2.1.6 and 2.1.7), Draft Guideline 2.5.6 concerning the "Communication of withdrawal of a reservation" merely refers to these Guidelines governing the formulation of reservations.[35]

II. Withdrawal of Objections (para 2)

18 Art 22 para 2 mirrors the provisions regarding the withdrawal of reservations as far as the withdrawal of objections to reservations is concerned. As already indicated, the provision relating to the withdrawal of objections was only lately reintroduced during the Vienna Conference.[36] **State practice regarding the withdrawal of objections is extremely scarce.**[37]

19 The general idea underlying the Convention is that the **procedure concerning the withdrawal of objections should follow the procedure for the withdrawal of reservations**. Consequently, the ILC modeled its Draft Articles relating to the withdrawal of objections along the lines of the Draft Articles dealing with the withdrawal of reservations. Draft Guideline 2.7.1 reproduces Art 22 para 2 VCLT.[38] Similarly, Draft Guideline 2.7.2 restates the requirement of a formulation

[32] ILC Report 2003 (n 6) 222.

[33] *Ibid* 223.

[34] The depositaries were expressly mentioned in the Draft Articles presented by *Waldock* in 1962 (see n 8 and 9) but later referred to Arts 76 to 78, where their role regarding the withdrawal of reservations was not expressly mentioned any more.

[35] "The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 [2.1.6, 2.1.8] and 2.1.7."; for details, see → Art 23 MN 8 *et seq*.

[36] See n 13.

[37] The only example mentioned in the current ILC debates relates to the withdrawal of a Cuban objection to the Convention on the Prevention and Punishment of the Crime of Genocide with respect to reservations to Articles IX and XII formulated by several socialist States Multilateral Treaties Deposited with the Secretary-General (2009) UN Doc ST/LEG/SER.E/26, Vol I 153 n 7 (cha IV.1).

[38] "Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time." For the commentary to this guideline, see ILC, Report of the ILC on the Work of its Sixty-third Session, UN Doc A/63/10, 228 *et seq* (2008).

in writing, which is expressly contained in Art 23 para 4[39] and Draft Guideline 2.7.3 refers to the respective Draft Guidelines relating to the withdrawal of reservations as far as all other procedural issues are concerned.[40]

Also, the solution for a possible **partial withdrawal of an objection** is inspired by the rules governing the partial withdrawal of a reservation (→ MN 5 *et seq*). Draft Guideline 2.7.7 reads: **20**

> "Unless the treaty provides otherwise, a State or an international organization may partially withdraw an objection to a reservation. The partial withdrawal of an objection is subject to the same formal and procedural rules as a complete withdrawal and becomes operative on the same conditions."[41]

III. Effects of the Withdrawal of Reservations and Objections (para 3 lit a and lit b)

The **Vienna Convention only incompletely regulates the legal effects of the withdrawal of reservations or of objections to reservations**. In fact, Art 22 para 3 only deals with the temporal effects of withdrawal (→ MN 22 *et seq* and 43 *et seq*). There are, however, also substantive effects to be considered as well (→ MN 30 *et seq* and 41 *et seq*). The provision distinguishes between the effects of the withdrawal of reservations (lit a) and the effects of the withdrawal of objections to reservations (lit b). **21**

1. Effects of the Withdrawal of a Reservation

a) Temporal Effects

aa) The General Principle Underlying para 3

It should be noted at the outset that the provision contained in Art 22 para 3 departs from the usual approach of the VCLT, which is that action under a treaty **takes effect with the notification to the depositary**. That is the principle followed in Art 16 lit b regarding the consent to be bound by the treaty or in Art 78 lit b regarding notifications and communications in general. Art 22 para 3, by contrast, requires notification to the State concerned. The reason for the different solution in Art 22 para 3 must be seen in the fact that otherwise, withdrawing State might hold liable the other contracting parties with respect to the provision to which the withdrawn reservation was formulated, although the other parties have not yet **22**

[39] "The withdrawal of an objection to a reservation must be formulated in writing." For the commentary to this guideline, see ILC Report 2008 (n 38) 230.

[40] "Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable mutatis mutandis to the withdrawal of objections to reservations." For the commentary to this guideline, see ILC Report 2008 (n 38) 230 *et seq*.

[41] For the commentary to this guideline, see ILC Report 2008 (n 38) 237–240.

been informed of the withdrawal. It is for this reason that Art 22 para 3 refers to the moment of notification of the other parties and not to the notification to the depositary.[42]

23 In principle, according to the wording of Art 22 para 3, the **withdrawal takes immediate effect with the notification to the other party**. However, during the 1965 deliberations, an additional necessity was felt to give the other parties to the treaty a period of 3 months after the notification in order to allow for adjustments if necessary.[43] The solution was finally not retained because it was considered to be too complicated. The ILC nevertheless added in its commentary to the Final Draft that

> "[t]he Commission appreciated that, even when the other States had received notice of the withdrawal of the reservation, they might in certain types of treaty require a short period of time within which to adapt their internal law to the new situation resulting from it. It concluded, however, that it would be going too far to formulate this requirement as a general rule, since in many cases it would be desirable that the withdrawal of a reservation should operate at once. It felt that the matter should be left to be regulated by a specific provision in the treaty."[44]

24 In consequence, the withdrawal takes immediate effect with the date of its notification to each other party of the treaty in question. **In its current debates on reservations to treaties the ILC confirmed this principle**, while at the same time trying to facilitate the inclusion of specific clauses dealing with the temporal effect of the withdrawal of reservations into the treaties concerned. In confirmation of the general principle, it adopted Draft Guideline 2.5.8 on the "Effective date of withdrawal of a reservation", which reproduces the solution contained in Art 22 para 3.

bb) Exceptions to the Principle

25 When adopting the Draft Guidelines, the ILC was of the opinion that, given its object and purpose, Art 22 para 3 did not apply in two specific situations. The first concerns a possible intention of **the withdrawing State to unilaterally set a date which is later than the notification to the other parties**. Since the provision in Art 22 para 3 aims at protecting the other parties from being caught unawares of the withdrawal, the ILC did not see any problem in the unilateral determination of a later date by the withdrawing state.

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[42] See [1962-II] YbILC, 182: "Since a reservation is a modification of the treaty made at the instance of the reserving State, the Commission considers that the onus should lie upon that State to bring the withdrawal to the notice of the other States; and that the latter could not be held responsible for a breach of a term of the treaty to which the reservation relates committed in ignorance of the withdrawal of the reservation." See similarly Final Draft, Commentary to Art 19, 209 para 3.

[43] SR *Waldock* proposed the following addition to Draft Art 22: "(c) On the date when the withdrawal becomes operative article 21 ceases to apply, provided that during a period of 3 months after that date, a party may not be considered as having infringed the provision to which the reservation relates by reason only of its having failed to effect any necessary changes in its internal law or administrative practice." [1965-I] YbILC 174.

[44] Final Draft, Commentary to 19, 209 para 3.

Another exception relates to situation where it is excluded that an earlier effect of the withdrawal could affect rights of the other parties to the treaty. This is notably the case with human rights treaties, where reservations, given the integral character of the obligations undertaken, are not made subject to the principle of reciprocity (→ Art 21 MN 22). For this reason, the ILC considered that there were no reasons to subject **"treaties establishing 'integral obligations'"** to the temporal limitations on the effects of withdrawal contained in Art 22 para 3. Draft Guideline 2.5.9 relating to "Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation", which reads: **26**

> "The withdrawal of a reservation takes effect on the date set by the withdrawing State where:
>
> (a) That date is later than the date on which the other contracting States or international organizations received notification of it; or
> (b) The withdrawal does not add to the rights of the withdrawing State or international organization in relation to the other contracting States or international organizations."

cc) Model Clauses

Additionally, the ILC adopted **three model causes** which deal with different situations, which may require a deviation from the general principle contained in Art 22 para 3. The first model clause deals with a **postponement of the effects of withdrawal**.[45] It is meant for situations in which the other parties to the treaty will probably have to adjust their national legislation in order to meet the new legal situation created by the withdrawal. It thus addresses the concerns which had already been voiced in the ILC in the 1960s.[46] **27**

> Practical examples for such a postponement are to be found in Art 97 para 4 of the 1980 UN Convention on the International Sale of Goods,[47] Art XIV para 2 of the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals[48] (90 days) or Art 24 para 3 of the 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons[49] (first day of the month following the expiration of three months after notification of the withdrawal).

The second model clause brings the **date of the effect of the withdrawal forward to the notification to the depositary**.[50] It addresses situations where **28**

[45] "A Contracting Party which has made a reservation to this treaty may withdraw it by means of notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary]." ILC Report 2003 (n 6) 239.

[46] See n 43 and accompanying text.

[47] 1489 UNTS 3.

[48] 19 ILM 15.

[49] 28 ILM 146.

[50] "A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary]." ILC Report 2003 (n 6) 240.

there is no need for the other parties to react to the withdrawal of a reservation and where all parties have an interest in a swift extension of the legal obligations of the withdrawing state.

> An example of this type of amendment may be found in Art 32 para 3 of the 1989 European Convention on Transfrontier Television.[51]

29 Finally, the third model clause gives **the withdrawing State discretion to determine the date on which the withdrawal is to take effect**.[52] While the provision formally seems to allow the shifting of the effects into both directions, a closer look reveals that it only makes sense to include such a close if the purpose of the parties is to allow the reserving State to expedite the legal effects of the withdrawal of its reservation. If it wants to postpone the legal effects, it can do so under Draft Guideline 2.5.9 without any specific clause (→ MN 26).

b) Substantive Effect

30 The substantive effect of the withdrawal of a reservation obviously must be seen in the **termination of the effects of the reservation**.[53] The draft articles adopted by the ILC in 1962 contained a provision which expressly addressed the substantive effect of the withdrawal of a reservation in Art 22 para 2 saying that "[u]pon withdrawal of a reservation the provisions of Art 21 [relating to the application of reservations] cease to apply."[54] At the Vienna Conference, the Drafting Committee again considered the substantive effect so obvious that it decided to delete the respective provision.[55]

31 When deliberating on the Draft Guidelines, the ILC decided to distinguish three different situations: first, as far as the **relations between the reserving State and accepting States** (which are, on the basis of the presumption contained in Art 20 para 5, all States that have not objected within the 12-months period (→ Art 20 MN 52 *et seq*) are concerned, the consequence of a withdrawal is that the original content of the treaty will apply also in regard to the formerly reserving state.

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[51] "Any Contracting State which has made a reservation under paragraph 1 may wholly or partly withdraw it by means of a notification addressed to the Secretary-General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary-General." ETS 132.

[52] "A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary]." ILC Report 2003 (n 6) 241.

[53] This is the rationale behind the early provision suggested by *Fitzmaurice* in 1956 according to which the legal effect of a withdrawal was that "the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related, and is equally entitled to claim compliance with that provision by the other parties."; see *Fitzmaurice* I, 116. The provision seemed so obvious that Yearbook explicitly states that no commentary is required (*ibid* 127).

[54] [1962-II] YbILC 182.

[55] Statement by *K Yasseen*, Chairman of the Drafting Committee, UNCLOT I 417 para 37.

The withdrawal thus results in a situation which would have existed if the reservation had not been made.[56]

The second situation concerns the **relations between the formerly reserving State and an objecting state**, which has not opposed the entry into force of the treaty as between itself and the reserving State (Art 20 para 4 lit b). In the relations between these two States, the withdrawal produces a similar effect. While the reservation is in operation according to Art 21 para 3, the provision, to which the reservation relates, does not apply. The withdrawal of the reservation thus has the effect of rendering the respective provision applicable as between these two States.[57] **32**

The third situation concerns the **relations between the reserving State and objecting States,** which had excluded the entry into force of the treaty. Under such conditions, the withdrawal of the reservations produces the entry into force of the whole treaty as between these two States, if there are no other reservations which continue to block this effect.[58] **33**

The ILC included the consequences just described into **Draft Guideline 2.5.7 on the "Effect of withdrawal of a reservation"**, which reads: **34**

> "The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.
> The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation."

c) Effect of Partial Withdrawal of a Reservation

The effect of a **partial withdrawal of a reservation cannot be equated to that of a complete withdrawal.** While the complete withdrawal produces the application of the provisions to which the reservation formerly was related in their entirety, this cannot be said of a partial withdrawal. The provisions concerned will apply to a larger extent, but not in their entirety. The reservation continues to produce effects, even if these effects are limited as compared to those produced by the original reservation. In consequence, the legal effects of the reservation must be considered to be modified to the extent of the partial withdrawal. **35**

A specific problem relates to the legal **effects of a partial withdrawal on objections** existing with regard to the original reservation. In contrast to the legal effects of the complete withdrawal of a reservation (→ MN 30), the merely partial **36**

[56] ILC Report 2003 (n 6) 229.

[57] ILC Report 2003 (n 6) 229 *et seq*.

[58] ILC Report 2003 (n 6) 230.

withdrawal may not be considered to automatically affect such objections. The objecting States may have good reasons to stick to their objections even in view of the partial withdrawal of the reservation. This can only be excluded in cases where the objection was clearly related to that part of the reservation, which is withdrawn.

37 The reasons just mentioned favour a solution according to which a partial withdrawal does not require the objecting States to formally confirm their objections if they wish to maintain them. The **practice of the UN Secretary-General** as depositary reveals that this view is also followed in practice. In consequence, it is up to the objecting States to reconsider the objections and withdraw them if this seems appropriate. Inaction will, however, usually lead to the continued application of the objections.

38 Finally, with regard to possible **new objections**, the partial withdrawal must be considered to be a withdrawal. In consequence, the other parties may, in principle not enter new objections to a reservation on the occasion of a partial withdrawal. The only exception that may be envisaged to that rule relates to situations where the partial withdrawal creates new legal burdens for the other parties. A possibility for such new burdens may arise where the partial withdrawal leads to a discriminatory application of the treaty in question. Under such circumstances, new objections may be made regarding the new legal burdens.

39 The ILC laid down the principles just described in **Draft Guideline 2.5.11 on the "Effect of a partial withdrawal of a reservation"**, which reads:

> "The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.
> No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect."

2. Effects of the Withdrawal of an Objection

40 Just as the withdrawal of reservations, the withdrawal of objection produces **temporal and substantive effects**.

a) Substantive Effect

41 The most obvious substantive effect of the withdrawal of an objection is the **acceptance of the reservation**.[59] On the basis of this starting point **further consequences have to be taken into account,** which, again, mirror the legal consequences attached to objections by the VCLT. If the withdrawn objection prevented the entry into force of the treaty as between the reserving and the opposing State (→ Art 20 para 4 lit b), the withdrawal of the objection will have the additional effect of having the treaty enter into force bilaterally between these two States. Furthermore, in the event that

[59] Draft Guideline 2.7.4; for the commentary, see ILC Report 2008 (n 38) 231–233.

the objection precluded the entry into force of the treaty in question between all parties (→ Art 20 para 2), the withdrawal will have the effect that the treaty now enters into force (with the reservation producing its effects).

The last consideration shows that the **effects of the withdrawal of an objection may go beyond merely the bilateral relationship between the reserving and the objecting State** and affect the legal obligations of all parties to the treaty. **42**

b) Temporal Effects

aa) General Rule

Just as with the temporal effects of the withdrawal of a reservation, the effects in time of the withdrawal of an objection are also clearly addressed in the text of the VCLT. Art 22 para 3 lit b states that "the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation." In contrast to the corresponding regulation concerning the withdrawal of a reservation in Art 22 para 3 lit a only the **bilateral relationship between the reserving and the objecting State** is addressed. This approach is taken up in Draft Guideline 2.7.5 on the "Effective date of withdrawal of an objection", which reads: **43**

> "Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation."

The ILC also dealt with possible **effects that go beyond the bilateral relations between the reserving and the objecting State** (→ MN 42 *et seq*). The withdrawal of an objection may directly lead to the entry into force of the whole treaty in the situations envisaged by Art 20 para 2 or when the withdrawal of an objection leads to the reserving State becoming a party to the treaty in question and incidentally to the number of parties required for the treaty to enter into force.[60] While it is true that in such situations, the other parties to the treaty may, for a short while, be in some uncertainty as to when exactly the treaty entered into force, the ILC convincingly considered this disadvantage to be minor in view of the modern communication methods.[61] **44**

bb) Autonomous Determination by the Withdrawing State

Just as in the context of the withdrawal of a reservation (→ MN 25), the ILC considered it necessary to deal with **unilateral decisions on the effective date of the withdrawal of an objection**. In this situation, again, the consequence must be avoided that a State is caught by legal obligation of which it is unaware because it has not yet received the necessary information. In the context of the withdrawal of an objection, this may arise if the objecting State sets the effective date earlier than **45**

[60] See the description ILC Report 2008 (n 38) 234 *et seq*.

[61] ILC Report 2008 (n 38) 236.

the notification of the withdrawal to the reserving state. Under such circumstances the formerly objecting State could on the basis of reciprocity rely on the reservation once its objection has been withdrawn. In order to avoid such an undesirable consequence, Draft Guideline 2.7.6 on "Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation" excludes the possibility of an earlier date.[62]

cc) Effect of a Partial Withdrawal of an Objection

46 The legal effects of a partial withdrawal of an objection are construed in a manner parallel to those of the partial withdrawal of a reservation (→ MN 35–39). The partial withdrawal of an objection is understood as **limiting the legal effects of an existing objection**.[63] The ILC decided to model the respective Draft Guideline 2.7.8 on the "Effect of a partial withdrawal of an objection" along the lines of Draft Guideline 2.5.11. Draft Guideline 2.7.8 reads:

> "The partial withdrawal modifies the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation to the extent of the new formulation of the objection."

Selected Bibliography

See the bibliography attached to the commentary on Art 19.

[62]The Draft Guideline reads: "The withdrawal of an objection becomes operative on the date set by its author where that date is later than the date on which the reserving State or international organization received notification of it."

[63]ILC Report 2008 (n 38) 240.

Article 23

Procedure regarding reservations

1. **A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.**
2. **If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.**
3. **An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.**
4. **The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.**

Contents

A. Function and Structure

As indicated by its title, Art 23 contains **procedural provisions**. The provision basically addresses two issues: the requirement of a written form (para 1 for the formulation of a reservation, an express acceptance of a reservation or an objection to a reservation; para 4 for the withdrawal of a reservation or of an objection to a reservation) and the requirement of a formal confirmation (paras 2 and 3). Thus, the procedural requirements of Art 23 reach beyond the title which only mentions reservations. **1**

Art 23 **does not group together all procedural requirements** relating to reservations. For instance, Art 20 para 5 VCLT, which deals with the presumption of acceptance (Art 20 MN 52 *et seq*), or Art 22 para 3 VCLT, which contains the formal requirement to "give notice" (→ Art 22 MN 17), may be qualified as having a procedural character.[1] Furthermore, some general procedural questions (the role **2**

[1] *A Pellet/W Schabas* in *Corten/Klein* Art 23 MN 10.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*, DOI 10.1007/978-3-642-19291-3_25, © Springer-Verlag Berlin Heidelberg 2012

of depositaries, the form of notifications and communications between States) are regulated in Part VII of the VCLT.[2]

3 Finally, **a number of procedural issues are not dealt with in the VCLT at all**. The most important lacunae relate to the modification of reservations, the competent authorities to formulate reservations and the procedure for the withdrawal of reservations and of objections to reservations. In its Guide to Practice, the ILC has devoted the whole part 2 to issues of "Procedure".[3] This part comprises a total of 90 Draft Guidelines,[4] the most important of which are taken into consideration in this commentary.

B. Negotiating History

4 Although the **early Special Rapporteurs** devoted some attention to questions of form, it is fair to say that, generally, the procedural aspects of reservations were not their main focus.[5] The 1962 Draft Articles submitted by SR *Waldock*, by contrast, had a lengthy procedural part, which covered more than a whole column in the ILC Yearbook.[6] The procedural aspects of the Draft Articles were already shortened and regrouped during the deliberations in 1962.[7] In 1965, SR *Waldock* submitted a revised version which contained a new Draft Art 20, which already had the current title and in which the procedural aspects were grouped together.[8]

5 ***Waldock*'s proposal** contained a number of procedural provisions relating to the function of depositaries and to notifications and communications. Following the decision to move all issues relating to depositaries and notifications and communications into separate provisions at the end of the VCLT,[9] the provision became considerably shorter and was included as Draft Art 18 into the Final Draft.[10] The only major change at the Vienna Conference was the addition of para 4.[11]

[2] → Art 76 MN 29–31, → Art 77 MN 8, 23, → Art 78 MN 6–7; as to the depositaries → MN 18 *et seq*.

[3] ILC, Report of the ILC on the Work of its Sixty-fifth Session, UN Doc A/65/10, 41–57 (2010).

[4] For all Draft Guidelines mentioned in this commentary → Annex to Art 23.

[5] *A Pellet/W Schabas* in *Corten/Klein* Art 23 MN 4.

[6] Art 17 paras 3–6 of the 1962 Draft, see [1962-II] YbILC 60 *et seq*.

[7] They are to be found in the newly numbered Arts 18 and 19, see [1962-II] YbILC 176.

[8] [1965-II] YbILC, 53.

[9] Final Draft, Commentary to Art 73, 270 para 1.

[10] Final Draft, Text of Art 18, 208.

[11] → Art 22 MN 3 and 7.

C. Elements of Article 23

I. Form and Communication of Reservations, Acceptances and Objections (para 1)

Art 23 para 1 deals with **two distinct issues**: first, the requirement of a written form for reservations, acceptances of and objections to reservations, and second, the communication of these acts to the contracting States and other States entitled to become parties to the treaty. Questions of competence are not addressed in the Convention but the ILC has closed this lacuna by adopting respective Draft **Guidelines.** 6

1. Written Form

Throughout the history of the deliberations on the VCLT there was no question that reservations would have to be in writing. The Commentary on the 1966 Draft Art 18 presents this **requirement of a written form as a matter of course**[12] and the requirement was never put into question. Accordingly, the Guide to Practice simply reproduces this rule in Draft Guideline 2.1.1: "A reservation must be formulated in writing."[13] 7

2. Communication

a) Addressees

It is evident that a reservation, once it has been formulated, needs to be transmitted to those that might be affected by the reservation. Art 23 para 1 specifies the addressees as "**the contracting States and other States entitled to become parties to the treaty**." The term "contracting State" is defined in Art 2 para 1 lit f VCLT. In this respect, the determination of the addressees poses no problem. The reserving State needs to communicate the reservation to all States, which have "consented to be bound by the treaty, whether or not the treaty has entered into force". 8

By contrast, it is much more difficult to find out who "**is entitled to become party to the treaty**." The formula was already used in the 1951 "Report on Reservations to Multilateral Conventions" by SR *Brierly*, which included a draft article on "States to be consulted as to reservations".[14] During the long drafting history of the convention, different suggestions were made ranging from the 9

[12] "Paragraph 1 *merely* provides that a reservation, an express acceptance of a reservation and an objection to a reservation must be in writing [. . .]." Final Draft, Commentary to Art 18, 208 para 2 (emphasis added).

[13] For details see ILC, Report of the ILC on the Work of its Fifty-fourth Session, [2002-II] YbILC 28–29; similar Draft Guidelines were adopted regarding acceptance (Draft Guideline 2.8.4) and objections (Draft Guideline 2.6.7).

[14] [1951-II] YbILC 16.

broadest concept proposed by *Lauterpacht* ("all the interested States"[15]) to the narrowest contained in a Canadian amendment ("negotiating and contracting States"[16]).

10 The only easy case, which can be made out, is where the **treaty itself determines the States or international organizations which are entitled to become party**. Notably, in the context of treaties negotiated under the auspices of a regional organization, participation in the treaty is limited to the members of the respective regional organization.[17]

11 However, in many cases, it remains unclear if there are any limitations on participation. The "Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties", which the UN published in 1999, extensively treats the problem,[18] which is even more acute for the Secretary-General as depositary since Art 77 para 1 lit b and e VCLT require a similar communication from the depositary.[19] A look at the problems described in this summary reveals, that the problems created by the vague formula rather relate to entities with an unclear legal status, such as liberation movements or non-independent entities. Also, it sometimes remains unclear whether a given treaty is limited to States or permits the participation of international organizations. The examples mentioned raise **problems which are not specific to reservations but point to general difficulties in the exercise of depositary functions**. For this reason, the ILC refrained from trying to clarify who is entitled to become a party to the treaty for the specific purposes of communicating reservations.[20]

b) Reservations to Constituent Instruments of an International Organization

12 A specific problem relates to reservations to a constituent instrument of an international organization. For such reservations, Art 20 para 3 VCLT establishes the requirement that, unless the treaty otherwise provides, a reservation must be accepted by the competent organ of the organization. Although the issue is not addressed in Art 23 para 1, it follows logically, that reservations to a constituent instrument of an international organization **have to be communicated to the competent organ**. Otherwise, this organ would not be in a position to take the necessary action.

13 The ILC decided to clarify this point by adopting a respective Draft Guideline. In deliberating on this Draft Guideline, the ILC discussed whether, in addition to the communication to the competent organ of the organization, the **reservation should**

[15] [1953-II] YbILC 92.

[16] UN Doc A/CONF.39/C.1/L.158, UNCLOT III 138 para 191.

[17] See, *eg*, Art K, para 1 of the 1996 European Social Charter (revised) ETS 163.

[18] 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, paras 73–100.

[19] → Art 77 MN 12–13, 24.

[20] ILC Report 2002 (n 13) 36.

also be communicated to all other parties and to those that are entitled to become party. It answered in the affirmative, basically because the fact that according to Art 20 para 3 VCLT acceptance of the reservation by the organization is required does not exclude that individual members of the organization take their own position on the reservation.[21] The result of the deliberations may be found in Draft Guideline 2.1.5, which reads:

> "A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.
> A reservation to a treaty in force, which is the constituent instrument of an international organization or to a treaty, which creates an organ that has the capacity to accept a reservation, must also be communicated to such organization or organ."[22]

c) Written Form

The text of Draft Guideline 2.1.5, which has just been reproduced, extends the requirement of written form of the reservation to the communication of the reservation. Strictly speaking, Art 23 para 1 only requires the reservation to be made in writing. It does not expressly spell out a similar requirement of form regarding the communication. But it is certainly correct to understand the provision as **implicitly requiring a written communication**.[23] Also for the practical purpose of documentation, it is reasonable to exclude oral communications and to require them to be made in writing. **14**

d) Statement of Reasons

The VCLT **does not require the reserving State to give reasons for formulating a reservation.** However, some specific treaty regimes, such as the ECHR, have established such a requirement. Under Art 57 para 1 ECHR, a contracting State may enter a reservation only to a particular provision of the ECHR and only to "the extent that any law then in force in its territory is not in conformity with the provision." Art 57 para 2 ECHR then requires that "[a]ny reservation made under this article shall contain a brief statement of the law concerned." The ECtHR considers that Art 57 para 2 ECHR "both constitutes an evidential factor and contributes to legal certainty". In the Court's view, it establishes "not a purely formal requirement but a condition of substance".[24] **15**

Inspired by Art 57 ECHR and the jurisprudence of the ECtHR in that regard, the ILC decided to establish a Draft Guideline which encourages States to give reasons when formulating a reservation. The Commission took great care in underlining the **16**

[21] ILC Report 2002 (n 13) 38 para 30; also → Art 20 MN 40 and 41.

[22] For the commentary, see ILC Report 2002 (n 13) 34–38.

[23] ILC Report 2002 (n 13) 36 para 16.

[24] ECtHR *Belilos v Switzerland* App No 10328/83, Ser A No 132 para 59 (1988).

optional character of the statement of reasons. As there is no legally binding requirement to state reasons for reservations under the VCLT, it cannot be established by means of a Guide to Practice, which also does not have an obligatory character. However, such a Guide to Practice may contain recommendations and suggestions. Reasons for reservations first and foremost have an informative purpose. Furthermore, they help to conduct what sometimes is called a 'reservations dialogue' between the reserving State and the other parties to the treaty or between the reserving State and monitoring bodies, which a treaty may establish: "Giving reasons [. . .] is also one of the ways in which States and international organizations making a reservation can cooperate with the other contracting parties and the monitoring bodies so that the validity of the reservation can be assessed."[25] Draft Guideline 2.1.9 reads:

> "A reservation should to the extent possible indicate the reasons why it is being made."[26]

17 A similar approach has been taken regarding reasons for objections to reservations.[27]

e) Procedure of Communication

18 In practice, communications regarding multilateral treaties are largely effected through the depositaries. If there is no depositary, the communications have to be transmitted by the parties themselves. While some of the earlier drafts had expressly spelled out the role of depositaries regarding reservations, the VCLT moved the issue to the general provisions in Arts 76–78.[28] In consequence, **Art 23 does not say how the communication to reservations is to be organized**. When establishing its Guide to Practice, the ILC decided to close this lacuna by adopting Draft Guidelines which adapt the general provisions to the specific needs of reservations. These Draft Guidelines are more or less self-explanatory. Draft Guideline 2.1.6 deals with the "Procedure for communication of reservations".[29]

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[25]ILC, Report of the ILC on the Work of its Sixtieth Session, UN Doc A/63/10, 186 (2008).

[26]For the commentary to this guideline, see ILC Report 2008 (n 25) 184–189.

[27]Draft Guideline 2.6.10; for the commentary to this guideline, see ILC Report 2008 (n 25) 203–206.

[28]→ n 9 and accompanying text.

[29]"Unless otherwise provided in the treaty or agreed by the contracting States and international contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and international organizations for which it is intended as soon as possible.

A communication relating to a reservation shall be considered as having been made with regard to a State or an international organization only upon receipt by that State or organization.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the

Draft Guideline 2.1.7 clarifies the functions of the depositary with regard to reservations.[30]

f) Manifestly Impermissible Reservations

A specific procedural problem arises when the depositary is of the opinion that a reservation manifestly does not meet the conditions for reservations applicable under the treaty in question. Given the role of depositaries as it emanates from Draft Guidelines 2.1.6 and 2.1.7, the depositary would have to communicate such a "reservation" irrespective of his own doubts as to its validity. After an intensive consideration of the position of the Member States, the ILC decided to **enhance the role of the depositary in that regard** and give the possibility to start a dialogue on the validity of the reservation. However, Draft Guideline 2.1.8 makes it entirely clear that the depositary has to perform its usual role if the reserving State maintains the reservation in view of the contrary legal opinion of the depositary. The depositary is by no means given a general monitoring power as regards the validity of the reservation in question.[31] During the debates in the ILC, different opinions persisted as to the question of whether or not the enhanced role of the depositary should apply with regard to all three grounds for invalidity contained in Art 19 VCLT. In the end, no distinction was made. This implies that the depositary may also rely on Draft Guideline 2.1.8 when the manifest impermissibility derives from the object and purpose-formula of Art 19 lit c VCLT.[32] **19**

communication is considered as having been made at the date of the electronic mail or the facsimile." For the commentary to this guideline, see ILC Report 2008 (n 25) 174–184.

[30] "The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned." For the commentary to this guideline, see ILC Report 2002 (n 13) 42–45; on the role of the depositary → Art 19 MN 122 *et seq*.

[31] "Where, in the opinion of the depositary, a reservation is manifestly impermissible, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the impermissibility of the reservation.

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation." This guideline was reconsidered and modified. For the new commentary, see ILC, Report of the ILC on the Work of its Fifty-eight Session, UN Doc A/61/10, 359–361 (2006).

[32] ILC Report 2006 (n 31) 360 *et seq*.

3. Competence to Formulate Reservations

20 As has already been indicated, Art 23 refrains from determining which **national authorities are, from the perspective of international law, competent to formulate reservations**. In the absence of explicit rules on the issue, the answer to the question must be derived from "the general framework of the Vienna Conventions and from the practice of States and international organizations in this area."[33]

21 In trying to develop the applicable rules, the **ILC sought guidance from the general provisions of the VCLT concerning the power to express consent to be bound by treaties** (Art 7). In fact, a reservation affects the substantive content of the treaty obligations undertaken by the parties concerned (Art 21 para 1). Depending on whether a possible objecting State also objects the entry into force of the treaty as between itself and the reserving State, the reservation may even affect the formal aspect of existing treaty relations (→ Art 20 para 4 lit b). According to the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, the practice of the Secretary-General consistently required one of three authorities: head of State, head of government or minister of foreign affairs.[34] Based on these considerations Draft Guideline 2.1.3 on the "Formulation of a reservation at the international level" has been adopted.[35]

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[33] ILC Report 2002 (n 13) 30 para 5.

[34] Summary of Practice (n 18) para 121: "Recognized international practice is for such instruments to be issued and signed, as is the case for full powers, either by the head of State or Government or by the minister for Foreign Affairs."

[35] "1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or
(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

(a) Heads of State, heads of Government and Ministers for Foreign Affairs;
(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;
(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;
(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization." For the commentary to this guideline, see ILC Report 2002 (n 13) 30–32.

Just as in the context of the expression to be bound by a treaty, differences between the determination of the competent organs to formulate reservations under international law and national law may arise. In the context of the expression to be bound Art 46 para 1 VCLT excludes that a State invokes provisions of internal law regarding the competence to conclude treaties. A similar approach has been followed by the ILC regarding reservations. In fact, the solution regarding reservations is in a sense even stricter. Under Art 46 para 1 VCLT an exception is possible if the "violation was manifest and concerned a rule of its internal law of fundamental importance." Given the fact that the internal rules regarding the competence to formulate reservations are likely to be only determined by practice (in contrast to the rules regarding the competence to conclude treaties, which usually are well documented in the constitution), the ILC considered rules determining the competence to formulate reservation *eo ipso* cannot fulfill the criteria required by Art 46 para 1 VCLT. In consequence, when transposing the regulation in Art 46 para 1 VCLT, for the purposes of a Draft Guideline on reservations, it omitted the exception. The result is Draft Guideline 2.1.4 on the "Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations".[36] **22**

II. Confirmation (paras 2 and 3)

As the ILC noted in 1966, "[s]tatements of reservations are made in practice at various stages in the conclusion of a treaty."[37] At that time, the Commission also contemplated what it called '**embryo reservations**', *ie* reservations expressed during the negotiations and recorded in the minutes. Under the definition of reservations finally retained in the Convention, such a practice cannot amount to a reservation within the meaning of Art 2 para 1 lit d VCLT, since this provision limits reservations to the moment of "signing, ratifying, accepting, approving or acceding to a treaty". The Commission underlined this point in its commentary to the Final Draft.[38] **23**

[36] "The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation." For the commentary to this guideline, see ILC Report 2002 (n 13) 32–34.

[37] Final Draft, Commentary to Art 18, 208 para 3.

[38] "The Commission, however, considered it essential that the State concerned should formally reiterate the statement when signing, ratifying, accepting, approving or acceding to a treaty in order that it should make its intention to formulate the reservation clear and definitive. Accordingly, a statement during the negotiations expressing a reservation is not, as such, recognized in article 16 as a method of formulating a reservation and equally receives no mention in the present article." Final Draft, Commentary to Art 18, 208 para 3.

24 Art 23 para 2 is **identical with Art 18 para 2 of the Final Draft**. The provision has its origins in Art 17 para 3 lit b of the 1962 Draft by *Waldock* who considered it necessary to have at least a confirmation "in some manner".[39]

25 The requirement of a **formal confirmation aims at legal clarity**. It is today considered to reflect customary international law.[40] In view of the fact that reservations have to be formulated in writing[41] and given the general aim of legal clarity, the ILC decided that also the formal confirmation of a reservation has to be made in writing.[42]

26 In consequence, **Art 23 para 2 only addresses the situation of reservations, which have been formulated before the treaty has become binding for the reserving State**, *ie* when signing the treaty subject to ratification acceptance or approval. This principle is reflected in Draft Guideline 2.2.1 on the "Formal confirmation of reservations formulated when signing a treaty", which basically reproduces the wording of Art 23 para 2.[43]

27 It can be concluded *e contrario* from the wording of Art 23 para 2 that reservations do not have to be formally confirmed when they are made when signing **a treaty, which does not require ratification, approval or acceptance**, but becomes binding upon signature. This conclusion is expressly spelled out in Draft Guideline 2.2.2. on "Instances of non-requirement of confirmation of reservations formulated when signing a treaty".[44]

28 In some cases, treaties expressly provide for the possibility to formulate a reservation when signing the treaty.[45] Given the **residual character of the provisions of the VCLT,** it is reasonable to assume that no formal confirmation is required if a treaty expressly allows for reservations at the moment of signature without requiring formal confirmation. This principle is embodied in Draft

[39]The provision reads: "A reservation formulated at the time of a signature which is subject to ratification or acceptance shall continue to have effect only if the instrument of ratification or acceptance either repeats the reservation or incorporates it by reference, or the reserving State at the time of ratification clearly expresses in some other manner its intention to maintain the reservation [1962-II] YbILC 60.

[40]ILC, Report of the ILC on the Work of its Fifty-third Session, UN Doc A/56/10, 181 (2001).

[41]→ MN 7.

[42]Draft Guideline 2.1.2: Form of formal confirmation: "Formal confirmation of a reservation must be made in writing." For the commentary to this guideline, ILC Report 2002 (n 13) 29–30.

[43]For the commentary to this guideline, see ILC Report 2001 (n 40) 180–183.

[44]For the commentary to this guideline, see ILC Report 2001 (n 40) 183.

[45]Examples are Art 8 para 1 of the 1963 Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality ETS 43; Art 17 of the 1961 Convention on the Reduction of Statelessness 989 UNTS 175; Art 30 of the 1988 Convention on Mutual Administrative Assistance on Tax Matters ETS 127; Art 29 of the 1997 European Convention on Nationality ETS 166; and Art 24 para 1 of the 1989 Convention on the Law Applicable to Succession to the Estates of Deceased Persons, text available at www.hcch.net (last visited 28 December 2010).

Guideline 2.2.3 on "Reservations formulated upon signature when a treaty expressly so provides".[46]

III. Withdrawal of a Reservation or Objection to a Reservation (para 4)

Art 23 para 4 extends the requirement of a written form to the **withdrawal of reservations or of objections to reservations**. The respective issues have already been dealt with in the context of Art 22.[47] 29

Selected Bibliography

See the bibliography attached to the commentary on Art 19.

[46] For the commentary to this guideline, see ILC Report 2001 (n 40) 183–184.

[47] → Art 22 MN 7 *et seq* and 19.

Guide to Practice on Reservations to Treaties

Annex to Article 23

The text of the Guide to Practice that is reproduced below is the compilation of guidelines successively adopted by the ILC since 1998[1] and provisionally adopted as a whole set in 2010.[2] The Guide to Practice is intended to clarify and develop Arts 19–23 while leaving unchallenged the regime established by these provisions. In the course of 2011, the Guide to Practice is to be adopted in a final version.

1. Definitions

1.1 Definition of Reservations

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.1.1 Object of Reservations

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

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[1]For the history of the Guide to Practice → Art 19 MN 38–40.

[2]Report of the ILC on the Work of its Sixty-second Session, UN Doc A/65/10, 36–73 (text only) and 73–271 (text and commentary) (2010). The work on the guidelines on the procedure for interpretative declarations (sub 2.4) is still in progress, the guidelines 2.4.1 - 2.4.8 were taken from the draft guideline, as finalized by the ILC Working Group on reservations to Treaties in May 2011 (UN Doc A/CN.4/L.779).

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1.1.2 Instances in Which Reservations May Be Formulated

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

1.1.3 Reservations Having Territorial Scope

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

1.1.4 Reservations Formulated When Notifying Territorial Application

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 Statements Purporting to Limit the Obligations of Their Author

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

1.1.6 Statements Purporting to Discharge an Obligation by Equivalent Means

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty, by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty, constitutes a reservation.

1.1.7 Reservations Formulated Jointly

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

1.1.8 Reservations Made Under Exclusionary Clauses

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to

modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

1.2 Definition of Interpretative Declarations

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

1.2.1 Conditional Interpretative Declarations

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

1.2.2 Interpretative Declarations Formulated Jointly

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

1.3 Distinction Between Reservations and Interpretative Declarations

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

1.3.1 Method of Implementation of the Distinction Between Reservations and Interpretative Declarations

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

1.3.2 Phrasing and Name

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.3.3 Formulation of a Unilateral Statement When a Reservation Is Prohibited

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 Unilateral Statements Other than Reservations and Interpretative Declarations

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

1.4.1 Statements Purporting to Undertake Unilateral Commitments

A unilateral statement formulated by a State or an international organization in relation to a treaty whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

1.4.2 Unilateral Statements Purporting to Add Further Elements to a Treaty

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 Statements of Non-recognition

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to

Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.4.4 General Statements of Policy

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

1.4.5 Statements Concerning Modalities of Implementation of a Treaty at the Internal Level

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other Contracting Parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

1.4.6 Unilateral Statements Made Under an Optional Clause

A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice. A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.7 Unilateral Statements Providing for a Choice Between the Provisions of a Treaty

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

1.5 Unilateral Statements in Respect of Bilateral Treaties

1.5.1 "Reservations" to Bilateral Treaties

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from

the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

1.5.2 Interpretative Declarations in Respect of Bilateral Treaties

Guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

1.5.3 Legal Effect of Acceptance of an Interpretative Declaration Made in Respect of a Bilateral Treaty by the Other Party

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

1.6 Scope of Definitions

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the validity and effects of such statements under the rules applicable to them.

1.7 Alternatives to Reservations and Interpretative Declarations

1.7.1 Alternatives to Reservations

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

- The insertion in the treaty of restrictive clauses purporting to limit its scope or application
- The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves

1.7.2 Alternatives to Interpretative Declarations

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- The insertion in the treaty of provisions purporting to interpret the same treaty
- The conclusion of a supplementary agreement to the same end

2. Procedure

2.1 Form and Notification of Reservations

2.1.1 Written Form

A reservation must be formulated in writing.

2.1.2 Form of Formal Confirmation

Formal confirmation of a reservation must be made in writing.

2.1.3 Formulation of a Reservation at the International Level

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:
   (a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or
   (b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.
2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:
   (a) Heads of State, heads of Government and Ministers for Foreign Affairs;
   (b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;
   (c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;
   (d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

2.1.4 Absence of Consequences at the International Level of the Violation of Internal Rules Regarding the Formulation of Reservations

The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or relevant rules of each international organization. A State or an international organization may not invoke the fact that a reservation has been

formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

2.1.5 Communication of Reservations

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 Procedure for Communication of Reservations

Unless otherwise provided in the treaty or agreed by the contracting States and international contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

1. If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or
2. If there is a depositary, to the latter, which shall notify the States and international organizations for which it is intended as soon as possible.

A communication relating to a reservation shall be considered as having been made with regard to a State or an international organization only upon receipt by that State or organization. Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

2.1.7 Functions of Depositaries

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or
(b) Where appropriate, the competent organ of the international organization concerned.

2.1.8 Procedure in Case of Manifestly Impermissible Reservations

Where, in the opinion of the depositary, a reservation is manifestly impermissible, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the impermissibility of the reservation. If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

2.1.9 Statement of Reasons

A reservation should to the extent possible indicate the reasons why it is being made.

2.2 Confirmation of Reservations

2.2.1 Formal Confirmation of Reservations Formulated When Signing a Treaty

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 Instances of Non-requirement of Confirmation of Reservations Formulated When Signing a Treaty

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

2.2.3 Reservations Formulated upon Signature When a Treaty Expressly So Provides

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty ...

2.3 Late Reservations

2.3.1 Late Formulation of a Reservation

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

2.3.2 Acceptance of Late Formulation of a Reservation

Unless the treaty provides otherwise or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

2.3.3 Objection to Late Formulation of a Reservation

If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

2.3.4 Subsequent Exclusion or Modification of the Legal Effect of a Treaty by Means Other than Reservations

A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(a) Interpretation of a reservation made earlier; or
(b) A unilateral statement made subsequently under an optional clause.

2.3.5 Widening of the Scope of a Reservation

The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged.

2.4 Procedure for Interpretative Declarations

2.4.1 Form of Interpretative Declarations

An interpretative declaration should preferably be formulated in writing.

2.4.2 Representation for the Purpose of Formulating Interpretative Declarations

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

2.4.3 Absence of Consequences at the International Level of the Violation of Internal Rules Regarding the Formulation of Interpretative Declarations

1. The competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration are determined by the internal law of each State or the relevant rules of each international organization.
2. A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding the competence and the procedure for formulating interpretative declarations for the purpose of invalidating the declaration.

2.4.4 Time at Which an Interpretative Declaration May be Formulated

Without prejudice to the provisions of guidelines 1.4 and 2.4.7, an interpretative declaration may be formulated at any time.

2.4.5 Communication of Interpretative Declarations

The communication of written interpretative declarations should follow the procedure established in guidelines 2.1.5, 2.1.6 and 2.1.7.

2.4.6 Non-Requirement of Confirmation of Interpretative Declarations Formulated When Signing a Treaty

An interpretative declaration formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

2.4.7 Late Formulation of an Interpretative Declaration

Where a treaty provides that an interpretative declaration may be formulated only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently, unless none of the other contracting States and contracting organizations objects to the late formulation of the interpretative declaration.

2.4.8 Modification of an Interpretative Declaration

Unless the treaty otherwise provides, an interpretative declaration may be modified at any time.

2.5 Withdrawal and Modification of Reservations and Interpretative Declarations

2.5.1 Withdrawal of Reservations

Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2.5.2 Form of Withdrawal

The withdrawal of a reservation must be formulated in writing.

2.5.3 Periodic Review of the Usefulness of Reservations

States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose. In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

2.5.4 Formulation of the Withdrawal of a Reservation at the International Level

1. Subject to the usual practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation made on behalf of a State or an international organization if:
   (a) That person produces appropriate full powers for the purposes of that withdrawal; or
   (b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.
2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:
   (a) Heads of State, heads of Government and Ministers for Foreign Affairs;
   (b) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

(c) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization.

2.5.5 Absence of Consequences at the International Level of the Violation of Internal Rules Regarding the Withdrawal of Reservations

The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or the relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.

2.5.6 Communication of Withdrawal of a Reservation

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 [2.1.6, 2.1.8] and 2.1.7.

2.5.7 Effect of Withdrawal of a Reservation

The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization by reason of that reservation.

2.5.8 Effective Date of Withdrawal of a Reservation

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

Model Clauses

A. Deferment of the Effective Date of the Withdrawal of a Reservation
A Contracting Party which has made a reservation to this treaty may withdraw it by means of notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of . . . [months] [days] after the date of receipt of the notification by [the depositary].

B. Earlier Effective Date of Withdrawal of a Reservation
A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].

C. Freedom to Set the Effective Date of Withdrawal of a Reservation
A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

2.5.9 Cases in Which a Reserving State or International Organization May Unilaterally Set the Effective Date of Withdrawal of a Reservation

The withdrawal of a reservation takes effect on the date set by the withdrawing State or international organization where:

(a) That date is later than the date on which the other contracting States or international organizations received notification of it; or
(b) The withdrawal does not add to the rights of the withdrawing State or international organization, in relation to the other contracting States or international organizations.

2.5.10 Partial Withdrawal of a Reservation

The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

2.5.11 Effect of a Partial Withdrawal of a Reservation

The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn. No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

2.5.12 Withdrawal of an Interpretative Declaration

An interpretative declaration may be withdrawn at any time by the authorities competent for that purpose, following the same procedure applicable to its formulation.

2.6 Formulation of Objections

2.6.1 Definition of Objections to Reservations

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

2.6.2 Definition of Objections to the Late Formulation or Widening of the Scope of a Reservation

"Objection" may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation or the widening of the scope of a reservation.

2.6.3 Freedom to Formulate Objections

A State or international organization may formulate an objection to a reservation irrespective of the permissibility of the reservation.

2.6.4 Freedom to Oppose the Entry into Force of the Treaty *Vis-À-Vis* the Author of the Reservation

A State or international organization that formulates an objection to a reservation may oppose the entry into force of the treaty as between itself and the author of the reservation.

2.6.5 Author

An objection to a reservation may be formulated by:

1. Any contracting State and any contracting international organization; and
2. Any State and any international organization that is entitled to become a party to the treaty in which case such a declaration does not produce any legal effect until the State or the international organization has expressed its consent to be bound by the treaty.

2.6.6 Joint Formulation

The joint formulation of an objection by several States or international organizations does not affect the unilateral character of that objection.

2.6.7 Written Form

An objection must be formulated in writing.

2.6.8 Expression of Intention to Preclude the Entry into Force of the Treaty

When a State or international organization making an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them.

2.6.9 Procedure for the Formulation of Objections

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.

2.6.10 Statement of Reasons

An objection should to the extent possible indicate the reasons why it is being made.

2.6.11 Non-requirement of Confirmation of an Objection Made Prior to Formal Confirmation of a Reservation

An objection to a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

2.6.12 Requirement of Confirmation of an Objection Formulated Prior to the Expression of Consent to Be Bound by a Treaty

An objection formulated prior to the expression of consent to be bound by the treaty does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound if that State or that organization had signed the treaty when it had formulated the objection; it must be confirmed if the State or the international organization had not signed the treaty.

2.6.13 Time Period for Formulating an Objection

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

2.6.14 Conditional Objections

An objection to a specific potential or future reservation does not produce the legal effects of an objection.

2.6.15 Late Objections

An objection to a reservation formulated after the end of the time period specified in guideline 2.6.13 does not produce the legal effects of an objection made within that time period.

2.7 Withdrawal and Modification of Objections to Reservations

2.7.1 Withdrawal of Objections to Reservations

Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

2.7.2 Form of Withdrawal of Objections to Reservations

The withdrawal of an objection to a reservation must be formulated in writing.

2.7.3 Formulation and Communication of the Withdrawal of Objections to Reservations

Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable *mutatis mutandis* to the withdrawal of objections to reservations.

2.7.4 Effect on Reservation of Withdrawal of an Objection

A State or an international organization that withdraws an objection formulated to a reservation is considered to have accepted that reservation.

2.7.5 Effective Date of Withdrawal of an Objection

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

2.7.6 Cases in Which an Objecting State or International Organization May Unilaterally Set the Effective Date of Withdrawal of an Objection to a Reservation

The withdrawal of an objection becomes operative on the date set by its author where that date is later than the date on which the reserving State or international organization received notification of it.

2.7.7 Partial Withdrawal of an Objection

Unless the treaty provides otherwise, a State or an international organization may partially withdraw an objection to a reservation. The partial withdrawal of an objection is subject to the same formal and procedural rules as a complete withdrawal and becomes operative on the same conditions.

2.7.8 Effect of a Partial Withdrawal of an Objection

The partial withdrawal modifies the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation to the extent of the new formulation of the objection.

2.7.9 Widening of the Scope of an Objection to a Reservation

A State or international organization which has made an objection to a reservation may widen the scope of that objection during the time period referred to in guideline 2.6.13 provided that the widening does not have as an effect the modification of treaty relations between the author of the reservation and the author of the objection.

2.8 Formulation of Acceptances of Reservations

2.8.0 Forms of Acceptance of Reservations

The acceptance of a reservation may arise from a unilateral statement in this respect or silence kept by a contracting State or contracting international organization within the periods specified in guideline 2.6.13.

2.8.1 Tacit Acceptance of Reservations

Unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation within the time period provided for in guideline 2.6.13.

2.8.2 Unanimous Acceptance of Reservations

In the event of a reservation requiring unanimous acceptance by some or all States or international organizations which are parties or entitled to become parties to the treaty, such an acceptance once obtained is final.

2.8.3 Express Acceptance of a Reservation

A State or an international organization may, at any time, expressly accept a reservation formulated by another State or international organization.

2.8.4 Written Form of Express Acceptance

The express acceptance of a reservation must be formulated in writing.

2.8.5 Procedure for Formulating Express Acceptance

Guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 apply *mutatis mutandis* to express acceptances.

2.8.6 Non-requirement of Confirmation of an Acceptance Made Prior to Formal Confirmation of a Reservation

An express acceptance of a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with guideline 2.2.1 does not itself require confirmation.

2.8.7 Acceptance of a Reservation to the Constituent Instrument of an International Organization

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

2.8.8 Organ Competent to Accept a Reservation to a Constituent Instrument

Subject to the rules of the organization, competence to accept a reservation to a constituent instrument of an international organization belongs to the organ competent to decide on the admission of a member to the organization or to the organ competent to amend the constituent instrument or to the organ competent to interpret this instrument.

2.8.9 Modalities of the Acceptance of a Reservation to a Constituent Instrument

Subject to the rules of the organization, the acceptance by the competent organ of the organization shall not be tacit. However, the admission of the State or the international organization which is the author of the reservation is tantamount to the acceptance of that reservation.

For the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required.

2.8.10 Acceptance of a Reservation to a Constituent Instrument That Has Not Yet Entered into Force

In the case set forth in guideline 2.8.7 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation by the end of a period of 12 months after they were notified of that reservation. Such a unanimous acceptance once obtained is final.

2.8.11 Reaction by a Member of an International Organization to a Reservation to Its Constituent Instrument

Guideline 2.8.7 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

2.8.12 Final Nature of Acceptance of a Reservation

Acceptance of a reservation cannot be withdrawn or amended.

2.9 Formulation of Reactions to Interpretative Declarations

2.9.1 Approval of an Interpretative Declaration

"Approval" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization expresses agreement with the interpretation formulated in that declaration.

2.9.2 Opposition to an Interpretative Declaration

"Opposition" to an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization rejects the interpretation formulated in the interpretative declaration, including by formulating an alternative interpretation.

2.9.3 Recharacterization of an Interpretative Declaration

"Recharacterization" of an interpretative declaration means a unilateral statement made by a State or an international organization in reaction to an interpretative declaration in respect of a treaty formulated by another State or another international organization, whereby the former State or organization treats the declaration as a reservation. A State or an international organization that intends to treat an interpretative declaration as a reservation should take into account draft guidelines 1.3–1.3.3.

2.9.4 Freedom to Formulate Approval, Opposition or Recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration may be formulated at any time by any contracting State or any contracting international organization and by any State or any international organization that is entitled to become a party to the treaty.

2.9.5 Form of Approval, Opposition and Recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration should preferably be formulated in writing.

2.9.6 Statement of Reasons for Approval, Opposition and Recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration should, to the extent possible, indicate the reasons why it is being made.

2.9.7 Formulation and Communication of Approval, Opposition or Recharacterization

An approval, opposition or recharacterization in respect of an interpretative declaration should, *mutatis mutandis*, be formulated and communicated in accordance with guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7.

2.9.8 Non-presumption of Approval or Opposition

An approval of, or an opposition to, an interpretative declaration shall not be presumed.

Notwithstanding guidelines 2.9.1 and 2.9.2, an approval of an interpretative declaration or an opposition thereto may be inferred, in exceptional cases, from the conduct of the States or international organizations concerned, taking intoaccount all relevant circumstances.

2.9.9 Silence with Respect to an Interpretative Declaration

An approval of an interpretative declaration shall not be inferred from the mere silence of a State or an international organization.

In exceptional cases, the silence of a State or an international organization may be relevant to determining whether, through its conduct and taking account of the circumstances, it has approved an interpretative declaration.

3. Permissibility of Reservations and Interpretative Declarations

3.1 Permissible Reservations

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) The reservation is prohibited by the treaty;
(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
(c) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

3.1.1 Reservations Expressly Prohibited by the Treaty

A reservation is expressly prohibited by the treaty if it contains a particular provision:

(a) Prohibiting all reservations;
(b) Prohibiting reservations to specified provisions and a reservation in question is formulated to one of such provisions; or
(c) Prohibiting certain categories of reservations and a reservation in question falls within one of such categories.

3.1.2 Definition of Specified Reservations

For the purposes of guideline 3.1, the expression "specified reservations" means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.

3.1.3 Permissibility of Reservations Not Prohibited by the Treaty

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

3.1.4 Permissibility of Specified Reservations

Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

3.1.5 Incompatibility of a Reservation with the Object and Purpose of the Treaty

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general thrust, in such a way that the reservation impairs the *raison d'être* of the treaty.

3.1.6 Determination of the Object and Purpose of the Treaty

The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context. Recourse may also be had in particular to the title of the treaty, the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice agreed upon by the parties.

3.1.7 Vague or General Reservations

A reservation shall be worded in such a way as to allow its scope to be determined, in order to assess in particular its compatibility with the object and purpose of the treaty.

3.1.8 Reservations to a Provision Reflecting a Customary Norm

1. The fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation although it does not in itself constitute an obstacle to the formulation of the reservation to that provision.

2. A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.

3.1.9 Reservations Contrary to a Rule of *Jus Cogens*

A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

3.1.10 Reservations to Provisions Relating to Non-derogable Rights

A State or an international organization may not formulate a reservation to a treaty provision relating to non derogable rights unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

3.1.11 Reservations Relating to Internal Law

A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific norms of the internal law of that State or rules of that organization may be formulated only insofar as it is compatible with the object and purpose of the treaty.

3.1.12 Reservations to General Human Rights Treaties

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.

3.1.13 Reservations to Treaty Provisions Concerning Dispute Settlement or the Monitoring of the Implementation of the Treaty

A reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

1. The reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*; or
2. The reservation has the effect of excluding the reserving State or international organization from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that it has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

3.2 Assessment of the Permissibility of Reservation

The following may assess, within their respective competences, the permissibility of reservations to a treaty formulated by a State or an international organization:

- Contracting States or contracting organizations
- Dispute settlement bodies
- Treaty monitoring bodies

3.2.1 Competence of the Treaty Monitoring Bodies to Assess the Permissibility of Reservations

A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.

The conclusions formulated by such a body in the exercise of this competence shall have the same legal effect as that deriving from the performance of its monitoring role.

3.2.2 Specification of the Competence of Treaty Monitoring Bodies to Assess the Permissibility of Reservations

When providing bodies with the competence to monitor the application of treaties, States or international organizations should specify, where appropriate, the nature and the limits of the competence of such bodies to assess the permissibility of reservations. For the existing monitoring bodies, measures could be adopted to the same ends.

3.2.3 Cooperation of States and International Organizations with Treaty Monitoring Bodies

States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body are required to cooperate with that body and should give full consideration to that body's assessment of the permissibility of the reservations that they have formulated.

3.2.4 Bodies Competent to Assess the Permissibility of Reservations in the Event of the Establishment of a Treaty Monitoring Body

When a treaty establishes a treaty monitoring body, the competence of that body is without prejudice to the competence of the contracting States or contracting international organizations to assess the permissibility of reservations to that treaty, or to that of dispute settlement bodies competent to interpret or apply the treaty.

3.2.5 Competence of Dispute Settlement Bodies to Assess the Permissibility of Reservations

When a dispute settlement body is competent to adopt decisions binding upon the parties to a dispute, and the assessment of the permissibility of a reservation is necessary for the discharge of such competence by that body, such assessment is, as an element of the decision, legally binding upon the parties.

3.3 Consequences of the Non-permissibility of a Reservation

A reservation formulated in spite of a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and the purpose of the treaty is impermissible, without there being any need to distinguish between the consequences of these grounds for non-permissibility.

3.3.1 Non-permissibility of Reservations and International Responsibility

The formulation of an impermissible reservation produces its consequences pursuant to the law of treaties and does not, in itself, engage the international responsibility of the State or international organization which has formulated it.

3.3.2 Effect of Individual Acceptance of an Impermissible Reservation

Acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not cure the nullity of the reservation.

3.3.3 Effect of Collective Acceptance of an Impermissible Reservation

A reservation that is prohibited by the treaty or which is incompatible with its object and purpose shall be deemed permissible if no contracting State or contracting organization objects to it after having been expressly informed thereof by the depositary at the request of a contracting State or a contracting organization.

3.4 Permissibility of Reactions to Reservations

3.4.1 Permissibility of the Acceptance of a Reservation

The express acceptance of an impermissible reservation is itself impermissible.

3.4.2 Permissibility of an Objection to a Reservation

An objection to a reservation by which a State or an international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty to which the reservation does not relate is only permissible if:

1. The additional provisions thus excluded have a sufficient link with the provisions to which the reservation relates; and
2. The objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection.

3.5 Permissibility of an Interpretative Declaration

A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty or is incompatible with a peremptory norm of general international law.

3.5.1 Permissibility of an Interpretative Declaration Which is in Fact a Reservation

If a unilateral statement which purports to be an interpretative declaration is in fact a reservation, its permissibility must be assessed in accordance with the provisions of guidelines 3.1–3.1.13.

3.6 Permissibility of Reactions to Interpretative Declarations

Subject to the provisions of guidelines 3.6.1 and 3.6.2, an approval of, opposition to, or recharacterization of, an interpretative declaration shall not be subject to any conditions for permissibility.

3.6.1 Permissibility of Approvals of Interpretative Declarations

An approval of an impermissible interpretative declaration is itself impermissible.

3.6.2 Permissibility of Oppositions to Interpretative Declarations

An opposition to an interpretative declaration is impermissible to the extent that it does not comply with the conditions for permissibility of an interpretative declaration set forth in guideline 3.5.

4. Legal Effects of Reservations and Interpretative Declarations

4.1 Establishment of a Reservation with Regard to Another State or Organization

A reservation formulated by a State or an international organization is established with regard to a contracting State or a contracting organization if it is permissible and was formulated in accordance with the required form and procedures, and if that contracting State or contracting organization has accepted it.

4.1.1 Establishment of a Reservation Expressly Authorized by a Treaty

A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States and contracting organizations, unless the treaty so provides.

A reservation expressly authorized by a treaty is established with regard to the other contracting States and contracting organizations if it was formulated in accordance with the required form and procedures.

4.1.2 Establishment of a Reservation to a Treaty Which Has to Be Applied in Its Entirety

A reservation to a treaty in respect of which it appears, from the limited number of negotiating States and organizations and the object and purpose of the treaty, that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if all the contracting States and contracting organizations have accepted it.

4.1.3 Establishment of a Reservation to a Constituent Instrument of an International Organization

A reservation to a treaty which is a constituent instrument of an international organization is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the

required form and procedures, and if it has been accepted in conformity with guidelines 2.8.7–2.8.10.

4.2 Effects of an Established Reservation

4.2.1 Status of the Author of an Established Reservation

As soon as a reservation is established in accordance with guidelines 4.1–4.1.3, its author becomes a contracting State or contracting organization to the treaty.

4.2.2 Effect of the Establishment of a Reservation on the Entry into Force of a Treaty

1. When a treaty has not yet entered into force, the author of a reservation shall be included in the number of contracting States and contracting organizations required for the treaty to enter into force once the reservation is established.
2. The author of the reservation may however be included at an earlier date in the number of contracting States and contracting organizations required for the treaty to enter into force, if no contracting State or contracting organization is opposed in a particular case.

4.2.3 Effect of the Establishment of a Reservation on the Status of the Author as a Party to the Treaty

The establishment of a reservation constitutes its author a party to the treaty in relation to contracting States and contracting organizations in respect of which the reservation is established if or when the treaty is in force.

4.2.4 Effect of an Established Reservation on Treaty Relations

1. A reservation established with regard to another party excludes or modifies for the reserving State or international organization in its relations with that other party the legal effect of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, to the extent of the reservation.
2. To the extent that an established reservation excludes the legal effect of certain provisions of a treaty, the author of that reservation has neither rights nor obligations under those provisions in its relations with the other parties with regard to which the reservation is established. Those other parties shall likewise have neither rights nor obligations under those provisions in their relations with the author of the reservation.
3. To the extent that an established reservation modifies the legal effect of certain provisions of a treaty, the author of that reservation has rights and obligations under those provisions, as modified by the reservation, in its relations with the

other parties with regard to which the reservation is established. Those other parties shall have rights and obligations under those provisions, as modified by the reservation, in their relations with the author of the reservation.

4.2.5 Non-reciprocal Application of Obligations to Which a Reservation Relates

Insofar as the obligations under the provisions to which the reservation relates are not subject to reciprocal application in view of the nature of the obligations or the object and purpose of the treaty, the content of the obligations of the parties other than the author of the reservation remains unaffected. The content of the obligations of those parties likewise remains unaffected when reciprocal application is not possible because of the content of the reservation.

4.3 Effect of an Objection to a Valid Reservation

Unless the reservation has been established with regard to an objecting State or organization, the formulation of an objection to a valid reservation precludes the reservation from having its intended effects as against that State or international organization.

4.3.1 Effect of an Objection on the Entry into Force of the Treaty as Between the Author of the Objection and the Author of a Reservation

An objection by a contracting State or by a contracting organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, except in the case mentioned in guideline 4.3.4.

4.3.2 Entry into Force of the Treaty Between the Author of a Reservation and the Author of an Objection

The treaty enters into force between the author of a valid reservation and the objecting contracting State or contracting organization as soon as the author of the reservation has become a contracting State or a contracting organization in accordance with guideline 4.2.1 and the treaty has entered into force.

4.3.3 Non-entry into Force of the Treaty for the Author of a Reservation When Unanimous Acceptance Is Required

If unanimous acceptance is required for the establishment of the reservation, any objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty for the reserving State or organization.

4.3.4 Non-entry into Force of the Treaty as Between the Author of a Reservation and the Author of an Objection with Maximum Effect

An objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, if the objecting State or organization has definitely expressed an intention to that effect in accordance with guideline 2.6.8.

4.3.5 Effect of an Objection on Treaty Relations

1. When a State or an international organization objecting to a valid reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.
2. To the extent that a valid reservation purports to exclude the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates.
3. To the extent that a valid reservation purports to modify the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions of the treaty as intended to be modified by the reservation.
4. All the provisions of the treaty other than those to which the reservation relates shall remain applicable as between the reserving State or organization and the objecting State or organization.

4.3.6 Effect of an Objection on Provisions Other than Those to Which the Reservation Relates

1. A provision of the treaty to which the reservation does not relate, but which has a sufficient link with the provisions to which the reservation does relate, is not applicable in the treaty relations between the author of the reservation and the author of an objection formulated in accordance with guideline 3.4.2.
2. The reserving State or organization may, within a period of 12 months following the notification of such an objection, oppose the entry into force of the treaty between itself and the objecting State or organization. In the absence of such opposition, the treaty shall apply between the author of the reservation and the author of the objection to the extent provided by the reservation and the objection.

4.3.7 Right of the Author of a Valid Reservation Not to Be Compelled to Comply with the Treaty Without the Benefit of Its Reservation

The author of a reservation which is permissible and which has been formulated in accordance with the required form and procedures cannot be compelled to comply with the provisions of the treaty without the benefit of its reservation.

4.4 Effect of a Reservation on Rights and Obligations Outside of the Treaty

4.4.1 Absence of Effect on Rights and Obligations Under Another Treaty

A reservation, acceptance of it or objection to it neither modifies nor excludes the respective rights and obligations of their authors under another treaty to which they are parties.

4.4.2 Absence of Effect on Rights and Obligations Under Customary International Law

A reservation to a treaty provision which reflects a rule of customary international law does not of itself affect the rights and obligations under that rule, which shall continue to apply as such between the reserving State or organization and other States or international organizations which are bound by that rule.

4.4.3 Absence of Effect on a Peremptory Norm of General International Law (*Jus Cogens*)

A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such between the reserving State or organization and other States or international organizations.

4.5 Consequences of an Invalid Reservation

4.5.1 Nullity of an Invalid Reservation

A reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of legal effect.

4.5.2 Status of the Author of an Invalid Reservation in Relation to the Treaty

When an invalid reservation has been formulated, the reserving State or the reserving international organization is considered a contracting State or a contracting organization or, as the case may be, a party to the treaty without the benefit of the reservation, unless a contrary intention of the said State or organization can be identified. The intention of the author of the reservation shall be identified by taking into consideration all factors that may be relevant to that end, including:

- The wording of the reservation
- Statements made by the author of the reservation when negotiating, signing or ratifying the treaty, or otherwise expressing its consent to be bound by the treaty
- Subsequent conduct of the author of the reservation
- Reactions of other contracting States and contracting organizations
- The provision or provisions to which the reservation relates, and
- The object and purpose of the treaty

4.5.3 Reactions to an Invalid Reservation

The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization. Nevertheless, a State or an international organization which considers that the reservation is invalid should, if it deems it appropriate, formulate a reasoned objection as soon as possible.

4.6 Absence of Effect of a Reservation on the Relations Between the Other Parties to the Treaty

A reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

4.7 Effect of an Interpretative Declaration

4.7.1 Clarification of the Terms of the Treaty by an Interpretative Declaration

An interpretative declaration does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties. In interpreting the treaty, account shall also be taken, as

appropriate, of the approval of, or opposition to, the interpretative declaration, by other contracting States or contracting organizations.

4.7.2 Effect of the Modification or the Withdrawal of an Interpretative Declaration in Respect of Its Author

The modification or the withdrawal of an interpretative declaration may not produce the effects provided for in draft guideline 4.7.1 to the extent that other contracting States or contracting organizations have relied upon the initial declaration.

4.7.3 Effect of an Interpretative Declaration Approved by All the Contracting States and Contracting Organizations

An interpretative declaration that has been approved by all the contracting States and contracting organizations may constitute an agreement regarding the interpretation of the treaty.

5. Reservations, Acceptances of and Objections to Reservations, and Interpretative Declarations in the Case of Succession of States

5.1. Reservations and Succession of States

5.1.1 Newly Independent States

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.
2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1 of the Guide to Practice.
3. When a newly independent State formulates a reservation in conformity with paragraph 2, the relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.
4. For the purposes of this Part of the Guide to Practice, "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.

5.1.2 Uniting or Separation of States

1. Subject to the provisions of guideline 5.1.3, a successor State which is a party to a treaty as the result of a uniting or separation of States shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses its intention not to maintain one or more reservations of the predecessor State at the time of the succession.
2. A successor State which is a party to a treaty as the result of a uniting or separation of states may not formulate a new reservation.
3. When a successor State formed from a uniting or separation of States makes a notification whereby it establishes its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, that State shall be considered as maintaining any reservation to the treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates, unless it expresses a contrary intention when making the notification o r formulates a reservation which relates to the same subject matter as that reservation. That successor State may formulate a new reservation to the treaty.
4. A successor State may formulate a reservation in accordance with paragraph 3 only if the reservation is one the formulation of which would not be excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1 of the Guide to Practice. The relevant rules set out in Part 2 (Procedure) of the Guide to Practice apply in respect of that reservation.

5.1.3 Irrelevance of Certain Reservations in Cases Involving a Uniting of States

When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State, such reservations as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

5.1.4 Establishment of New Reservations Formulated by a Successor State

Part 4 of the Guide to Practice applies to new reservations formulated by a successor State in accordance with guideline 5.1.1 or 5.1.2.

5.1.5 Maintenance of the Territorial Scope of Reservations Formulated by the Predecessor State

Subject to the provisions of guideline 5.1.6, a reservation considered as being maintained in conformity with guideline 5.1.1, paragraph 1, or guideline 5.1.2, paragraph 1 or 3, shall retain the territorial scope that it had at the date of the succession of States, unless the successor State expresses a contrary intention.

5.1.6 Territorial Scope of Reservations in Cases Involving a Uniting of States

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of the States forming the successor State becomes applicable to a part of the territory of that State to which it did not apply previously, any reservation considered as being maintained by the successor State shall apply to that territory unless:
   (a) The successor State expresses a contrary intention when making the notification extending the territorial scope of the treaty; or
   (b) The nature or purpose of the reservation is such that the reservation cannot be extended beyond the territory to which it was applicable at the date of the succession of States.
2. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of two or more of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States, no reservation shall extend to that territory unless:
   (a) An identical reservation has been formulated by each of those States in respect of which the treaty was in force at the date of the succession of States;
   (b) The successor State expresses a different intention when making the notification extending the territorial scope of the treaty; or
   (c) A contrary intention otherwise becomes apparent from the circumstances surrounding that State's succession to the treaty.
3. A notification purporting to extend the territorial scope of reservations within the meaning of paragraph 2 (b) shall be without effect if such an extension would give rise to the application of contradictory reservations to the same territory.
4. The provisions of the foregoing paragraphs shall apply *mutatis mutandis* to reservations considered as being maintained by a successor State that is a contracting State, following a uniting of States, to a treaty which was not in force for any of the uniting States at the date of the succession of States but to which one or more of those States were contracting States at that date, when the treaty becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States.

5.1.7 Territorial Scope of Reservations of the Successor State in Cases of Succession Involving Part of a Territory

When, as a result of a succession of States involving part of a territory, a treaty to which the successor State is a party or a contracting State becomes applicable to that territory, any reservation to the treaty formulated previously by that State shall also apply to that territory as from the date of the succession of States unless:

(a) The successor State expresses a contrary intention; or
(b) It appears from the reservation that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a specific territory.

5.1.8 Timing of the Effects of Non-maintenance by a Successor State of a Reservation Formulated by the Predecessor State

The non-maintenance, in conformity with guideline 5.1.1 or 5.1.2, by the successor State of a reservation formulated by the predecessor State becomes operative in relation to another contracting State or contracting organization or another State or international organization party to the treaty only when notice of it has been received by that State or international organization.

5.1.9 Late Reservations Formulated by a Successor State

A reservation shall be considered as late if it is formulated:

(a) By a newly independent State after it has made a notification of succession to the treaty;
(b) By a successor State other than a newly independent State after it has made a notification establishing its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State; or (c) by a successor State other than a newly independent State in respect of a treaty which, following the succession of States, continues in force for that State.

5.2 Objections to Reservations and Succession of States

5.2.1 Maintenance by the Successor State of Objections Formulated by the Predecessor State

Subject to the provisions of guideline 5.2.2, a successor State shall be considered as maintaining any objection formulated by the predecessor State to a reservation formulated by a contracting State or contracting organization or by a State Party or

international organization party to a treaty unless it expresses a contrary intention at the time of the succession.

5.2.2 Irrelevance of Certain Objections in Cases Involving a Uniting of States

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the State so formed, such objections to a reservation as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.
2. When, following a uniting of two or more States, the successor State is a party or a contracting State to a treaty to which it has maintained reservations in conformity with guideline 5.1.1 or 5.1.2, objections to a reservation made by another contracting State or a contracting organization or by a State or an international organization party to the treaty shall not be maintained if the reservation is identical or equivalent to a reservation which the successor State itself has maintained.

5.2.3 Maintenance of Objections to Reservations of the Predecessor State

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, any objection to that reservation formulated by another contracting State or State Party or by a contracting organization or international organization party to the treaty shall be considered as being maintained in respect of the successor State.

5.2.4 Reservations of the Predecessor State to Which No Objections Have Been Made

When a reservation formulated by the predecessor State is considered as being maintained by the successor State in conformity with guideline 5.1.1 or 5.1.2, a contracting State or State Party or a contracting organization or international organization party to the treaty that had not objected to the reservation in respect of the predecessor State may not object to it in respect of the successor State, unless:

(a) The time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period; or
(b) The territorial extension of the treaty radically changes the conditions for the operation of the reservation.

5.2.5 Capacity of a Successor State to Formulate Objections to Reservations

1. When making a notification of succession establishing its status as a party or as a contracting State to a treaty, a newly independent State may, in the conditions laid down in the relevant guidelines of the Guide to Practice, object to reservations formulated by a contracting State or State Party or by a contracting organization or international organization party to the treaty, even if the predecessor State made no such objection.
2. A successor State, other than a newly independent State, shall also have the capacity provided for in paragraph 1 when making a notification establishing its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State.
3. The capacity referred to in the foregoing paragraphs shall non-etheless not be recognized in the case of treaties falling under guidelines 2.8.2 and 4.1.2.

5.2.6 Objections by a Successor State Other than a Newly Independent State in Respect of Which a Treaty Continues in Force

A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States may not formulate an objection to a reservation to which the predecessor State had not objected unless the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period.

5.3 Acceptances of Reservations and Succession of States

5.3.1 Maintenance by a Newly Independent State of Express Acceptances Formulated by the Predecessor State

When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty, it shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization unless it expresses a contrary intention within 12 months of the date of the notification of succession.

5.3.2 Maintenance by a Successor State Other than a Newly Independent State of Express Acceptances Formulated by the Predecessor State

1. A successor State, other than a newly independent State, in respect of which a treaty continues in force following a succession of States shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization.

2. When making a notification of succession establishing its status as a contracting State or as a party to a treaty which, on the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State, a successor State other than a newly independent State shall be considered as maintaining any express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization unless it expresses a contrary intention within 12 months of the date of the notification of succession.

5.3.3 Timing of the Effects of Non-maintenance by a Successor State of an Express Acceptance Formulated by the Predecessor State

The non-maintenance, in conformity with guideline 5.3.1 or guideline 5.3.2, paragraph 2, by the successor State of the express acceptance by the predecessor State of a reservation formulated by a contracting State or by a contracting organization becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

5.4 Interpretative Declarations and Succession of States

5.4.1 Interpretative Declarations Formulated by the Predecessor State

A successor State should, to the extent possible, clarify its position concerning interpretative declarations formulated by the predecessor State. In the absence of any such clarification, a successor State shall be considered as maintaining the interpretative declarations of the predecessor State.

The preceding paragraph is without prejudice to situations in which the successor State has demonstrated, by its conduct, its intention to maintain or to reject an interpretative declaration formulated by the predecessor State.

Section 3
Entry into Force and Provisional Application of Treaties

Article 24
Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.
2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.
3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.
4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Contents

A. Purpose and Function

Upon entry into force, the rights and obligations laid down in a treaty become effective in international law and require implementation in national law. From that moment on, the treaty is **fully binding upon the parties** (→ Art 26 MN 33 *et seq*). Thus, in the interest of legal certainty, the rules on entry into force must be precise enough to guarantee that the exact date is sufficiently clear. At the same time, the rules must provide for some flexibility because – especially in cases of multilateral treaties – a certain amount of time might pass before the treaty enters into force. Accordingly, the rules accompanying the entry into force must allow for reactions **1**

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
DOI 10.1007/978-3-642-19291-3_27,

to changing circumstances.[1] Therefore, Art 24 is supported by Art 25, which allows for the provisional application of a treaty.

B. Historical Background and Negotiating History

2 The first *Waldock* report included lengthy provisions on diverse **presumptions for the date of entry into force** in Draft Art 20. These proposals were partly based on the *Fitzmaurice* report.[2] Moreover, a separate provision on the **legal effects of entry into force**[3] was included in Art 21, which was deleted in Art 23 of the first ILC draft of 1962. This draft had already led to a more abstract version of the Article. Rules providing for presumptions as to the date of entry into force were dropped. The Commission rejected the idea of filling in gaps in a treaty concerning the entry into force because it considered such presumptions as an inappropriate interference with the parties' possible intentions. It preferred to leave the determination of the exact date to the negotiating States.[4] Further, Art 23 para 4 of the first ILC draft dealt with the **non-retroactive effect of ratifications**. The clause stipulates that a treaty becomes effective for each party on the date it enters into force with respect to that party. The rule rebutted the argument that a treaty may apply retroactively to the date of signature. The idea that retroactive effect must be explicitly provided for is now reflected in Art 24 paras 1–3 as well as in Art 28 VCLT.

3 The final ILC draft reduced the article even further, paying respect to the **autonomy of negotiating States**. The ILC thought that the legal presumptions included in earlier drafts were still too far-reaching. The 1962 text had accepted that "where a treaty fixed a date by which instruments of ratification [. . .] were to take place, there would be a certain presumption that this was intended to be the date of entry into force of the treaty." Thus, if a treaty did not specify the date of entry into force, the presumption would have applied that the date fixed for ratifications was to be considered as the date of entry into force. The Commission, however, doubted that the date for deposit of ratification instruments should be considered as the date of entry into force in all cases. Consequently, the Commission rejected the idea of translating the indication "given by the fixing of such dates into a definite legal presumption."[5] Hence, the only presumption that the ILC accepted in order to reflect State practice is included in Art 24 para 2.[6] However, in its final

[1] *E Roucounas* Uncertainties Regarding the Entry into Force of Some Multilateral Treaties, in *K Wellens* (ed) International Law: Theory and Practice (1998) 179; *J Klabbers* Treaties, Conclusion and Entry into Force in MPEPIL (2008) MN 16; *A Mahiou* in *Corten/Klein* Art 24 MN 3.

[2] *Waldock* I 68 *et seq*.

[3] *Waldock* I 71.

[4] [1962-II] YbILC 182.

[5] [1962-II] YbILC 209 *et seq*.

[6] Final Draft, Commentary to Art 21, 210 para 3.

commentary, the Commission accepted that "if, in a particular case, the fixing of a date for the exchange or deposit of instruments [...] were to constitute a clear indication of the intended date of entry into force," this would be covered by the phrase "in such manner and upon such date as it may provide", which is now included in Art 24 para 1 VCLT.[7]

The ILC considered Art 24 para 3 "to be an undisputed rule".[8] The Commission had explicitly addressed the problem of entry into force after ratification in its Report to the General Assembly on Draft Art 13 (Art 16 VCLT). According to the Commission, the problem arises "whether the deposit by itself establishes [a legal relationship] between the depositing State and other contracting States or whether the legal nexus arises only upon their being informed by the depositary."[9] Although the ILC held that the **date of the deposit** is decisive and forms a well-settled rule, it acknowledged that as a consequence, there will be a certain lapse of time before the other contracting Parties will be informed about the entry into force.[10] In addition, the Commission stressed that Arts 16 and 24 of the Convention are of a *lex specialis* nature in relation to Art 78 so that their "specific provisions [...] will prevail."[11] **4**

The ILC described the practice that a **period of time between the deposit of the required number of instruments of ratification and the entry into force** was included in numerous treaties. However, because of the great diversity of agreements, the Commission refrained from introducing such a lapse of time as a general rule but considered the basic rule to be that "entry into force takes place at once upon the relevant consents having been established, unless the treaty otherwise provides."[12] **5**

Art 24 para 4 was added at the first session of the Vienna Conference upon the proposal of the United Kingdom. It was based on Art 42 para 4 of SR *Fitzmaurice*'s first report.[13] In this report, *Fitzmaurice* had addressed the logical problem that the **normative effect of the provisions on the entry into force of a treaty** would hypothetically depend on the entry into force of the whole treaty. *Fitzmaurice* claimed that "by a tacit assumption, [...] the clauses of a treaty providing for ratification [...] are deemed to come into force separately and at once, on signature – or are treated as if they did."[14] Since there was no further discussion during the Conference, it can be assumed that the paragraph reflects customary international law.[15] **6**

[7] Final Draft, Commentary to Art 21, 210 para 2; *Sinclair* 44.

[8] Final Draft, Commentary to Art 21, 210 para 4.

[9] Final Draft, Commentary to Art 13, 201 para 3.

[10] Final Draft, Commentary to Art 13, 201 para 3.

[11] Final Draft, Commentary to Art 73, 271 para 7.

[12] Final Draft, Commentary to Art 21, 210 para 5.

[13] *Fitzmaurice* I 116.

[14] *Fitzmaurice* I 127.

[15] *Klabbers* (n 1) MN 14; *Roucounas* (n 1) 181.

C. Elements of Article 24

I. Treaty

7 According to Art 2 para 1 lit a (→ Art 2 MN 3 *et seq*), the concept of a treaty refers to an international agreement in written form concluded between States and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

II. Negotiating States

8 The expression "negotiating States" in Art 24 refers to the definition included in Art 2 para 1 lit e VCLT. It describes those States which take part in the drawing up and adopting of the text of the treaty (→ Art 2 MN 46).

III. Agreement on the Entry into Force (para 1)

9 According to para 1, it is left to the negotiating states to formulate the prerequisites for a treaty's entry into force. Such provisions are usually laid down in the final articles of a treaty. Only where the treaty does not contain any explicit clause are the rules of the VCLT according to para 2 applicable. This paragraph reflects the **autonomy of parties to a treaty** and is considered as a rule of customary international law.[16] There is a great variety of clauses which depend on the content and the circumstances under which a treaty is concluded.

10 A treaty can enter into force upon **signature**. This will be the case where parliamentary approval is not required.[17] Examples include above all administrative agreements, which do not call for parliamentary participation.[18] In such cases, the entry into force might depend on a fixed date.[19] There are even treaties

[16] *A Mahiou* in *Corten/Klein* Art 24 MN 4.

[17] *Aust* 166; *A Mahiou* in *Corten/Klein* Art 24 MN 5.

[18] For example, para 14 Verwaltungsabkommen über die Zusammenarbeit der deutschen Behörden und der Behörden der belgischen Truppe und des zivilen Gefolges bei der Beilegung von Streitigkeiten gemäß Artikel 44 des Zusatzabkommens zum NATO-Truppenstatut (ZA NTS) und dem Abkommen zwischen der Bundesrepublik Deutschland und dem Königreich Belgien über die Beilegung von Streitigkeiten bei Direktbeschaffungen [1975] Bundesanzeiger 25, Beilage 5/75, and [1980] Bundesanzeiger 223.

[19] Art 7 para 1 Abkommen zwischen der Österreichischen Bundesregierung und der Regierung der Republik Albanien über die Aufhebung der Sichtvermerkspflicht für Inhaber von Diplomaten- und Dienstpässen [1992] öBGBl 434.

concluded between several States which enter into force upon signature, *eg* the Dayton Agreement.[20]

> The parties were obliged to sign the Dayton Agreement itself in Paris upon which it would enter into force while at the same time the parties agreed to be bound by the Initialing Agreement upon signature in Dayton. Here the particular political circumstances called for a specific solution. On the one hand, European governments participating in the attempts to foster peace in Bosnia and Herzegovina wanted to emphasize Europe's role in the negotiations next to the predominant US role. On the other hand, it was essential to guarantee that a permanent solution was established.[21]

11 Parliamentary competences in foreign affairs require formal means of ascertaining the consent of the States Parties. Since **constitutional requirements** will often have to be fulfilled before a treaty can enter into force, parties may choose the date of exchange of instruments of notification or ratification.[22] This lapse of time not only allows for compliance with constitutional exigencies and publication of the content of the treaty within the State but also enables the States to modify the internal legal system according to the treaty obligations. However, necessary modifications of domestic law will sometimes take place at a later stage, for instance, in reaction to legal decisions on the incompatibility between the treaty and national law.[23] In order to push States to proceed quickly with the ratification process, treaties may include a **specific date** next to other conditions for the entry into force.[24]

> A pertinent example is included in Art XXIV lit a of the 1999 Food Aid Convention[25] as well as in Art 16 para 1 of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.[26] Here it is stated that "[t]his Protocol shall enter into force on 1 January 1989, provided that at least eleven instruments of ratification, acceptance, approval of the Protocol or accession thereto have been deposited by States or regional economic integration organizations representing at least two-thirds of 1986 estimated global consumption of the controlled substances, and the provisions of paragraph 1 of Article 17 of the Convention have been fulfilled. In the event that these conditions have not been fulfilled by that date, the Protocol shall enter into force on the ninetieth day following the date on which the conditions have been fulfilled."

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[20] Arts I and II of the 1995 Agreement on the Initialing of the General Framework Agreement for Peace in Bosnia and Herzegovina (1996) 35 ILM 117.

[21] *P Gaeta* The Dayton Agreements and International Law (1996) 7 EJIL 147, 150; however, see *JM Sorel* L'accord de paix sur la Bosnie-Herzégovine du 14 décembre 1995, un traité sous bénéfice d'inventaire (1995) 41 AFDI 64.

[22] Agreement between the Government of the Federal Republic of Germany and the Government of the Republic of Poland concerning cultural cooperation 2060 UNTS 221; *Sinclair* 44.

[23] *Roucounas* (n 1) 181–182.

[24] *Aust* 166.

[25] "This Convention shall enter into force on 1 July 1999 if by 30 June 1999 the Governments, whose combined commitments, as listed in paragraph (e) of Article III, equal at least 75% of the total commitments of all governments listed in that paragraph, have deposited instruments of ratification, acceptance, approval or accession, or declarations of provisional application, and provided that the Grains Trade Convention, 1995 is in force." 2073 UNTS 135.

[26] 1522 UNTS 3.

12 Additional requirements will assume importance where **multilateral treaties** aim to regulate **interests concerning the international community**.[27] The design of the clauses on the entry into force will reflect the underlying political compromises or the nature of the treaty especially in terms of the required number of ratifications.[28] The need for such clauses is accepted in State practice because otherwise the legal effects of a treaty would depend on the consent of all States which have taken part in the negotiations. This would amount to a kind of veto right for all participating States.[29] Only in cases of **closed multilateral treaties** or **plurilateral treaties** (→ Art 2 MN 10) is it common to require ratification by all negotiating States.

Examples include the EU Treaties[30] or Art 19 Protocol No 14 to the ECHR.[31] The Treaties of Rome provided for ratification by all six Member States because the aim of integration and forging a common Europe called for a clear statement that the European Community would either be established as a Community of all six States or would fail.[32] The character and purpose of the European Union prompted Member States to apply the same strict standard for subsequent changes of the EU/EC Treaty despite the growing number of Member States and increasing difficulties in achieving ratification by all Member States.[33]

13 When a multilateral treaty aims to regulate **humanitarian issues**, the entry into force of a convention might only depend on a very limited number of ratifications.[34] A low number of required ratifications enables the achievement of the humanitarian convention's purpose to protect individuals within a short period of time.

The 1951 Refugee Convention requires only six ratifications,[35] the two Additional Protocols of the Geneva Conventions on Humanitarian Law[36] as well as the 1925 Geneva Protocol against the Use of Gases[37] only two, and the 1926 Slavery Convention only one.[38]

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[27] *A Mahiou* in *Corten/Klein* Art 24 MN 6.

[28] *Reuter* 66.

[29] *A Mahiou* in *Corten/Klein* Art 24 MN 7.

[30] For example, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306, 1.

[31] Art 19 Protocol No 14 to the ECHR, Amending the Control System of the Convention ETS 194.

[32] *M Schweitzer* in *E Grabitz/M Hilf* (eds) Das Recht der Europäischen Union (2009) Art 313 EC MN 3.

[33] *A Weber* in *H von der Groeben/J Schwarze* (eds) Kommentar zum EU-/EG-Vertrag (6th edn 2003) Art 52 EU MN 2.

[34] *UN Treaty Section* Final Clauses of Multilateral Treaties (2003) 58; *Roucounas* (n 1) 186.

[35] 189 UNTS 150.

[36] 1125 UNTS 3; 1125 UNTS 609.

[37] 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare 94 LNTS 66: "The present Protocol will come into force for each signatory Power as from the date of deposit of its ratification, and, from that moment, each Power will be bound as regards other Powers which have already deposited their ratifications."

[38] Art 12: "The Convention will come into operation for each State on the date of the deposit of its ratification or of its accession." 60 LNTS 253.

A low threshold number of ratifications might also serve to **reduce the need for the provisional application** of a treaty. When Contracting States of the ECHR aimed to overcome the blockade of the European Court of Human Rights reform process due to Russia's refusal to ratify Protocol 14, they stipulated that the entry into force of the new Protocol 14 *bis,* which allowed for provisional application, required only three ratifications. A minimum of three ratifications was considered to be appropriate due to the multilateral character of the Protocol.[39] **14**

A higher number of ratifications underlines the **credibility** and **universality** of a convention. In particular, the quasi-statutory function of **law-making treaties** speaks in favour of a comparatively high number of ratifications.[40] The clause used in the 1982 UN Convention on the Law of the Sea demonstrates that a treaty might require a high number of ratifications to guarantee its effectiveness. This is the case in particular where a treaty establishes new institutions that have to be financially supported. The UNCLOS clause also reflects the controversial drafting history of the treaty. However, UNCLOS shows that the clause on entry into force cannot compensate for insufficient consensus. Industrialized States only joined the treaty after the entry into force, because the controversial rules on the Deep Seabed Regime were renegotiated.[41] The clause on entry into force of the 1994 Implementation Agreement responded to earlier experience. The entry into force of the Implementation Agreement not only depends on quantitative but also qualitative conditions: at least five ratifying States have to be developed States.[42] **15**

A high number of ratifications further involves the danger that the entry into force of an international agreement will be unduly delayed or will completely fail. **16**

For instance, protocols to the 1944 Chicago Convention require a high number of ratifications and therefore the lapse of time between conclusion and entry into force is particularly long with up to 16 years in some cases.[43]

[39] *A Mowbray* Crisis Measures of Institutional Reform for the European Court of Human Rights (2009) 9 HRLR 647, 651.

[40] *Roucounas* (n 1) 184.

[41] *Aust* 164; *Roucounas* (n 1) 187 *et seq*.

[42] Art 6 para 1: "This Agreement shall enter into force 30 days after the date on which 40 States have established their consent to be bound in accordance with articles 4 and 5, provided that such States include at least seven of the States referred to in paragraph l(a) of Resolution II of the Third United Nations Conference on the Law of the Sea [. . .] and that at least five of those States are developed States. If these conditions for entry into force are fulfilled before 16 November 1994, this Agreement shall enter into force on 16 November 1994."

[43] 1995 Protocol Relating to an Amendment to the Convention on International Civil Aviation, not yet in force (122 ratifications); 1990 Protocol Relating to an Amendment to the Convention on International Civil Aviation (Art 50 lit a), entered into force 28 November 2002 (108 ratifications); 1989 Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 56], entered into force 18 April 2005 (108 ratifications); 1984 Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 3 *bis*), entered into force 1 October 1998 (102 ratifications).

17 In view of the disadvantages of requiring a high number of ratifications, it is quite common to require an average number of between 35 and 60, which underlines on the one hand the importance and broad acceptance of a convention but on the other hand allows for entry into force within a reasonable period of time.[44]

Examples include the VCLT (35 ratifications), the 1994 Convention to Combat Desertification in Those Countries Experiencing Serious Drought in Africa (50 ratifications),[45] the UN Framework Convention on Climate Change (50 ratifications),[46] the Kyoto Protocol (55 ratifications),[47] the Rome Statute (60 ratifications)[48] and the 1993 Chemical Weapons Convention (65 ratifications).[49]

18 The treaty design will also be decisive for **further qualitative requirements** that may be built around entry into force. In the case of qualitative conditions, entry into force depends on the consent of certain States, which fulfil decisive characteristics for the design of the treaty. Often, these characteristics are of a financial, economic or scientific nature. Irrespective of the principle of equality of States, these clauses are meant to guarantee that the entry into force of a treaty depends on the acceptance of either those States whose predominant interests are concerned or whose participation is essential to the effectiveness of the treaty.[50]

In particular, disarmament treaties lay down conditions to guarantee the participation of relevant States. An example can be found in the Nuclear Non-Proliferation Treaty which enters into force only upon signature of the nuclear weapon States United Kingdom, United States and USSR which serve as depositaries.[51] Likewise, the Comprehensive Nuclear Test Ban Treaty provides that it "shall enter into force 180 days after the date of deposit of the instruments of ratification by all States listed in Annex 2 to this Treaty."[52] Thus, the treaty calls for ratification by all countries possessing nuclear reactors. Since the United States, China, Egypt, Indonesia, Iran and Israel, which are listed in the annex have not yet ratified the treaty, it has not entered into force to date. India, North Korea and Pakistan have not even signed it. The practice of requiring ratification by relevant States has its flaws where entry into force depends on ratification by all relevant States. In such a case few States might impede entry into force of a whole disarmament regime despite far-reaching support amongst other interested States.[53] On the other hand, the 1979 Moon Treaty did not include a comparable clause and entered into force upon ratification by five States. However, since neither the US nor Russia ratified the Treaty it is without any practical legal significance.[54]

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[44] *A Mahiou* in *Corten/Klein* Art 24 MN 7.

[45] 1954 UNTS 3.

[46] 1771 UNTS 107.

[47] 1771 UNTS 107.

[48] 2187 UNTS 90.

[49] 1975 UNTS 469.

[50] *UN Treaty Section* (n 34) 59 *et seq*; *A Mahiou* in *Corten/Klein* Art 24 MN 8.

[51] Art IX para 3, 729 UNTS 161.

[52] 35 ILM 1439.

[53] *D Lenefsky* The Entry into Force Provision of the Comprehensive Test Ban Treaty: An Example of Bad International Lawyering (1999) 10 New York Law School JICL 255, 259.

[54] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies 1363 UNTS 3; *C Christol* The 1979 Moon Agreement: Where is it today? (1999) 27 Journal of Space Law 1, 31.

The object of making a treaty efficient through requiring certain States to participate before the treaty can enter into force is also often used in **environmental treaties**. **19**

The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer required that eleven instruments of ratification "have been deposited by States or regional economic integration organizations representing at least two-thirds of 1986 estimated global consumption of the controlled substances."[55] In a comparable manner the 1997 Kyoto Protocol requires the participation of States Parties which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990.[56] Consequently, the protocol could only enter into force upon the ratification by either the United States or Russia which joined the protocol in 2004.[57]

Economic and financial treaties or **commodity agreements**, where a balance between producing and consuming States shall be guaranteed,[58] also use detailed requirements to guarantee the efficiency of the treaty regime. **20**

Examples include the IBRD Articles of Agreement[59] and the Articles of Agreement of the International Monetary Fund.[60] Some treaties make the entry into force of a treaty depend on further agreement of the States which have issued instruments of ratification as an additional means of guaranteeing the treaty's effectiveness particularly in view of financial aspects. Pertinent examples can be found in the 1979 Constitution of the United Nations Industrial Development Organization[61] as well as the 1983 Statutes of the International Centre for Genetic Engineering and Biotechnology.[62]

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[55] 1522 UNTS 3.

[56] Art 25 para 1: "This Protocol shall enter into force on the ninetieth day after the date on which not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I [. . .]"; 2303 UNTS 1.

[57] 1771 UNTS 107; *Aust* 165.

[58] Art 22 lit a of the 1989 Terms of Reference of the International Copper Study Group 1662 UNTS 248: "These terms of reference shall enter into force definitively when States together accounting for at least 80 per cent of trade in copper, as set out in the annex to these terms of reference, have notified the Secretary-General of the United Nations (hereinafter referred to as 'the depositary') pursuant to subparagraph (c) below of their definitive acceptance of these terms of reference."; *Aust* 165.

[59] Article XI Section 1: "This Agreement shall enter into force when it has been signed on behalf of governments whose minimum subscriptions comprise not less than 65 per cent of the total subscriptions set forth in Schedule A and when the instruments referred to in Section 2 (a) of this Article have been deposited on their behalf, but in no event shall this Agreement enter into force before May 1, 1945." 2 UNTS 134.

[60] Art XX Section 1: "This Agreement shall enter into force when it has been signed on behalf of governments having sixty-five per cent of the total of the quotas set forth in Schedule A and when the instruments referred to in Section 2 (a) of this Article have been deposited on their behalf, but in no event shall this Agreement enter into force before May 1, 1945." 2 UNTS 40.

[61] Art 25 para 1: "This Constitution shall enter into force when at least eighty States that had deposited instruments of ratification, acceptance or approval notify the Depositary that they have agreed, after consultations among themselves, that this Constitution shall enter into force." 1401 UNTS 3.

[62] Art 21 para 1: "These Statutes shall enter into force when at least 24 States, including the Host State of the Centre, have deposited instruments of ratification or acceptance and, after having

21 Finally, a certain **geographical representation** may be decisive for the effectiveness of a treaty. In such a case, the clause on entry into force will include geographical conditions. Thus, Art 10 of the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution demands ratification by nineteen States and organizations within the geographical scope of the Protocol.[63]

22 Only in very few cases does entry into force depend on a **set date**. This practice is not very common because there is a danger that the required instruments of ratification will not be issued by the set date.[64] Consequently, Art 52 para 2 Maastricht Treaty,[65] for instance, provides for an alternative: "This Treaty shall enter into force on 1 January 1993, provided that all the Instruments of ratification have been deposited, or, failing that, on the first day of the month following the deposit of the Instrument of ratification by the last signatory State to take this step." Due to the Danish referendum and, *inter alia*, to the proceedings before the German Constitutional Court, the second alternative was applied with the Treaty entering into force on 1 November 1993.[66]

23 A considerable number of treaties which have been concluded have not entered into force. Reasons for this mostly lie within the political sphere. Some treaties already provide for such a situation and give room for political **activities to support the ratification process**.

> For instance, the Comprehensive Nuclear Test Ban Treaty[67] provides in its Art XIV that in such a case after three years there shall be a "Conference of the States that have already deposited their instruments of ratification on the request of a majority of those States" in order to consider measures to accelerate the ratification process.

IV. Lack of Agreement: Consent to Be Bound by the Treaty

24 Art 24 para 2 contains a **presumption for treaties which do not contain an explicit clause on entry into force** or do not provide for any other agreement.

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ascertained among themselves that sufficient financial resources are ensured, notify the Depositary that these Statutes shall enter into force." 1763 UNTS 91.

[63] Art 10 para 1: "The present Protocol shall enter into force on the ninetieth day following the date on which: (a) instruments of ratification, acceptance, approval or accession have been deposited by at least nineteen States and Organizations referred to in article 8 paragraph 1 which are within the geographical scope of EMEP"; 1491 UNTS 167.

[64] *UN Treaty Section* (n 34) 63. See as an example Art III para 1 of the 1949 Agreement Providing for the Provisional Application of the Draft International Customs Conventions on Touring, on Commercial Road Vehicles and on the International Transport of Goods by Road 45 UNTS 150: "The present Agreement shall enter into force on 1 January 1950."

[65] [1992] OJ C 191, 1.

[66] *M Schweitzer* in *E Grabitz*/*M Hilf* (eds) Das Recht der Europäischen Union (2009) Art 52 EU MN 5.

[67] GA Res 50/245, 10 September 1996, UN Doc A/RES/50/245.

The treaty will enter into force as soon as consent to be bound can be established for all negotiating States. According to Art 11 VCLT, "[t]he consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed." The provision reflects customary international law. However, in general this is not relevant for modern multilateral treaties deposited with the Secretary-General, which normally provide for an explicit clause on entry into force. Furthermore, it is very unlikely that such a multilateral treaty achieves the participation of all negotiating States, at least within a reasonable period of time.[68] The provision still has some relevance in relation to bilateral treaties.[69]

Examples include the 1998 Memorandum of Understanding between the United Nations and the Republic of Iraq[70] as well as the 1995 Norway–United Kingdom Brent Spa Agreement.[71]

25 In **bilateral treaties,** normally, the date of the exchange of the instruments of ratification is decisive. In the ICJ case *Arbitral Award Made by the King of Spain*, Nicaragua argued that the whole proceedings before the King of Spain as arbitrator were null and void because his designation took place after the arbitration treaty, which had only been concluded for a fixed period of time, had ceased to exist. The exact date of entry into force was in dispute since this treaty did not contain an explicit clause. The ICJ found that "the intention of the Parties was that the Treaty should come into force on the date of the exchange of ratifications [. . .]. That this was the intention of the two parties is put beyond doubt by the action taken by the two parties by agreement in respect of the designation if the King of Spain as arbitrator."[72] Otherwise, it is the date of the deposit of the last required ratification.[73]

V. Ratification After Entry into Force (para 3)

26 According to Art 24 para 3, when a State ratifies a treaty after its entry into force, the date of deposit of the instrument of ratification is decisive, unless the treaty otherwise provides. Such provisions often stipulate that a certain period of time must pass after depositing the instrument of ratification before the treaty will enter into force for the State concerned. The period corresponds to the period for the

[68] *UN Treaty Section* (n 34) 57.

[69] *Aust* 168.

[70] 2005 UNTS 209.

[71] 1887 UNTS 217.

[72] ICJ *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v Nicaragua)* [1960] ICJ Rep 192, 208.

[73] *A Mahiou* in *Corten/Klein* Art 24 MN 10.

original entry into force. This rule aims to enable the depositary to fulfil its various functions.[74] A pertinent example can be found in Art 126 para 2 Rome Statute.[75]

27 The **decisive date for entry into force** is determined by the act of depositing the instrument of ratification. The ICJ confirmed this rule as a customary international law rule in the *Right of Passage over Indian Territory* case regarding the effects of Art 36 para 2 ICJ Statute: "The contractual relation between the Parties and the compulsory jurisdiction of the Court [...] are established, 'ipso facto and without special agreement', by the fact of the making of the Declaration. [...] For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned."[76] In the *Land and Maritime Boundary between Cameroon and Nigeria* case, the ICJ explicitly refuted the argument that the treaty only enters into force between the existing States Parties and an acceding State on the date upon which the States Parties are informed by the depositary. In this case, Nigeria maintained that Cameroon's application was filed prematurely and thus Cameroon did not act in good faith because, on the date of the filing of the Application, Nigeria had not been informed by the depositary that Cameroon had accepted the jurisdiction of the ICJ. In its interpretation, Nigeria relied on Art 78 VCLT.[77] The Court, however, confirmed its findings in *Right of Passage over Indian Territory* and relied on the preparatory works of the ILC: it is the act of deposit and not the notification by the depositary which establishes the legal nexus. With regard to the relation between Arts 24 and 16 on the one hand and Art 78 on the other hand, the Court held that "Article 78 of the Convention is only designed to lay down the modalities according to which notifications and communications should be carried out. It does not govern the conditions in which a State expresses its consent to be bound by a treaty and those under which a treaty comes into force, those questions being governed by Articles 16 and 24 of the Convention."[78]

VI. Matters Arising Before Entry into Force (para 4)

28 Treaties usually regulate the conditions upon which they enter into force. Thus, entry into force depends on the States' compliance with provisions of a treaty, which are not yet binding. In order to meet this logical challenge and prevent any

[74] *UN Treaty Section* (n 34) 65; *Aust* 169.

[75] "For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession." 2187 UNTS 90.

[76] ICJ *Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125, 146.

[77] ICJ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening)* (Preliminary Objections) [1998] ICJ Rep 275, para 22.

[78] ICJ *Cameroon v Nigeria* (n 77) para 31.

pretexts from hampering cooperation, Art 24 para 4 requires that **provisions on entry into force** and all "matters arising necessarily before the entry into force of the treaty" must be applied from the adoption of the treaty. Art 24 para 4 VCLT is a rule of customary international law.[79]

29 The expression "necessarily" does not intend to exclude matters which might also arise after entry into force, such as reservations or the functions of the depositary. It rather refers to other treaty provisions which might also be relevant before entry into force, such as **rules for provisional application** or the authentication of the text.[80]

30 This provision often serves as a basis for the establishment of **preparatory commissions,** which are to commence work upon entry into force of a treaty.[81] Treaties, such as arms control agreements, which provide for monitoring or verification systems, need to be provisionally applied so that a preparatory commission can establish the necessary arrangements, which need to be operational upon entry into force.[82] Such an arrangement may include financial appropriations, draft rules of procedure, engaging secretariat staff and preparing premises.[83] In some cases, the preparatory commissions are established by resolutions issued by signatory States. These resolutions may have the character of an additional treaty.[84] Some preparatory commissions begin work on the basis of Art 25 VCLT (→ Art 25 MN 8).

> The Preparatory Commission for the Establishment of an International Criminal Court was based on the Resolution F of the Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and supported by the United Nations.[85] The Commission was responsible for preparing draft rules of procedure, a relationship agreement between the Court and the UN, a headquarters agreement, financial regulations, an agreement on the privileges and immunities of the Court and a budget for the first financial year. The 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT) establishes a detailed verification and monitoring system. The system installs numerous monitoring stations around the world which had to be constructed. Thus, bilateral facility agreements providing for privileges and immunities were required. Therefore in 1996, the signatory States concluded an additional treaty by adopting a resolution. The

[79] *Klabbers* (n 4) MN 14.

[80] *Sinclair* 46.

[81] UNSG Report, Examples of Precedents of Provisional Application, Pending Their Entry into Force, of Multilateral Treaties, Especially Treaties Which Have Established International Organizations and/or Regimes, 12 June 1973, UN Doc A/AC.138/88; US Congressional Research Service, Law of the Sea Treaty: Alternative Approaches to Provisional Application (1974) 13 ILM 454.

[82] *A Michie* The Provisional Application of Arms Control Treaties (2005) 10 Journal of Conflict and Security Law 345, 354.

[83] *Aust* 175.

[84] *Aust* 176.

[85] GA Res 53/105, 8 December 1998, UN Doc A/RES/53/105; GA Res 54/105, 9 December 1999, UN Doc A/RES/54/105; GA Res 55/155, 12 December 2000, UN Doc A/RES/55/155; GA Res 56/85, 12 December 2001, UN Doc A/RES/56/85; *C Byron* The Preparatory Commission for the International Criminal Court (2001) 50 ICLQ 420.

treaty installs a preparatory commission consisting of the signatory States. The Commission has been bestowed with separate legal personality and a Provisional Technical Secretariat. The Secretariat's work, which includes circulation of data collected by the monitoring stations, becomes more and more important because the CTBT has not yet entered into force.[86]

D. The Role of the Depositary in the Determination of the Exact Date of Entry into Force

31 In many multilateral treaties, there will be a further **lapse of time between the deposit** of the required number of instruments of ratification **and entry into force**. The period varies between several days and several months with the normal period being from thirty days to 12 months.[87] Thus, for instance, the Rome Statute provides that it will enter into force on the sixtieth day following the deposit of the last instrument of ratification.[88] The purpose of this practice is on the one hand to allow States to adapt their national law to the obligations arising from the treaty. On the other hand the practice enables the depositary to prepare the entry into force by determining the actual date and announcing the entry into force to the States Parties by a formal notice.[89]

32 The determination of the exact date can prove to be problematic. In the past, it was sometimes doubtful whether an entity that was not a member of the UN would qualify as a State. In order to circumvent this problem, State practice developed the so-called **'Vienna Formula',** which was used in the VCLT allowing ratification for all "States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention." If an **'all States' formula** was used, the Secretary-General looked for guidance by the General Assembly considering the determination to be a highly political question.[90]

33 Under certain circumstances, it might be doubtful whether the required number of ratifications for entry into force has been reached. This might be the case where an instrument of **ratification** has been **withdrawn** or where the **State ceases to exist** before the treaty enters into force. According to the practice of the UN Secretary-General, the prior ratification does not count for the required number of ratifications for entry into force if the number has not yet been attained. However, a withdrawal or the end of existence of a State has no consequences for the entry into

[86] *A Anastassov* Can the Comprehensive Nuclear Test Ban Treaty be Implemented before Entry into Force (2008) 55 NILR 73, 89 *et seq*; *Aust* 176; *A Aust* The Comprehensive Nuclear Test Ban Treaty: the problem of entry into force (2009) 52 JapYIL 1.

[87] *UN Treaty Section* (n 34) 59.

[88] Art 126 para 1.

[89] *UN Treaty Section* (n 34) 59; *Roucounas* (n 1) 181.

[90] 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, paras 79 *et seq*.

force if it occurs after the deposit of the last instrument of ratification required for the entry into force.[91]

Since the entry into force might depend on **qualitative conditions,** it might be doubtful whether these conditions have been fulfilled. In such a case, the depositary will have to contact either the States Parties or other institutions competent to evaluate whether the requirements have been met. **34**

> For instance, the Convention on the Intergovernmental Maritime Consultative Organization stipulated in Art 60 that it will enter into force "on the date when 21 States, of which seven shall each have a total tonnage of not less than 1,000,000 gross tons of shipping, have become parties".[92] When 21 instruments of ratification had been deposited the UN Secretary-General had to evaluate whether the conditions concerning the tonnage which seven States had to possess were fulfilled. Thus, the Secretary-General informed the Chairman of the Preparatory Committee of the Intergovernmental Maritime Consultative Organization that he intended to notify the entry into force of the Convention in relation to the number of ratifications that had reached him and the data he possessed on the tonnage. In response the Chairman of the Preparatory Committee validated the data, so that the Secretary-General could formally announce the entry into force of the Convention.[93]

An additional problem arises where an instrument of ratification contains a **reservation** to a treaty to which other States Parties have objected. Thus, the determination of the entry into force of the Vienna Convention itself was unclear because when the 35 instrument of ratification had been deposited, several ratifications had been accompanied by reservations. Consequently, the UN Secretary-General consulted the States Parties on the issue assuming that the reservations did not hinder the Convention from entering into force. Since none of the States Parties objected within a period of 90 days, the Secretary announced the entry into force of the Convention as of 27 January 1980.[94] This practice was discontinued because it delayed the notification of the entry into force and implied an evaluation by the UN Secretary-General on the effects of reservations and corresponding objections, which was considered to be inappropriate. At present, the UN Secretary-General will count all ratifications irrespective of whether reservations have been objected by States Parties.[95] **35**

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[91] Summary of Practice (n 90) paras 157–159, 233, 235. See, however, the criticism raised by *Aust* 171.

[92] 289 UNTS 48.

[93] Summary of Practice (n 90) para 227; for further examples, see *UN Treaty Section* (n 34) 63.

[94] *Sinclair* 45.

[95] Summary of Practice (n 90) paras 184–186.

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Article 25
Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or
(b) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Contents

A. Purpose and Function

If a treaty is applied before its formal entry into force, it is applied provisionally. In such a case, a negotiating State is bound by the treaty although the treaty has not yet been formally ratified on the national level. In general, negotiating States will only consider such a provisional application if one of the States must submit the treaty to a **constitutional ratification process**.[1] Provisional application is thus a frequently used tool when national ratification might prolong the period between conclusion of a treaty and its entry into force. **1**

Art 25 merely confirms the basic principle that a treaty may be provisionally applied. It is left to the parties to agree on the exact scope and conditions of the provisional application.[2] Thus, some treaties include lengthy rules on their **2**

[1] *R Lefeber* The Provisional Application of Treaties, in *J Klabbers*/*R Lefeber* (eds) Essays on the Law of Treaties (1998) 81.

[2] *U Klaus* The Yukos Case under the Energy Charter Treaty and the Provisional Application of International Treaties (2005) 4.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
DOI 10.1007/978-3-642-19291-3_28, © Springer-Verlag Berlin Heidelberg 2012

provisional application, such as Art 45 paras 1–7 Energy Charter Treaty.[3] At this stage, Art 25 paras 1 and 2 are considered to reflect **customary international law**.[4] Brazil, Columbia, Costa Rica, Guatemala, and Peru made a reservation to Art 25 subjecting the provision to its constitutional laws but not explicitly rejecting the norm as a matter of principle. Moreover, Austria, Denmark, Finland, Germany, and Sweden objected.

3 The provisional application of a treaty allows for immediate responses to the pressing needs a treaty aims to address. In particular, as an **emergency tool,** provisional application allows for resolute activities irrespective of lengthy constitutional ratification processes. Thus, provisional application is often provided for in international security agreements concerning the ending of hostilities or establishing measures of arms control, in environmental agreements responding to an ecological crisis or in economic agreements responding to urgent economic needs.[5]

A frequently cited example is contained in Art 3 of the 1934 Pacte d'entente Balkanique[6] as a peace treaty ending hostilities. A comparable clause was also used in the 1940 Moscow Peace Treaty between Finland and the USSR.[7] In matters of arms control the model for the IAEA Additional Safeguards Protocol allows for provisional application between the IAEA and the inspected State in order to strengthen the effectiveness of the IAEA's safeguard system and to allow for quick responses where required.[8] The 1986 Chernobyl nuclear incident also pressed for speedy responses so that the 1986 IAEA Convention on Early Notification of a Nuclear Incident (Art 13)[9] and the 1986 IAEA Convention on Assistance in the Case of a Nuclear Incident (Art 15) are provisionally applicable.[10] In 1948 the Convention for European Economic Cooperation accelerated the implementation of the Marshall Plan by way of provisional application[11] while the 1974 Agreement on an International Energy Programme (Art 68)[12] reacted to the 1973/1974 oil crisis. The Energy Charter Treaty which regulates promotion and protection of investment in the energy sector is provisionally applicable (Art 45) because States saw an urgent necessity to advance the reform of the former Communist economic regimes and to integrate East and West European energy markets after 1989 in order to guarantee the energy supply to Western States.[13]

[3] 2080 UNTS 99.

[4] *A Michie* The Provisional Application of Arms Control Treaties (2005) 10 Journal of Conflict and Security Law 345, 347.

[5] *Lefeber* (n 1) 82; *Lefeber* Treaties, Provisional Application, in MPEPIL (2008) MN 2.

[6] 153 LNTS 154.

[7] (1940) 34 AJIL Supp 127.

[8] 36 ILM 1232 (1997).

[9] 25 ILM 1377 (1986).

[10] *AO Adede* The IAEA Notification and Assistance Conventions in Case of a Nuclear Accident (1987) 118.

[11] Art 24 lit b 1948 Convention for European Economic Co-operation, 888 UNTS 142: "[P]ending the coming into force of the Convention in the manner provided [. . .] the signatories agree, in order to avoid delay in its execution, to put it into operation on signature on a provisional basis and in accordance with their several constitutional requirements."

[12] 14 ILM 1 (1975).

[13] *Klaus* (n 2) 3.

Provisional application may also serve to guarantee that **sensitive compromises,** 4
which have been reached in treaty negotiations, will not be endangered in the period between signature and entry into force, for instance if one of the parties reconsiders its position and refuses ratification. Since measures of implementation become possible thereby, provisional application is a more efficient tool for safeguarding the parties' positions than the obligation to refrain from conduct that would contravene the object and purpose of a treaty before its entry into force. Thus, provisional application can supplement or reinforce Art 18 and fulfill a purpose as a **confidence-building measure** promoting trust among the signatory States. In particular, agreements concerning national security issues, such as arms control agreements, are applied provisionally according to this ratio.[14]

Examples include the Protocol on the Provisional Application of Certain Provisions of the 1990 Treaty on Conventional Armed Forces in Europe,[15] the 1992 Treaty on Open Skies,[16] the 1993 Treaty on Further Reduction and Limitation of Strategic Offensive Arms (START II)[17] and the 1997 Ottawa Convention.[18] The promotion of trust in the field of military research after the end of the Cold War was also a motive for the Protocol on the Provisional Application of the Agreement establishing an International Science and Technology Centre as a non proliferation program.[19] In the case of the 1990 Treaty on Conventional Armed Forces in Europe a reason for its provisional application seems to have been the fear that due to the break-up of the Warsaw Pact, ratification of the treaty would be delayed.[20] The provisional application of the 1997 Ottawa Convention was also based on severe humanitarian concerns. Upon ratification, Austria, Mauritius, South Africa, Sweden and Switzerland issued declarations of provisional application.[21]

Provisional application might also work as an **incentive for ratification** if it 5
proves the Contracting States decisiveness in applying the treaty and demonstrates that the treaties' provisions are effective. In the case of the reform of the ECHR, provisional application of some reform elements included in Protocol No 14 was agreed upon 3 years after all other 46 Contracting States had ratified the Protocol except for Russia.[22] The decisive activities by the Contracting States may have prompted Russia to ratify Protocol No 14 on 15 January 2010.

Another reason for provisional application is to **avert legal gaps between** 6
successive treaty regimes in the interest of legal security and to allow for efficient

[14] *Michie* (n 4) 352 and 354 *et seq*; see also *Lefeber* (n 5) MN 2.

[15] 30 ILM 6 (1991), Protocol 30 ILM 52.

[16] [2002] UKTS 27.

[17] [1993] SIPRI Yearbook 576.

[18] 36 ILM 1507 (1997), Art 18.

[19] OJL 64, 8 March 1994 p 2.

[20] *R Johnson* Beyond Article XIV: Strategies to Save the CTBT (2003) 73 Disarmament Diplomacy 1.

[21] *Michie* (n 4) 362.

[22] Committee of Ministers Minutes (2009) PV Addendum 1 and Appendix 2 (Statement by the Committee of Ministers on the Conference of the High Contracting Parties to the European Convention on Human Rights), 119th session, 12 May 2009.

transition.[23] Thus, the Security Council calls for or recommends the provisional application of status-of-force agreements pending further negotiations in order to allow for a smooth transition between different peacekeeping missions.[24] The necessity to bridge a legal gap arises in particular in cases of treaties with fixed terms.[25] The fishery agreements between the European Union and some developing States, which are concluded for a limited period of time, are routinely applied on a provisional basis so that the fishing rights for vessels from EU Member States are continuously guaranteed.[26] Likewise, provisional application might serve to prevent conflicting obligations in cases of **amendments or modifications of treaties**.[27]

> Provisional application in the interest of legal security is often included in commodity agreements, such as the 1981 Sixth International Tin Agreement (Art 55 para 2),[28] the 1983 International Coffee Agreement (Art 61 para 2),[29] the 1989 International Agreement on Jute and Jute Products (Art 39 and 40),[30] the 1989 International Sugar Agreement (Art 39 and 40)[31] and the 1994 UN International Tropical Timber Agreement (Art 40, Art 41 para 3).[32] In the case of the 1994 Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea (Art 7)[33] the provisional application lay in the political interest of those States which did not want the original Part XI of UNCLOS to become effective upon the entry into force of UNCLOS. Provisional application allowed States interested in a modified deep seabed regime to participate at an early date.[34] In order to achieve a consistent application of the rules governing the International Telecommunication Union, the ITU plenipotentiary conference had called upon Member States for which the amended ITU Constitution and Convention had not yet entered into force, to apply these instruments provisionally.[35] The Revised Treaty of Chaguaramas which encompasses nine protocols amending the original treaty of 1973 is applied provisionally since 2002 because ratification of the protocols could not be achieved.[36]

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[23] *Lefeber* (n 5) MN 2.

[24] UNSC Res 1289 (2000), 7 February 2000, UN Doc S/RES/1289 (2000), para 16: "Reiterates its request to the Government of Sierra Leone to conclude a status-of-forces agreement with the Secretary-General within 30 days of the adoption of this resolution, and recalls that pending the conclusion of such an agreement the model status-of-forces agreement dated 9 October 1990 (A/45/594) should apply provisionally".

[25] *Lefeber* (n 1) 83.

[26] See *eg* the Fisheries Agreement between the European Community and Côte d'Ivoire [1990] OJ L 379, 3; see *Michie* (n 4) 346 n 8.

[27] *Michie* (n 4) 346.

[28] 1282 UNTS 205.

[29] 1333 UNTS 119.

[30] 1605 UNTS 211.

[31] 1703 UNTS 203.

[32] 1945 UNTS 143; 34 ILM 1014 (1994).

[33] 33 ILM 1313 (1994).

[34] *J Charney* US Provisional Application of the 1994 Deep Seabed Agreement (1994) 88 AJIL 705, 709.

[35] ITU Resolution 69 (Kyoto 1994); see *Michie* (n 4) 347.

[36] Protocol on the Provisional Application of the Revised Treaty of Chaguaramas 2259 UNTS 440.

In some cases, provisional application is agreed upon because the negotiating States are **certain that the agreement will be ratified** at the national level or – on the contrary – in order to escape **political obstacles at the domestic level**. This is particularly the case with bilateral agreements.[37] 7

On the one hand, this category covers bilateral agreements on friendship and cooperation, *eg* the treaty concluded between the Comoros and France in 1978[38] or the 1984 Agreement on Cultural, Educational and Scientific Exchange between Cyprus and Mongolia.[39] On the other hand, the 1977 Maritime Boundary Agreement between the United States and Cuba was applied provisionally because political hindrances were foreseen.[40]

Finally, an interim or **preparatory commission,** which is to prepare the entry into force of a treaty, might require provisional application.[41] Treaties which provide for the establishment of international organisations need to be provisionally applied so that a preparatory commission can establish the necessary arrangements which need to be operational upon entry into force. Such an arrangement may include financial appropriations, draft rules of procedure, engaging secretariat staff and preparing premises.[42] However, it is most frequently the case preparatory commissions take up their work on the basis of Art 24 para 4 (→ Art 24 MN 30). 8

Art 308 para 4 UNCLOS stipulated that the rules, regulations and procedures drafted by the Preparatory Commission shall apply provisionally pending their formal adoption by the Authority in accordance with Part XI.

B. Historical Background and Negotiating History

The provisional application of a treaty has only started to occur more regularly in the twentieth century. Thus, neither the Harvard nor the *McNair* draft dealt with specific provisions on this issue.[43] In contrast, the ILC thought that in modern treaty practice, provisional application takes place frequently enough in order to be included in the draft articles in Art 24.[44] However, the US and the Japanese government doubted the necessity to include such a provision in a convention. The Japanese government feared that "the precise legal nature of provisional entry into force [. . .] [was] not very clear" so that the question should be left to the will of 9

[37] *Michie* (n 4) 346 *et seq*.

[38] 1306 UNTS 263.

[39] 1365 UNTS 121; see *Michie* (n 4) 346 n 7.

[40] US Senate Treaty Document EX. H, 96–1.

[41] Examples of Precedents of Provisional Application, Pending their Entry into Force, of Multilateral Treaties, Especially Treaties which have Established International Organizations and/or Regimes, 12 June 1973, UN Doc A/AC.138/88; US Congressional Research Service, Law of the Sea Treaty: Alternative Approaches to Provisional Application (1974) 13 ILM 454.

[42] *Aust*, 175; *Michie* (n 4) 354.

[43] *Sinclair* 51.

[44] ILC Report 14th Session [1962-II] YbILC 182.

the parties.[45] Despite remaining uncertainties with a view to the legal effect of the provision, *Waldock* insisted on the inclusion of a provision on the provisional application "lest the omission be interpreted as denying it."[46] Furthermore, he argued against an inclusion under the rules of normal entry into force but in favour of a **separate norm** on provisional application. *Waldock* stressed that "there is a certain anomaly, from the point of view of constitutional law, in dealing with 'provisional entry into force' as an ordinary case of 'entry into force under the terms of a treaty', which for constitutional reasons has been made subject to ratification or approval."[47]

10 The observations of the Swedish government underlined the **danger of abuse**: "Provisional application is often resorted to for the very reason that there is no absolute assurance that internal constitutional procedures will result in the confirmation of the provisional acceptance of the treaty."[48] Consequently, the Swedish government suggested the introduction of a provision allowing for the unilateral termination of provisional application, which eventually led to Art 25 para 2.[49] Art 24 of the first ILC draft had hitherto only provided for a consensual termination of provisional application in deviation from the suggestions of SR *Waldock*.[50] Based on Art 42 para 1 of the first *Fitzmaurice* report SR *Waldock* had already provided for a **unilateral termination** of provisional application subject to a 6-month lapse of time in his draft of Art 24. Despite Sweden's comment, Art 22 Final Draft did not include any rule on termination because after re-examining the article and taking account of the governments' comments, the ILC "decided to dispense with the provision and to leave the point to be determined by the agreement of the parties and the operation of the rules regarding termination of treaties."[51] However, at the Vienna Conference, Belgium,[52] Hungary and Poland[53] proposed the inclusion of a rule on the termination of provisional application because Art 53 of the draft, which dealt with the termination of treaties, would not cover the case where a State had not yet become a party to a treaty. "It should therefore suffice to terminate provisional application if the State concerned manifested its wish not to become a party to the treaty."[54] Thus, while the ILC seems to have considered Art 25 para 1 as representing **customary international law**, this was not the case for para 2.

[45] *Waldock* IV 58.
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid.*
[49] *Ibid.*
[50] *Waldock* I 71; ILC Report 14th Session [1962-II] YbILC 182.
[51] Final Draft, Commentary to Art 22, 210 para 4.
[52] UN Doc A/CONF.39/C.1/L.194, UNCLOT III 144.
[53] UN Doc A/CONF.39/C.1/L.198, UNCLOT III 144.
[54] Statement of *Denis* (Belgium) UNCLOT I 142.

Moreover, at the Conference, there were discussions on the provisional application of a treaty **after its entry into force**. The representative of the United Kingdom stressed that "the inclusion of the phrase 'pending its entry into force' in paragraph 1 did not preclude the provisional application of a treaty by one or more States after the treaty had entered into force definitively between other States. A regime where a treaty had entered into force definitively between certain States, but was nonetheless being applied provisionally by other States, was not unknown in international practice."[55] The representative of India agreed with this interpretation.[56] **11**

C. Elements of Article 25

I. Treaty

The concept of a treaty in Art 25 refers to the definition included in Art 2 lit a (→ Art 2 MN 3 *et seq*). It signifies an international agreement in written form concluded between States and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. **12**

According to Art 25 para 1, a **treaty as a whole** as well as **parts of it** may be provisionally applied. Thus, even though the original treaty does not provide for its provisional application, its amendments or protocols may be provisionally applied.[57] **13**

It is up to the negotiating States to agree on the **date** upon which the provisional application shall become effective since the VCLT does not specify such a date.[58] The practice of the 1974 Agreement on an International Energy Programme (Art 68 para 1), as well as of the 1994 Energy Charter Treaty (Art 45 para 1), suggests that the date of signature is usually chosen by negotiating States. However, Art 18 of the 1997 Ottawa Convention stipulates that a declaration of provisional application may be made by States upon their ratification, acceptance, approval or accession to the treaty, without signature of the treaty.[59] Such a clause protects national ratification requirements while it may endanger the swift application of a convention with a strong humanitarian purpose.[60] **14**

[55]Statement of *Vallat* (United Kingdom) UNCLOT II 40.

[56]Statement of *Jagota* (India) UNCLOT II 51.

[57]*Lefeber* (n 1) 84; *Lefeber* (n 5) MN 4.

[58]*Aust* 172; *Lefeber* (n 1) 85 *et seq*.

[59]For a criticism of this practice, see *Michie* (n 4) 363.

[60]In the case of the Ottawa Convention, this danger did not become real since the Convention entered into force only 2 years after its conclusion in 1997.

II. Some Other Manner (para 1 lit b)

15 The provisional application does not have to be agreed upon in the treaty itself but may be included in a **protocol** or **annex** forming part of the treaty, such as in the case of the Treaty on Conventional Armed Forces in Europe.[61] It can also be agreed upon in an entirely **separate agreement**,[62] as has been done in the 1947 Protocol of Provisional Application of the GATT.[63] Due to its specific purpose, such a separate agreement can also be concluded in a simplified manner,[64] for instance on the basis of an exchange of letters[65] or by consensus.[66] Art 25 para 1 lit b does not provide for any specific procedure through which such an agreement should be concluded.

> The Contracting Parties of the ECHR utilized two different ways in order to overcome the blockade of the reform of the European Court of Human Rights caused by the Russian Duma's refusal to ratify Protocol No 14. On the one hand, the parties adopted Protocol No 14 *bis* which in its Art 7 provides for its own provisional application.[67] On the other hand, they adopted an agreement by consensus. On the basis of this agreement each State may consent to the direct provisional application of certain procedural elements of Protocol No 14 that are expected to accelerate the Court's capacity to deal with the applications.[68] Neither Russia nor any other Contracting Party objected. Switzerland, Germany,[69] the Netherlands, Luxembourg and the United Kingdom chose the latter avenue while Denmark, Georgia, Ireland, Iceland, Monaco, Norway, San Marino, Sweden and Slovenia ratified Protocol No 14 *bis*.

16 The 1994 Agreement Relating to the Implementation of Part XI of the 1982 UN Convention on the Law of the Sea contains a somewhat unusual clause in its Art 7.[70]

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[61] 30 ILM 6 (1991), Protocol 30 ILM 52.

[62] *Mathy* in *Corten/Klein* Art 25 MN 23; *Villiger* Art 25 MN 6 *et seq*.

[63] 55 UNTS 308.

[64] See *Kuwait v American Independent Oil Co (Aminoil)* 21 ILM 976, 1005 (1982).

[65] 1982 Interim Agreement Relating to the Civil Air Transport Agreement of August 11, 1952, as Amended, with Record of Consultations, Memorandum of Understanding and Exchange of Letters 1736 UNTS 284.

[66] Committee of Ministers (n 22).

[67] Art 7: "Pending the entry into force of this Protocol according to the conditions set under Article 6, a High Contracting Party to the Convention having signed or ratified the Protocol may, at any moment, declare that the provisions of this Protocol shall apply to it on a provisional basis. Such a declaration shall take effect on the first day of the month following the date of its receipt by the Secretary-General of the Council of Europe."

[68] Committee of Ministers (n 22).

[69] Declaration contained in a note verbale from the Permanent Representative of Germany, dated 29 May 2009, registered at the Secretariat General on 29 May 2009.

[70] Art 7 para 1 of the 1994 Agreement Relating to the Implementation of Part XI: "If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by: (a) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing; (b) States and entities which sign this Agreement, except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement."

According to this clause, express notification is not required but rather **implicit consent** to the provisional application of the agreement will suffice. The implicit consent can be deduced from the adoption of the Agreement in the General Assembly or by signature. This was considered to be legally sufficient because Art 7 reflects the parties' clear intent to discard formal requirements. Moreover, there was still the possibility to opt out of provisional application by notification to the depositary.[71]

III. Negotiating States

According to Art 2 lit e, negotiating States are those States taking part in the drawing up and adopting of the text of the treaty (→ Art 2 MN 46). **17**

A treaty is not necessarily applied provisionally by all negotiating States. Mostly, **signature** is a minimum requirement for provisional application.[72] In some cases, **consent to the adoption** of the treaty's text may also be sufficient (→ MN 15–16).[73] If a State may, for constitutional reasons, not apply a treaty provisionally, a possibility to opt out of the provisional application may be included.[74] **18**

> Pertinent examples can be found in Art 7 of the 1994 Agreement on Part XI as well as in Art 45 para 2 of the 1994 Energy Charter Treaty. States opting out of the provisional application of the Energy Charter Treaty include Australia, Iceland and Norway.[75]

Provisional application may also be possible for States which want to **accede** to a treaty that has already entered into force. This has been envisaged during the Vienna Conference (→ MN 11). Although the necessity of such a provision is not self-evident since States will probably have had enough time to consent to a treaty prior to its entry into force, there is pertinent practice.[76] For instance, Art 71 para 3 of the 1974 Agreement on an International Energy Programme provides for accession on a provisional basis. Provisional application after the entry into force of a treaty may even be necessary if there is a lapse of time foreseen in the treaty between the deposit of the instrument of ratification and the actual entry into force for the acceding State, see *eg* Art 17 para 2 of the 1997 Ottawa Convention.[77] **19**

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[71] 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, para 240.

[72] *Lefeber* (n 1) 84 *et seq*; *Villiger* Art 25 MN 6.

[73] *Lefeber* (n 5) MN 5; *Mathy* in *Corten/Klein* Art 25 MN 24.

[74] *Lefeber* (n 5) MN 6; *Villiger* Art 25 MN 13.

[75] 34 ILM 373 (1995).

[76] *Lefeber* (n 1) 85; *Lefeber* (n 5) MN 7.

[77] *Michie* (n 4) 362.

IV. Pending Its Entry into Force

20 Provisional application usually ends upon the entry into force of a treaty for those States that have ratified the treaty. For those that have not yet ratified the treaty, the provisional application will continue. This is reflected in most clauses on the provisional application of a treaty that state that the provisional application end with the entry into force *for that State*. Consequently, a State that has not yet expressed its consent to be bound by a treaty is expected to continue to apply the treaty provisionally.[78]

> For instance, the European Energy Charter Treaty was applied provisionally by signatory States that did not opt out between 1994 and 1998. After the entry into force of the treaty in April 1998, the treaty was provisionally applied by Russia until 19 October 2009, and by Belarus.

V. Unilateral Termination of the Provisional Application (para 2)

21 Art 25 para 2 addresses the danger of **abuse** or **indefinite provisional application** by allowing for unilateral termination unless the treaty otherwise provides or the negotiating States have otherwise agreed. This provision stresses that negotiating States may provide for the conditions of a unilateral termination.[79] States may wish to regulate consensual termination of provisional application where the treaty does not enter into force until a specific date.[80] They may wish to include a certain lapse of time before a unilateral termination becomes effective. The first draft by SR *Waldock* provided for such a lapse of time in order to submit unilateral termination to procedural requirements.[81] Moreover, transitional arrangements might be necessary after a termination of provisional application[82] and the formal requirements for a valid termination may be laid down.[83]

> On 20 August 2009, Russia issued an official notification to the depositary that it did not intend to become a contracting party to the Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects. According to Art 45 para 3 lit a,

[78] *Aust*, 172; *M Arsanjani*/*M Reisman* Provisional Application of Treaties in International Law: the Energy Charter Treaty Awards in E Canizzaro (ed) The Law of Treaties beyond the Vienna Convention (2011) 86, 94; *Lefeber* (n 1) 86; *Lefeber* (n 5) MN 10; *Mathy* in *Corten*/*Klein* Art 25 MN 27.

[79] *Lefeber* (n 1) 87; *Villiger* Art 25 MN 8.

[80] *Lefeber* (n 5) MN 11; Art 7 para 3 of the 1994 Agreement on Part XI.

[81] Art 45 para 3 of the 1994 Energy Charter Treaty (60 days); Art 68 para 2 of the 1974 Agreement on an International Energy Programme (60 days); para 5 of the 1947 Protocol on the Provisional Application of the GATT (60 days).

[82] Art 45 para 3 of the 1994 Energy Charter Treaty.

[83] Art 45 para 3 of the 1994 Energy Charter Treaty; Art 68 para 2 of the 1974 Agreement on an International Energy Programme; para 5 of the 1947 Protocol on the Provisional Application of the GATT.

> Energy Charter Treaty Russia had thus terminated its provisional application of the Treaty and the Protocol upon the expiration of 60 calendar days from the date on which the notification is received by the depositary, *ie* on 19 October 2009. In the unpublished *Yukos* decision of 30 November 2009, the arbitral tribunal established according to the Energy Charter Treaty and the UNCITRAL Arbitration Rules held that the termination of the provisional application of the Energy Charter Treaty by Russia only became effective upon that date. Consequently, any energy-related investment made in Russia before 19 October 2009 will continue to be protected for another 20 years according to Art 45 para 3 lit b of the Energy Charter Treaty.[84]

Some treaties do not contain any explicit clause on the termination of provisional application. Examples include START II and the 1997 Ottawa Convention. Whenever the provisional application is agreed upon in a separate agreement, one of the parties may terminate this agreement unilaterally if the entry into force of the main agreement is unduly delayed.[85] **22**

VI. Provisional Application and National Law

While the provisional application of a treaty is a useful tool at the level of public international law, it may provoke serious conflicts with the national law **requirements of parliamentary ratification** and thus, with the internal rules on separation of powers, especially in cases in which the national law is in conflict with the obligations arising out of the treaty.[86] Thus, some observers opine that in the case of provisional application, participation of national parliaments would be reduced to a mere formal act.[87] Although this is probably overstated, there is – at least – a danger of abusive usage of this instrument.[88] In dualist systems it is therefore common that a government can only consent to apply a treaty provisionally if the internal law is consistent with the treaty obligations.[89] Otherwise, owing to the danger of circumventing national ratification requirements, national law may prohibit a State from agreeing to provisional application of a treaty[90] or regulate in detail the prerequisites for provisional application, such as in the case of Russia.[91] **23**

In the **United States,** observers have argued that in terms of separation of powers, the President may possess the competence to agree to the provisional **24**

[84]PCA *Hulley Enterprises Ltd v Russia* PCA Case No AA 226 (2009); *Yukos Universal Ltd v Russia* PCA Case No AA 227 (2009); *Veteran Petroleum Ltd v Russia* PCA Case No AA 228 (2009).

[85]*Kuwait v Aminoil* (n 62) 1005.

[86]*Klaus* (n 2) 4.

[87]*A Verdross/B Simma* Universelles Völkerrecht (3rd edn 1984) 460.

[88]*Lefeber* (n 1) 82; see, however, *Villiger* Art 25 MN 13.

[89]*Lefeber* (n 1) 90; *Lefeber* (n 5) MN 15; see, however, *Mathy* in *Corten/Klein* Art 25 MN 11.

[90]*Lefeber* (n 1) 89; see also the reservation of Columbia, Costa Rica, Guatemala and Peru to Art 25.

[91]Art 23 Russian Federal Law on International Treaties 34 ILM 1370 (1995).

application of agreements if they are comparable to executive agreements. This will be the case where there is only a limited scope of application *ratione materiae* and *ratione temporis* and the executive tries to seek early Senate consent to the main agreement. In addition, congressional participation already in the negotiations of the main agreement is decisive.[92]

25 International agreements concluded between **EU Member States** under the 'third pillar' often contain clauses on provisional application. Since all EU Member States subject these treaties to the national ratification process, the clauses seek to protect national ratification by stating that a declaration on provisional application may only be issued when notifying the completion of their constitutional requirements for adopting the convention in question.[93] Correspondingly, in **Germany,** provisional application is usually dealt with in the law relating to parliamentary ratification. These laws may contain an explicit authorization for the Federal Government to issue a declaration on provisional application.[94]

Examples include Art 18 para 4 Convention drawn up on the Basis of Article K.3 of the Treaty on European Union Relating to Extradition between the Member States of the European Union[95] and Art 15 para 4 Convention Drawn up on the Basis of Article K.3 of the Treaty on European Union on Driving Disqualifications.[96] The German declaration according to Art 1 para 2 of the German law ratifying the Treaty on Extradition[97] resulted in provisional application of the Convention between Germany and Belgium, Denmark, Finland, Luxembourg, the Netherlands, Austria, Portugal, Sweden, Spain and the United Kingdom.

26 Another way to solve the potential conflict is to include a clause **subjecting the provisional application to the requirements of national law** so that national law might prevail in case of conflict,[98] also in relation to budgetary appropriations.

Art 68 para 1 of the 1974 Agreement on an International Energy Programme requires provisional application to the extent possible that is not inconsistent with their legislation. Art 7 para 2 of the 1994 Agreement on Part XI provides that it is to be applied provisionally in accordance with the States' national or internal laws, regulations and annual budgetary appropriations. Art 45 para 1 of the 1994 Energy Charter Treaty stipulates that it is to be applied provisionally by a State "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." In the unpublished *Yukos* decision of 2009, the arbitral tribunal established according to the Energy Charter Treaty and the UNCITRAL Arbitration Rules found that Russia is bound by the Energy Charter Treaty on the basis of its provisional application. The tribunal ruled that Russia agreed to the

[92] *Charney* (n 34) 707; *F Montag* Völkerrechtliche Verträge mit vorläufigen Wirkungen (1986) 113–149.

[93] For example Art 15 para 4 Convention on Driving Disqualifications.

[94] See *D Thym* Ungleichzeitigkeit und Europäisches Verfassungsrecht (2005) 184; see also *Montag* (n 92) 164–223.

[95] [1996] OJ C 313, 12.

[96] [1998] OJ C 216, 1.

[97] [1998-II] BGBl 2253.

[98] *Lefeber* (n 1) 89; *Lefeber* (n 5) MN 13.

provisional application of the treaty upon signing it, and concluded that the provisional application was fully consistent with Russian law and treaty practice.[99]

27 Arbitrations concerning the Energy Charter Treaty raised the issue of the relation between the clause subjecting the provisional application to the requirements of national law and the **possibility to opt out of provisional application**. Since the Energy Charter Treaty accepts the supremacy of national law in cases of provisional application in Art 45 para 1 and grants the possibility to opt out in Art 45 para 2, it is doubtful whether a signatory State that did not opt out of provisional application may still claim that provisional application is inconsistent with its domestic law.[100] In the case of *Kardassopoulos v Georgia,* the tribunal found that a State that has signed the Charter without opting out of provisional application has not waived its right to later claim inconsistencies with its national law.[101] This interpretation of provisional application of the Energy Charter Treaty has been criticized for ignoring the object and purpose of the treaty as well as for its incompatibility with Arts 27 and 46 as well as customary international law.[102]

28 Although **Art 27** and **Art 46** reflect customary international law (→ Art 27 MN 4, → Art 46 MN 77), this does not mean that States could not derogate from these provisions. What is decisive is the intention of the parties as reflected in these provisions. Here, it is important to note that the text of the clause on provisional application does not create any link between the national law exception and opting out upon signature. The argument that such an interpretation would not be in line with the object and purpose of the Energy Charter Treaty because it does not minimize the risks of energy investment and entails the danger of reducing investor confidence[103] is not proven in practice. The decision of the tribunal in the *Yukos* cases demonstrates that a State's reliance on the national law exception does not preclude meaningful investor protection. Here, the tribunal found that the provisional application of the Energy Charter Treaty does not conflict with Russia's national law.[104]

[99]PCA *Hulley v Russia* (n 84); *Yukos v Russia* (n 84); *Veteran Petroleum v Russia* (n 84); for criticism see *Arsanjani/Reisman* (n 78) 92 *et seq*.

[100]*M Belz* Provisional Application of the Energy Charter Treaty: Kardassopoulos v Georgia and Improving Provisional Application in Multilateral Treaties (2009) 22 Emory ILR 727, 730.

[101]ICSID *Kardassopoulos v Georgia* Case ARB/05/18. The claimant, a Greek citizen, had privately invested in Georgia. He claimed that the Republic of Georgia had expropriated a concession for the construction of oil and gas pipelines without compensation for the investments between 1995 and 1997 when Georgia, as well as Greece, was applying the Energy Charter Treaty on a provisional basis.

[102]*Belz* (n 100) 748.

[103]*Belz* (n 100) 745.

[104]PCA *Hulley v Russia* (n 84); *Yukos v Russia* (n 84); *Veteran Petroleum v Russia* (n 84).

VII. Legal Effects of Provisional Application

29 In international law, a treaty provisionally applied is **binding** and **enforceable**.[105] Although the ILC had already confirmed that "there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis",[106] States have insisted on the aspirational nature of provisional application and in consequence denied that any legal obligations would arise.[107] However, arbitral tribunals in the cases of *Kardassopoulos v Georgia* and in the *Yukos* arbitration found that signatory States that had accepted provisional application upon signature were bound by the full rights and obligations of the Energy Charter Treaty. As a result, both tribunals asserted their jurisdiction under the Energy Charter Treaty to decide disputes concerning expropriation by Georgia and Russia, respectively.[108] In the case of *Kardassopoulos v Georgia,* the tribunal based its finding on the argument that the signatory States had agreed to provisional application, which is the basis for creating legal obligations under international law treaty law.[109] This interpretation is also confirmed by legal literature.[110]

30 State practice confirms that provisional application creates legal rights and obligations. Thus, Member States of the Council of Europe purposely used provisional application of Protocol No 14 as a strategy to circumvent the blockade of the entry into force of the protocol caused by Russia's refusal to ratify it (→ MN 5, → MN 15). This effect can only be achieved when States agree that provisional application creates direct legal rights and obligations. The fact that provisional application was restricted to organizational norms and was not extended to changes concerning the admissibility of complaints before the European Court of Human Rights[111] stresses that treaties which are only applied on a provisional basis suffer from a **lack of legitimacy** as well as of **legal certainty**. Thus, it is overstated to claim that incurring full legal obligations would reduce the incentives to ratify a treaty.

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[105] *Lefeber* (n 1) 90; *Lefeber* (n 5) MN 16; *Mathy* in *Corten/Klein* Art 25 MN 25; *Villiger* Art 25 MN 4.

[106] Final Draft, Commentary to Art 22, 210 para 1.

[107] See *eg* ICSID *Kardassopoulos v Georgia* (n 101) para 84.

[108] ICSID *Kardassopoulos v Georgia* (n 101) paras 209 *et seq*, 262; PCA *Hulley v Russia* (n 84); *Yukos v Russia* (n 84); *Veteran Petroleum v Russia* (n 84).

[109] ICSID *Kardassopoulos v Georgia* (n 101) para 209.

[110] *Lefeber* (n 1) 90; *T Wälde* The Energy Charter Treaty (1996) 314.

[111] Committee of Ministers (n 22).

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Part III
Observance, Application and Interpretation of Treaties

Section 1
Observance of Treaties

Article 26
Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Contents

A. Purpose and Function

Art 26 restates the pillar of treaty law[1] and the pivotal key to international law: *pacta sunt servanda*. Considering its significance, the provision is not too prominently placed in Part III of the Convention (→ MN 8). The Preamble, after all, highlights *parcta sunt servanda* by aligning the principle with two others basic corner stones of treaty law: free consent and good faith (3rd recital, → Preamble MN 7). Rephrasing the principle *pacta sunt servanda* in Art 26 is first and foremost **1**

[1] *C Binder* The pacta sunt servanda Rule in the Vienna Convention on the Law of Treaties: A Pillar and Its Safeguards in *I Buffard et al* (eds) Festschrift Hafner (2008) 317, 321.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
DOI 10.1007/978-3-642-19291-3_29, © Springer-Verlag Berlin Heidelberg 2011

of **symbolic significance**. As *Verdroß* rightly stresses, the binding force of international treaties has logical priority to any particular treaty and thus cannot itself be the legal consequence of a treaty such as the VCLT.[2]

2 In essence, it is the proclamation of the **binding force in international law** that gives Art 26 its decisive character. The binding force qualifies the treaty for establishing a **legal relationship** between the parties (→ Art 2 MN 32–36); it requires the parties not only to comply with the treaty provisions (→ MN 33) but also to give them effect as a matter of **good faith performance** (→ MN 46). And most important, the binding force of a treaty clarifies that treaty rights and obligations are no pawn in the hands of one party alone (→ MN 11–12).

3 The messages carried by Art 26 are interwoven with those of other provisions of the VCLT. The phrase "in force" has to be assessed in the light of Art 42; the phrase "upon parties" is revisited in Art 34 and "performed [. . .] in good faith" has close ties to Art 31. Consequently, Art 26 cannot be applied in clinical isolation but is supplemented by the provisions on **interpretation** as well as **invalidity**, **termination** and **suspension** (Arts 43–64). As to that, one can keep it with *Thirlway* by breaking the principle *pacta sunt servanda* down to "agreements regarded *by the law* as binding (pacta) are binding *in law* (servanda)".[3]

B. Historical Background and Negotiating History

I. Historical Background

4 *Pacta sunt servanda* is one of the long-standing principles of international law that have their roots in private law relations.[4] The phrase *pacta sunt servanda* is probably owed to the medieval canonists,[5] but its actual normative content is as old as the concept of 'treaty' itself. With some caveats, the civil law principle can be traced back to Roman times, namely to *Cicero*[6] and the Digest,[7] but it is in fact of

[2] *A Verdroß* Die Verfassung der Völkerrechtsgemeinschaft (1926) 28–33; see also *Fitzmaurice* IV 53.

[3] *TWA Thirlway* International Customary Law and Codification (1997) 38 (emphasis original).

[4] *Cf G Ripert* Les règles du droit civil applicable aux rapports internationaux (1933) 44 RdC 569, 589.

[5] One of the oldest traces of the rule as we know it today can be found in the *Liber Extra*, decrees by Pope *Gregory IX* from the year 1234, a restatement of holdings of the Council of Carthage (around 348 AD) presided by *Gratus*, Decretales 1, 35, 1: "pacta quantumcumque nuda servanda sunt" ("pacts, however naked, must be kept"). For the history of *pacta sunt servanda cf* also *R Redslob* Histoire des grands principes du droit des gens (1923) 47–57, 122–128.

[6] See particularly *Cicero* De officiis (44 BC) liber III para 92: "pacta et promissa semperne servanda sint".

[7] *Ulpian* in Digest 2, 14, 7, 7.

much greater antiquity.[8] Interestingly enough, Roman jurists contended that *pactum* has the same etymological root as *pax*.[9] Many religions mandate compliance with agreements, be it Hinduism,[10] Judaism,[11] Buddhism,[12] Christianity[13] or Islam.[14] In line with this strong foundation in religion, the 'sanctity' of treaties was often affirmed by religious ceremonies.[15] Among European thinkers, the importance of the principle was pointed out by *Augustine of Hippo*,[16] *Thomas Aquinas*,[17] *Francisco de Vitoria*,[18] *Francisco Suárez*,[19] *Hugo Grotius*,[20] *Cornelis van Bynkershoek*,[21] *Johann Jacob Moser*,[22] *Emer de Vattel*,[23] *Immanuel Kant*[24] and even by

[8] *M Lachs* Pacta sunt servanda (1997) 3 EPIL 847.

[9] *Ulpian* in Digest 2, 14, 1: "pactum autem a pactione dicitur (inde etiam pacis nomen appellatum est)". On the 'international' Roman treaty practice *C Baldus* 'Vestigia pacis' – The Roman Peace Treaty: Structure or Event? in *R Lesaffer* (ed) Peace Treaties and International Law in European History (2004) 103.

[10] See *eg VP Nanda* International Law in Ancient Hindu India in *MW Janis/C Evans* (eds) Religion and International Law (1999) 51, 53–54.

[11] *P Weil* Le judaïsme et le développement du droit international (1978) 151 RdC 253, 278–282.

[12] *KN Jayatilleke* The Principles of International Law in Buddhist Doctrine (1967) 120 RdC 441, 557.

[13] *Cf* Book of Judges 11:30–40; Gospel of Matthew 5:37; Epistle of James 5:12.

[14] Sura 5 of the Qur'an begins with the verse "O ye believers, perform your contracts", cited by sole arbitrator *Dupuy* in *Texaco v Libya* 53 ILR 389, 461 (1977).

[15] *OI Tiunov* Pacta sunt servanda: The Principle of Observing International Treaties in the Epoch of the Slave-Owning Society (1993/1994) 38 St Louis University LJ 929, 934.

[16] *Augustinus* Epistola CCV ad Bonifatium: "fides enim quando promittitur, etiam hosti servanda est, contra quem bellum geritur".

[17] *Thomas Aquinas* Summa theologiae (1265–1273) II^{a} II^{ae} q 58 Art 4, q 88 Arts 1 and 3, q 89 Arts 1 and 7, q 110 Art 3.

[18] *F de Vitoria* De potestate civili (1528) q 21: "libere enim quisquis paciscitur, pactis tamen tenetur".

[19] *F Suárez* De legibus ac Deo legislatore (1612) book II ch XVIII § 7, ch XIX § 7 (*GL Williams et al* translation (1944) 339, 346–347).

[20] See *eg H Grotius* De jure belli ac pacis (1646) book II ch XI thesis I § 4 (*FW Kelsey* translation (1925) 329), paraphrasing *Ulpian* in Digest 2, 14, 1. Still, *Grotius* himself never formulated the rule *pacta sunt servanda*; see *R Hyland* Pacta sunt servanda: A Meditation (1994) 34 VaJIL 405, 425.

[21] *C van Bynkershoek* Quaestiones juris publici (1737) book II ch X (*T Frank* translation (1930) 190–195).

[22] *JJ Moser* Grund-Sätze des jetzt üblichen Europäischen Völcker-Rechts in Fridens-Zeiten (1750/1763) 574.

[23] *E de Vattel* Le droit des gens (1758) book II ch XII § 163 (*CG Fenwick* translation (1916) 162–163).

[24] See particularly his famous categorical imperative in *I Kant* Metaphysische Anfangsgründe der Rechtslehre (1797) II. Hauptstück 2. Abschnitt § 19 (*W Weischedel* edition Vol 8 (1977) 385).

Jean Bodin.[25] *Samuel Pufendorf* alerted that "from broken faith can arise the most just reasons for recriminations and war".[26]

5 As a norm of paramount importance in international relations, *pacta sunt servanda* found its way into early codifications of international law, *eg* those of *Bluntschli*[27] and *Fiore*.[28] The League of Nations Covenant emphasized *pacta sunt servanda* in its Preamble[29] but heavily restricted 'servanda' in its Art 18.[30] In 1928, a clear restatement of *pacta sunt servanda* was introduced by Art 10 Havana Convention on Treaties: "No state can relieve itself of the obligations of a treaty or modify its stipulations except by the agreement, secured through peaceful means, of the other contracting parties."[31] The provision was later reiterated in Art 3 lit b and Art 18 OAS Charter.[32] The Harvard Research in International Law Project introduced *pacta sunt servanda* as Art 20 in its Draft Convention on the Law of Treaties.[33]

II. Negotiating History

6 At large, the negotiations on *pacta sunt servanda* were not overly controversial, as the principle itself was undisputed. In SR *Fitzmaurice*'s first report (1956), *pacta sunt servanda* appeared in the introductory part of his draft code (Draft Art 5).[34] It was a rather vast article, expressly addressing, *inter alia*, changes of government within the State (para 3), territorial changes (para 4), internal law (para 5) and the *clausula rebus sic stantibus* (para 7). SR *Waldock*'s third report (1964) contained a similarly voluminous Draft Art 55:

[25] *J Bodin* De la république (1577) book I ch VIII (*R Knolles* translation (1606) 84–113, particularly 106–107).

[26] *S Pufendorf* De jure naturae et gentium (1688) book III ch IV § 2 (*CH Oldfather/WA Oldfather* translation (1934) 380).

[27] *JC Bluntschli* Le droit international codifié (1881) Art 410.

[28] *P Fiore* Il diritto internazionale codificato e la sua sanzione giuridica (1890) Arts 735, 769–772 (*EM Borchard* translation (1918) 325, 336).

[29] Preamble para 5 Covenant of the League of Nations 225 CTS 188: "by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another".

[30] Art 18: "No such treaty or international engagement shall be binding until so registered."

[31] Adopted at the 6th International Conference of American States, 20 February 1928 (1928) 22 AJIL Supp 138.

[32] 1948 Charter of the Organization of American States 119 UNTS 3.

[33] Art 20 Harvard Draft: "A State is bound to carry out in good faith the obligations which it has assumed by a treaty."

[34] *Fitzmaurice* I 108.

"1. A treaty in force is binding upon the parties and must be applied by them in good faith in accordance with its terms and in the light of the general rules of international law governing the interpretation of treaties.
2. Good faith, *inter alia*, requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects.
3. The obligations in paragraph 1 and 2 apply also –
(a) to any State to the territory of which a treaty extends under article 59;[35] and
(b) to any State to which the provision of a treaty may be applicable under articles 62[36] and 63,[37] to the extent of such provisions.
4. The failure of any State to comply with its obligations under the preceding paragraphs engages its international responsibility, unless such failure is justifiable or excusable under the general rules of international law regarding State responsibility."[38]

Even if Draft Art 55 was subsequently reduced to the present concise sentence, *Waldock*'s draft is still the key to understanding Art 26.[39] The reduced wording of Draft Art 55 was adopted by the ILC in 1964.[40] Without being altered at the Vienna Conference, Art 26 passed with 96 votes, no abstentions and no dissents.[41] **7**

In the course of the drafting process, some discussions evolved about the article's **suitable position** within the Draft Convention.[42] Some ILC members and a few States wanted to affirm the special prominence of the rule by inserting it at the beginning of the Convention.[43] Eventually, it was deemed to be more appropriate to aim for systematic coherence of the text and to reiterate the norm by its inclusion in the Preamble.[44] **8**

The only substantial issue connected with *pacta sunt servanda* was the question of the validity of **'unequal' treaties** (→ Art 52 MN 16).[45] Representatives from some States, particularly from the Eastern bloc and newly independent post-colonial nations,[46] would have wanted an explicit exclusion of these treaties from *pacta* **9**

[35] *Waldock* III 15 (Draft Art 59): extension of a treaty to the territory of a State with its authorization.

[36] *Waldock* III 19 (Draft Art 62): treaties providing for obligations or rights of third States.

[37] *Waldock* III 26 (Draft Art 63): treaties providing for objective régimes.

[38] *Waldock* III 7–8.

[39] See particularly [1964] YbILC I 165 para 8.

[40] [1964] YbILC I 232 para 3 (*Paredes* and *Bartoš* abstained).

[41] UNCLOT II 49 para 67.

[42] For an early instance, see *eg Fitzmaurice* I 118; *Waldock* VI 60 noted that "to precede [Part I] with a staccato statement of the *pacta sunt servanda* rule might not seem very satisfactory from a scientific point of view".

[43] See *eg* the comments of Israel, *Waldock* VI 59, 298; *cf* also the remarks of *Ruda*, *El-Erian* and *Rosenne* [1966-I/2] YbILC 32 para 9, 33 para 20, 34 para 28; *cf* also *Fitzmaurice* I 108, Draft Art 5.

[44] SR *Waldock* had proposed to include the rule in the Preamble so as to demonstrate its importance, [1966-I/2] YbILC, 37 para 71; *cf* Final Draft, Commentary to Art 23, para 5.

[45] Occasionally dubbed 'inequitable' or 'leonine treaties'. That issue made Part V the most highly contested piece of the Convention at the Vienna Conference, see *Rosenne* 75–77.

[46] See *eg* the comment of Czechoslovakia, *Waldock* VI 59.

sunt servanda. This demand was abandoned with reference to the phrase "treaty in force", which was regarded as sufficiently clear in this respect.[47]

10 The phrase "**treaty in force**" was subject to further discussions: some ILC members objected to the inclusion of the element "in force", arguing that such qualification might lead to unnecessary ambiguities and thus weaken the rule.[48] Others wanted to further qualify the element ("in force and valid"), so as to emphasize substantive aspects of validity and not merely formal ones, and to distinguish between operation and validity of a treaty.[49] These demands were all ultimately dismissed, for, as *Ago* noted at the Vienna Conference, "[i]t should be borne in mind [. . .] that [Art 26] was of a declaratory nature which would be somewhat impaired if it included points of detail, as proposed in the amendments in question".[50]

C. Will, Consent and Obligation

11 The PCIJ put the still prevailing rationale for the binding character of international law into these famous but somewhat ambiguous words:

> "The rules of law binding upon States [. . .] emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims."[51]

Given that consensus demands the corresponding will of at least two actors (*consensus ad idem*), the crucial question remains: what prevents States from changing their sovereign will that once was aimed at self-limitation but is now considered inconvenient?

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[47] See *eg* the observations of the representatives of Cuba and Czechoslovakia UNCLOT II 45–46 paras 4 and 22; see in this context the 'Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties' annexed to the Final Act, UN Doc A/CONF.39/26, UNCLOT III 285.

[48] *Cf* ILC Report 16th Session [1964-II] YbILC 177 para 3; ILC Report 17th Session Part II [1966-II] YbILC 211 para 3; *Briggs*, *Elias*, *Verdross*, *Tabibi*, *Tsuruoka*, *Amado*, *Liang*, *Yasseen* and again *Elias* in [1964-I] YbILC 24 para 44, 24 para 51, 24 para 57, 27 para 11, 28 para 22, 30 para 45, 30 para 46, 30 para 50, 31 para 57; the comment of Cyprus, *Waldock* VI 59; *Verdross*, *Briggs* in [1966-I/2] YbILC 32 para 7, 35 para 44. For the opposite view, see ILC Report 16th Session [1964-II] YbILC 177 para 3; ILC Report 17th Session Part II [1966-II] YbILC 211 para 3; *Bartoš*, *Rosenne* in [1964] YbILC I 25 para 66, 26 para 75; *Tunkin*, Chairman *Ago*, *de Luna*, *El-Erian*, *Pessou*, SR *Waldock* in [1964-I] YbILC 28 para 15, 29 para 30, 29 para 35, 30 para 41, 30 para 43, 32 para 69; *Lachs*, *Rosenne*, *Ago*, *Jiménez de Aréchaga* in [1966-I/2] YbILC 33 para 15, 34 para 27, 34 para 36, 36 para 56.

[49] *Cf* the amendment proposed at the Vienna Conference by Bolivia, Czechoslovakia, Ecuador, Spain and Tanzania UN Doc A/CONF.39/C.1/L.118, UNCLOT III 145 para 233.

[50] UNCLOT II 49 para 63.

[51] PCIJ *SS Lotus* PCIJ Ser A No 10, 18.

The "**self-limitation theory**"[52] (*Staatswillenstheorie*), which can be traced to *Hegel*'s teachings,[53] has been chiefly developed by German writers of the nineteenth century.[54] Stressing the sovereign will of States, this school of thought hazards the logical consequence that the unilateral withdrawal of consent, motivated by a change of governmental aims, ends treaty relations.[55] Unsurprisingly, international legal scholarship rejects the self-limitation theory as a total negation of international law. Most commonly it is argued that the freely given **consent to be bound** generates **legal obligations** independent of any future changes in the sovereign will (*ex consensu advenit vinculum*).[56] However, the prevailing **consent-based theory** (Preamble, 3rd recital) requires a preconditioned, legally binding rule that commands that treaties are to be obeyed: *pacta sunt servanda*.[57] **12**

D. Foundation

One finds as much unanimity on the existence of the rule *pacta sunt servanda* as there is dissent regarding its philosophical, theoretical and normative foundations.[58] In order to exhibit a strong mainstay for the principle *pacta sunt servanda*, most authors vindicate more than one approach. Indeed, considered in isolation, each single hypothesis is definitely debatable. On the whole, the validity of the principle *pacta sunt servanda* is generally accepted independent of the fundamental questions associated with it.[59] As *Schachter* put it, the discourse on foundation achieves **13**

[52]See *eg* Harvard Draft 987. *H Lauterpacht* The Function of Law in the International Community (1933) 411 calls it "doctrine of self-limitation".

[53]*GWF Hegel* Grundlinien der Philosophie des Rechts (1820) §§ 330–340.

[54]See *eg AW Heffter* Das Europäische Völkerrecht der Gegenwart (1844) § 81; *G Jellinek* Die rechtliche Natur der Staatsverträge (1880) particularly at 40; *id* Gesetz und Verordnung (1887) 197; *O Nippold* Der völkerrechtliche Vertrag, seine Stellung im Rechtssystem und seine Bedeutung für das internationale Recht (1894) 19–22.

[55]*G Jellinek* (n 54) 40–42.

[56]*Fitzmaurice* I 108 (Draft Art 4 para 1): "The foundation of treaty obligation is consent, coupled with the fundamental principle of law that consent gives rise to obligation." See also *Lauterpacht* (n 52) 411; *cf* also *EM Borchard* Governmental Responsibility in Tort VI (1927) 36 Yale LJ 1039, 1086; critics include *H Triepel* Völkerrecht und Landesrecht (1899) 79; *L Duguit* The Law and the State (1917) 31 Harvard LR 1, 139–144; *A Verdross* Le fondement du droit international (1927) 16 RdC 251, 265–266; *JL Brierly* Le fondement du caractère obligatoire du droit international (1928) 23 RdC 482; *P Chailley* La nature juridique des traités internationaux selon le droit contemporain (1932) 102.

[57]*J Delbrück* in *G Dahm*/*J Delbrück*/*R Wolfrum* Völkerrecht Vol I/1 (2nd edn 1989) 37; see also *T Franck* The Power of Legitimacy Among Nations (1990) 187.

[58]For an overview, see *O Schachter* Towards a Theory of International Obligation (1968) 8 VaJIL 300, 301.

[59]*MM Radoikovitch* La revision des traités et le Pacte de la Société des Nations (1930) 19.

nothing more than a chaplain's opening prayer at public meetings: it has little effect on what is said afterwards.[60]

I. Naturalism and Cognate Schools

14 Some doctrines take the position that *pacta sunt servanda* exists independent of the will of States because it emanates from non-consensual commands; such commands could be **divine**, or could be mandated by **reason**, the **necessities of international life**, **justice** or **morality**.[61] Even if the naturalist school, in its purest sense, has lost its dominance from the nineteenth century onwards, many scholars with a consistently positivist sentiment have recourse to pre-legal considerations when *pacta sunt servanda* is discussed. *Dahm*, for example, calls *pacta sunt servanda* a rule not of logic but of practical reason, whose legal validity stems from its character as *ius necessitum* for the international community.[62] *Lauterpacht* specifies the rule as an objective principle that confronts States independently of their will.[63] According to *Wehberg*, "[i]nternational law, and with it also the sanctity of contracts, results by a natural necessity from the inevitability of social intercourse".[64] The doctrine of **necessity of law** grows out of the Latin maxim *ubi societas ibi ius,* which proceeds from the assumption that the need of the international society is the same as the need of human society: the prevention of chaos and anarchy by law.[65]

II. Good Faith

15 The principle of good faith permeates the international legal order in many ways (→ Art 31 MN 60–61). Its importance for the intercourse of States has been stressed by several authorities, including *Francisco Suárez*,[66] *Alberico Gentili*[67] and *Emer*

[60] *Schachter* (n 58) 302.

[61] *Cf J Boyle* Ideals and Things: International Legal Scholarship and the Prison-House of Language (1985) 26 Harvard ILJ 327, 337; *JL Brierly* The Law of Nations (6th edn 1963) 54–56.

[62] *G Dahm* Völkerrecht Vol 1 (1958) 12 and n 17; *J Delbrück* in *G Dahm/J Delbrück/ R Wolfrum* Völkerrecht Vol I/3 (2nd edn 2002) 600; *J Basdevant* Règles générales du droit de la paix (1936) 58 RdC 471, 642.

[63] *H Lauterpacht* The Nature of International Law and General Jurisprudence (1932) 12 Economica 301, 304; equally *R Jennings/A Watts* Oppenheim's International Law Vol I (9th edn 1992) 1206: "fundamental assumption, which is neither consensual nor necessarily legal, of the objectively binding force of international law".

[64] *H Wehberg* Pacta sunt servanda (1959) 53 AJIL 775, 782.

[65] *Jianming Shen* The Basis of International Law: Why Nations Observe (1999) 17 Dickinson JIL 287, 307.

[66] *Suárez* (n 19) book II ch XIX §§ 7–9 (*Williams et al* translation 346–349).

[67] *A Gentili* De jure belli (1589) book III ch XIV.

de Vattel.[68] *Hugo Grotius* emphasized that good faith demands that even *pacta* with enemies, pirates, rebels and infidels should be diligently kept.[69] Modern scholars have embraced the idea that *pacta sunt servanda* emanates from good faith,[70] *eg Bin Cheng*[71] and *Chailley*[72] who considered good faith the most important general principle of law.

In its famous *Nuclear Tests* judgment, the ICJ elevates good faith to the very foundation of the *pacta sunt servanda* principle: **16**

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. 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."[73]

Despite this accentuation of the good faith principle, the ICJ understands the concept as a **background principle** informing and shaping the observance of existing rules of international law but being not in itself a source of obligation where none would otherwise exist.[74] **17**

III. Basic Norm, Rule of Recognition

The adherents of the basic norm approach, particularly *Anzilotti* (*norma fondamentale*)[75] and *Kelsen* (*Grundnorm*),[76] assert that *pacta sunt servanda* is a fundamental axiom or hypothesis incapable of juridical demonstration. In the monistic view of *Kelsen*, it is the 'first foundation' of his pyramid of norms (and thus itself not a part **18**

[68] *Vattel* (n 23) book II ch XV §§ 219–222 (*Fenwick* translation 188–189).

[69] *Grotius* (n 20) book III ch XIX (*Kelsey* translation 792–803); *cf* also *ibid* book III ch XXV thesis I (*Kelsey* translation 860–861); *cf* furthermore *Augustinus* (n 16).

[70] See *eg de Luna* [1964-I] YbILC 29 para 34; *Waldock* III 8.

[71] *Bin Cheng* General Principles of Law as Applied by International Courts and Tribunals (1953) 113.

[72] *P Chailley* La nature juridique des traités internationaux selon le droit contemporain (1932) 79 *et seq*.

[73] ICJ *Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457, para 49.

[74] ICJ *Border and Transborder Armed Actions (Nicaragua v Honduras)* [1988] ICJ Rep 69, para 94; see generally on good faith the separate opinion of Judge *Ajibola* in *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, 71–74; see also *MN Shaw* International Law (6th edn 2008) 104; in the same sense *P Hector* Das völkerrechtliche Abwägungsgebot (1992) 144–145.

[75] *D Anzilotti* Corso di diritto internazionale (3rd edn 1928) 43–45.

[76] See *eg H Kelsen* Das Problem der Souveränität und die Theorie des Völkerrechts (1920) 106 (*Kelsen* later joined the adherents of the customary law doctrine; see n 80).

of the system of positive law).[77] *Anzilotti*, consistent with his *norma fondamentale* theory, extends the scope of *pacta sunt servanda* beyond the law of treaties to obligations arising from custom.[78]

19 *HLA Hart* challenges the need for a basic norm of international law, arguing that international law was but a mere set of primary rules that lacked a generally accepted secondary **'rule of recognition'** and thus did not constitute a complete legal system. However, he concedes that at the time of his writing (1961) international law was "perhaps in a stage of transition" and that a rule of recognition might yet emerge, mentioning *pacta sunt servanda* as one of the potential candidates.[79]

IV. International Customary Law

20 Many writers conceive *pacta sunt servanda* as a generally recognized rule of customary international law (Art 38 para 1 lit b ICJ Statute).[80] Starting from that, *Kunz* qualifies *pacta sunt servanda* as a **constitutional norm of superior rank**, established by custom and instituting a particular procedure for the creation of international law, namely treaty procedure.[81] On this footing, *pacta sunt servanda*

[77] *H Kelsen* Principles of International Law (2nd edn 1966) 26; *id* Théorie du droit international public (1953) 84 RdC 4, 131; *id* Les rapports de système entre le droit interne et le droit international public (1926) 14 RdC 231, 303; very much in the same sense *J Hostie* Examen de quelques règles du droit international dans le domaine des communications et du transit (1932) 40 RdC 401, 479.

[78] *Anzilotti* (n 75) 72–73; *cf* also *M Bourquin* Règles générales du droit de la paix (1931) 35 RdC 1, 80 ("principe plus vaste"); *Tunkin* [1964] YbILC I 27 para 14 ("rule [...] of much wider application than the law of treaties"); *Ago* [1964] YbILC I 28 para 26 ("basis of the binding force of any rule of international law"); *S Bastid* Les traités dans la vie internationale (1985) 115; *Lachs* (n 8) 370; *J Salmon* in *Corten/Klein* Art 26 MN 11.

[79] See particularly *HLA Hart* The Concept of Law (1961) 230–231.

[80] *J de Louter* Le droit international public positif Vol 1 (1920) 471; *L Oppenheim* International Law Vol 1 (3rd edn 1920, *RF Roxburgh* ed) 655; *Basdevant* (n 62) 642; *JB Whitton* The Sanctity of Treaties (pacta sunt servanda) (1935) 16 International Conciliation 395, 404; *P Guggenheim* Traité de droit international public Vol 1 (1953) 57; *Wehberg* (n 64) 782–783; *J Salmon* in *Corten/Klein* Art 26 MN 43; for earlier references see Harvard Draft 989. See also *Difference between New Zealand and France Concerning the Interpretation or Application of Two Agreements Concluded on 9 July 1986 between the Two States and Which Related to the Problems Arising from the 'Rainbow Warrior' Affair* (New Zealand v France) 20 RIAA 217 para 75 (1990). *Kelsen* later also joined this school of thought, see *H Kelsen* General Theory of Law and State (1945) 369, stating that the basic norm of international law is the principle *consuetudo est servanda,* establishing custom as a 'norm-creating fact', and that customary international law, including *pacta sunt servanda*, developed on the basis of this norm; *id* What Is the Reason for the Validity of Law? in *DS Constantopoulos et al* (eds) Festschrift Spiropoulos (1957) 257, 263.

[81] *JL Kunz* The Meaning and the Range of the Norm pacta sunt servanda (1945) 39 AJIL 180, 181; see also *L Henkin* International Law: Politics and Values (1995) 31–32, who emphasizes, however, that this '*ur*' conception of interstate constitutional law is not "customary law" in the sense of Art 38 ICJ Statute because it did not result from practice.

can be labeled as a **fundamental principle of international law** derived from custom and now mirrored in Art 26.[82]

V. General Principle of Law

Years before the sources of international law had been codified in Art 38 PCIJ Statute,[83] *Mérignhac*[84] proposed an analogy from private law as the proper legal foundation of the international rule *pacta sunt servanda* to the effect that international treaties are as binding on States as contracts are binding on individuals. This early perception is reflected in numerous arbitral awards of the nineteenth century. **21**

> See *eg* the arbitral award rendered by *AP Morse* in the case of *Van Bokkelen v Haiti* (1888): "Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals, and these are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith."[85] In the same sense is the arbitral award rendered by *WR Day* in the case of *Metzger & Co v Haiti* (1900): "It need hardly be stated that the obligations of a treaty are as binding upon nations as are private contracts upon individuals. The principle has been too often cited by publicists and enforced by international decisions to need amplification here."[86] See also the decision of the Franco-Venezuelan Mixed Commission of 1905 in the *Maninat* case: "A treaty is a solemn compact between nations. It possesses in ordinary the same essential qualities as a contract between individuals, enhanced by the weightier quality of the parties and by the greater magnitude of the subject-matter."[87]

With Art 38 para 1 lit c ICJ Statute in mind, the classification of the principle *pacta sunt servanda* as a general principle of law has its contemporary adherents as well.[88] The important advantage of this foundation – compared to international customary law – is its non-consensual legal nature[89]: recognized *in foro domestico* and elevated to a proper source of international law, the principle *pacta sunt servanda* is hedged against the unlikely event of consensual revocation. **22**

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[82] *Dupuy* (n 14) 19 para 51; see also ECJ (CJ) *Racke* C-162/96 [1998] ECR I-3655, para 49.

[83] 1920 Statute of the Permanent Court of International Justice 6 LNTS 380.

[84] *A Mérignhac* Traité de droit public international Vol 2 (1907) 634. See also *H Lauterpacht* Private Law Sources and Analogies of International Law (1927) 156.

[85] *Van Bokkelen v Haiti (United States v Haiti)* [1886-I] US Foreign Relations 1034–1035.

[86] *Metzger & Co v Haiti (United States v Haiti)* [1901] US Foreign Relations 262, 276. See also *ibid* 271: "It cannot be that good faith is less obligatory upon nations than upon individuals in carrying out agreements."

[87] *Heirs of Jean Maninat (France v Venezuela)* 10 RIAA 55, 78 (1905).

[88] *M Fitzmaurice/O Elias* Contemporary Issues in the Law of Treaties (2005) 3; IACtHR *Reintroduction of the Death Penalty in Peru* (Advisory Opinion) Case OC-14/94 (1995) 16 Human Rights LJ 9, 13; *Dupuy* (n 14) 19 para 51, citing *Jessup*.

[89] *OA Elias/CL Lim* The Paradox of Consensualism in International Law (1998) 208.

E. Elements of Article 26

I. Every Treaty

1. Treaties (Art 2)

23 → Art 2 MN 3–36

2. International Agreements (Art 3)

24 → Art 3 MN 3; on their binding force, see → Art 3 MN 16

3. Internationalized Contracts

25 Despite the apodictic statement of the PCIJ in the *Serbian Loans* case that contracts with non-State entities are exclusively governed by municipal law,[90] scattered voices proposed the adverse: the international principle *pacta sunt servanda* should be applied to **any contract between a State and an alien** by reason of the 'international character' of the contractual relation.[91] The motive behind this perception was to enable the alien's State of nationality to internationally resist the non-performance of the contract by diplomatic protection.

> See the written statement of the Swiss government to the PCIJ in the *Losinger & Co Case* of 1936: "The principle *pacta sunt servanda* [. . .] must be applied not only to agreements directly concluded between States, but also to agreements between a State and an alien; precisely by reason of their international character, such agreements may become the subject of a dispute in which a State takes the place of its nationals for the purpose of securing the observance of contractual obligations existing in their favour."[92]

26 The prevailing view, however, does not consider the mere non-performance of a **domestic law contract** an 'internationally wrongful act'; the arbitrary consequences of the non-performance, however, such as the denial of justice or the expropriation without adequate compensation, may result in the international responsibility of the contract-breaching State.[93]

27 If a contract between a State and an alien or a foreign corporation expressly or implicitly provides for the application of international law or general principles of law (Art 38 para 1 lit c ICJ Statute) as the **proper and primary law** of the

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[90] PCIJ *Payment of Various Serbian Loans Issued in France* PCIJ Ser A No 20, 41 (1929); *Payment in Gold of Brazilian Federal Loans Issued in France* PCIJ Ser A No 21, 141 (1929).

[91] For references, see SR *Garcia-Amador* 4th Report on State Responsibility [1959-II] YbILC 1, para 119.

[92] PCIJ *Losinger & Co Case* PCIJ Pleadings, Oral Statements and Documents Ser C No 78, 32 (1936), English translation in *Garcia-Amador* (n 91) para 116.

[93] *Garcia-Amador* (n 91) paras 121–123. This is the prevailing view even if the contracting parties have chosen international law as the proper law of the contract, see *I Marboe/A Reinisch* Contracts between States and Foreign Private Law Persons in MPEPIL (2008) MN 32–35.

contract,[94] this choice of law embraces the principle *pacta sunt servanda* without changing the legal nature of the contractual relationship (→ Art 3 MN 72).[95] The application of the principle simply constrains the competence of the State Party to unilaterally terminate the contract according to its domestic laws.[96] This proposition was adopted by numerous arbitrators.[97] As for the basis of validity of contracts not providing for a proper law clause, it is up to the arbitral tribunal to decide on the issue by following one of the numerous doctrines (→ Art 3 MN 66–71), by applying *lex fori* (*eg* Art 42 ICSID Convention[98]) or by falling back to the law, which the tribunal considers to correspond best to the nature of the legal relationships between the parties.[99]

4. Interstate Agreements Governed by Domestic Law

Neither international nor national jurisprudence supports the view that *pacta sunt servanda* is a general behavioural rule obliging States to comply with their contractual obligations irrespective of the legal nature of the respective obligation (→ Art 2 MN 23–29). Whereas the international principle exclusively calls for good faith performance of international treaties, its equivalent *in foro domestico* (→ MN 21) demands the same for interstate agreements subjected to domestic law. **28**

II. In Force

What appears to be a tautology at first sight – **treaties in force have binding force** – is an imperative qualification of the principle *pacta sunt servanda*:[100] only treaties regarded by international law as binding are binding in international law.[101] **29**

[94] *Cf C Schreuer* The ICSID Convention: A Commentary (2nd edn 2009) Art 42 MN 21.

[95] *U Kischel* State Contracts (1992) 343.

[96] Against *pacta sunt servanda* as the basis of validity of State contracts *L Lankarani El-Zein* Les contrats d'États à l'épreuve du droit international (2001) 139–158; a critique of this view is given by *C Leben* La théorie du contrat d'État et l'évolution du droit international des investissements (2003) 302 RdC 197, 349–358.

[97] Sole arbitrator *Mahmassani* in *Liamco v Libya* 62 ILR 140, 175–176 ("sanctity of property and contracts"), 190–193 (1977); sole arbitrator *Dupuy* in *Texaco v Libya* (n 14) 462; sole arbitrator *Lagergren* in *BP v Libya* 53 ILR 297, 332 (1979).

[98] 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 UNTS 159.

[99] Arbitrators *Badawi*, *Hassan* and *Habachy* in *Saudi Arabia v Aramco* 27 ILR 117, 167 (1958): "The Concession Agreement [...] derives therefore its judicial force from the legal system of Saudi Arabia, The Shari'a, the Divine law of Islam supplemented by Royal Decree [...]".

[100] *Cf Ago* [1964-I] YbILC 28 para 26; [1966-I/2] YbILC 35 para 47.

[101] *Thirlway* (n 3) 38.

30 Whether a treaty is in force has to be decided exclusively on the basis of the respective treaty provisions (*eg* expiring date) and the VCLT.[102] Consequently, Part V (Arts 42–72) of the Convention is of crucial importance due to its exhaustive reasons for a treaty's **invalidity**, its **termination** and the **suspension** of the operation of a treaty.

> See the arbitral award *Chile v Peru* of 1875 rendered by the US Ambassador in Santiago: "It is a well established principle of international law that after a treaty possessing all of the elements of validity [. . .] has been formally executed, it can only be altered or amended before its proper expiration by the same authority, and under the same formality of procedure as the original".[103] In the *Land and Maritime Boundary between Cameroon and Nigeria* case, the ICJ clarified: "Nigeria is not justified in relying on the principle of good faith and the rule *pacta sunt servanda*, both of which relate only to the fulfilment of existing obligations."[104]

31 Even though it is not reflected in the provision's wording, the ILC and the Vienna Conference considered it self-evident that Art 26 is applicable to a treaty **provisionally applied** pending its entry into force under Art 25.[105]

32 **Derogation rules on the conflict of treaties** (*lex posterior derogat legi priori etc*) do not affect the legal force of the derogated treaty; they exclusively concern the **application of treaty provisions** by the State Party (see Art 30 para 3).[106] In this light, Art 26 appears to be ill-defined: not every treaty in force has to be performed in good faith. To the contrary: established derogation rules and good faith interpretation of a treaty (Art 31) may entail that the conflicting treaty provision must not be performed (→ Art 30 MN 35).

III. Legally Binding Force (Obligations)

33 Valid treaties in force are legally binding upon the parties, *ie* all obligations imposed by treaties are **legal obligations**. Consequently, States Parties have the **legal right** to demand compliance and the **legal duty** to comply with the obligations imposed by the treaty. The question remains, however, as to who may demand treaty compliance from whom. Within the scope of multilateral treaties, the answer depends on the **compliance structure** of the respective legal obligation. (→ Art 60 MN 52–63).[107] ILC member *de Luna* did not consider the **principle of reciprocity** embodied in Art 60 paras 1–4 VCLT an exception of *pacta sunt servanda* but rather

[102] UNCLOT I 158 para 71.

[103] *Chile–Peru Alliance (Chile v Peru) H La Fontaine* (ed) Pasicrisie internationale (1902) 157, 165.

[104] ICJ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening)* (Preliminary Objections) [1998] ICJ Rep 275, para 59.

[105] UNCLOT II 47 para 33, 49 para 63, 157 para 47; Final Draft, Commentary to Art 23, 211 para 3.

[106] *N Natz-Lück* Treaties, Conflicts between in MPEPIL (2008) MN 18.

[107] The classification of international law obligations has been discussed in the context of Art 40 ILC Articles on State Responsibility as well, *cf LA Sicilianos* The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility (2002) 13 EJIL 1127.

a corollary of the principle of the sanctity of treaties in the light of the Roman maxim *frangenti fidem fides non est servanda* (faith need not be kept with one who breaks faith).[108]

1. Reciprocal Obligations

Reciprocal (or **mutual**[109]) **obligations** are contractual obligations consisting in a synallagmatic grant or interchange between the parties ('positive'[110] or 'first-order reciprocity'[111]), *ie* the giving and recieving of rights, benefits, concessions or advantages in some fields with respect to a particular matter (→ Art 2 MN 33).[112] **34**

> Art 2 para 3 Geneva Convention III[113] clothes positive complementarity in words: "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

Within the realm of reciprocal obligations, States Parties have a **reciprocal interest** in the observance of the provisions imposing reciprocal obligations, making the compliance by the other party the measure of one's own compliance ('negative'[114] or 'second-order reciprocity'[115]).[116]

Not only bilateral but also several multilateral treaties provide for corresponding rights and duties that are to be performed reciprocally between pairs of States or pairs of State groups (**multilateral treaties of bilateral compliance structure**).[117] **35**

> The 1961 Vienna Convention on Diplomatic Relations[118] and the 1963 Vienna Convention on Consular Relations[119] give examples for multilateral treaties having bilateral compliance structures.

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[108] [1963-I] YbILC 128 para 3.

[109] On the differences between the English and the French usage of the terms, see *B Simma* Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge (1972) 44–45.

[110] *E Schneeberger* Reciprocity as a Maxim of International Law (1948) 37 Georgetown LJ 29; for a more limited perception of the positive complementarity concept, see *S Watts* Reciprocity and the Law of War (2009) 50 Harvard ILJ 365, 376: extension of reciprocal compliance to Non-States Parties on the condition that they comply freely without being legally obliged.

[111] *D Jinks* The Application of the Geneva Convention to the 'Global War on Terrorism' (2005) 46 VaJIL 165, 192; 'obligational reciprocity' according to *Watts* (n 110) 372.

[112] *Fitzmaurice* II 31; see also *R Provost* International Humanitarian Law and Human Rights (2002) 121.

[113] 1949 Geneva Convention Relative to the Treatment of Prisoners of War 75 UNTS 135.

[114] *Schneeberger* (n 110) 30.

[115] *M Osiel* The End of Reciprocity (2009) 79: 'observational reciprocity'.

[116] *B Simma* Reciprocity in MPEPIL (2009) MN 11.

[117] *CJ Tams* Enforcing Obligations erga omnes in International Law (2005) 54; *Simma* (n 109) 80, 152; *C Chaumont* Cours général de droit international public (1970) 129 RdC 447.

[118] 500 UNTS 95.

[119] 596 UNTS 261.

36 Most multilateral treaties consist of reciprocal obligations *inter omnes*[120] (**integral** or **interdependent obligations**[121]). According to the compliance structure of these treaties, each State Party has a legal interest of its own, that all States Parties perform the reciprocal obligations in good faith.[122] Consequently, the performance of the treaty obligations by any party is necessarily dependent on an equal or corresponding performance by all other parties.[123] According to SR *Lauterpacht,* it is the essence of multilateral treaties to have an *inter omnes* compliance structure.[124] The non-compliance of one State Party puts into question the purpose for which the multilateral treaty was concluded.[125]

The Partial Test Ban Treaty[126] and disarmament treaties,[127] the 1959 Antarctic Treaty[128] and the Outer Space Treaty[129] are examples for multilateral treaties of *inter omnes* application.

2. Non-reciprocal Obligations

37 Non-reciprocal obligations – also referred to as **objective**, **absolute**, **self-existing**, or **inherent obligations**[130] – do not result in the exchange of direct, reciprocal benefits owed to the other States Parties but in the performance of the treaty for a benefit of a community good, which is tantamount to an 'immaterial' benefit of each State Party.[131]

In its advisory opinion on *Reservations to the Genocide Convention*, the ICJ emphasized: "The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. [. . .] In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of

[120] *Simma* (n 109) 153.

[121] *Sicilianos* (n 107) 1134.

[122] *B Simma* From Bilateralism to Community Interest in International Law (1994) 250 RdC 217, 338, 351–352.

[123] *Fitzmaurice* II 31 (Draft Art 19 para 1 lit b): multilateral treaties of an 'integral type', *cf Fitzmaurice* IV 46; *Simma* (n 109) 155.

[124] *Lauterpacht* II 135.

[125] *Tams* (n 117) 57.

[126] 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water 480 UNTS 43.

[127] See *Simma* (n 109) 156, whereas, according to *Simma*, treaties on the prohibition to use certain weapons may also fall within the categeory of multilateral treaties bilateral in application.

[128] 402 UNTS 71.

[129] 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies 610 UNTS 205.

[130] *Fitzmaurice* IV 46; *Simma* (n 109) 181; 'global' reciprocity according to *Sicilianos* (n 107) 1135.

[131] According to *Simma* (n 109) 314, these obligations are nonetheless reciprocal although in a form which does not imply the synallagmatic interdependence of treaty performance. See also *Simma* (n 116) MN 6.

this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties."[132]

Because the duty to comply is not dependent on the corresponding performance by other States Parties, recourse to Art 60 paras 1–4 is precluded.[133] **38**

There is a broad consensus in the academic debate, evidenced in international practice, that **human rights obligations** are never reciprocal.[134] Today, the reciprocity clauses of early treaties on **minority rights** (*eg* Art 45 of the 1923 Treaty of Lausanne[135]) are criticized as 'anachronistic' and contrary to modern human rights law which "transcends the framework of mere reciprocity between the contracting States".[136] **39**

The non-reciprocity of provisions relating to the protection of humans in **treaties of humanitarian character** is provided for in Art 60 para 5 (→ Art 60 MN 81–86). The extent of non-reciprocical obligations imposed by modern humanitarian law such as the four 1949 Geneva Conventions and the two 1977 Protocols is far from clear, as the numerous declarations of States Parties on the occasion of the ratification of Protocol I exemplify. **40**

See the declaration of the United Kingdom: "The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question".[137] Similar views were taken by Egypt, France, Germany and Italy.

Quite contrary to State practice, the ICTY favours a much broader, entirely human-centred approach in its *Kupreškić* judgment: **41**

"The absolute nature of most obligations imposed by rules of international humanitarian law reflects the progressive trend towards the so-called 'humanisation' of international legal obligations, which refers to the general erosion of the role of reciprocity in the

[132]ICJ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

[133]*Fitzmaurice* II 31 (Draft Art 19 para 1).

[134]ECommHR *Decision of the Commission as to the Admissibility of Application No 788/60*, 11 January 1961, 4 YbECHR 116, 140; *Ireland v United Kingdom* App No 5310/71, 18 January 1978, Ser A No 25 para 239; IACtHR *Effect of Reservations on the Entry into Force of the American Convention* (Advisory Opinion) Case OC-2/82, 24 September 1982, Ser A No 2 para 29; Human Rights Committee, General Comment 24 (52), Reservations to the ICCPR, 4 November 1994, UN Doc CCPR/C/21/Rev.1/Add.6, para 17.

[135]28 LNTS 11.

[136]Report of the Committee for Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe 'Freedom of Religion and Other Human Rights for Non-Muslim Minorities in Turkey and for the Muslim Minority in Thrace (Eastern Greece)', 21 April 2009, CoE Doc 11860, paras 32, 33.

[137]Reservation letter of 28 January 1998 sent to the Swiss government by UK Ambassador *Hulse*.

> application of humanitarian law over the last century. [. . .] Unlike other international norms, such as those of commercial treaties which can legitimately be based on the protection of reciprocal interests of States, compliance with humanitarian rules could not be made dependent on a reciprocal or corresponding performance of these obligations by other States. This trend marks the translation into legal norms of the 'categorical imperative' formulated by Kant in the field of morals: one ought to fulfil an obligation regardless of whether others comply with it or disregard it."[138]

42 Apart from obligations aimed at protecting individuals and groups, the non-reciprocity of treaty obligations is commonly accepted in the field of **international environmental law**.[139]

3. Obligations *erga omnes partes*

43 The diffuse concept of obligations *erga omnes* is subject to extensive scholarly writing.[140] In the light of jurisprudence and academic treatises, *erga omnes* has become a legal umbrella term covering various legal effects.[141] In the context of treaty law, the notion ***erga omnes partes*** or ***erga omnes contractantes*** is used to describe treaty-based obligations the good faith performance of which all States Parties have a legal interest.[142]

> See the ICTY Judgment in the *Blaskić* case: "The nature and content of this obligation, as well as the source from which it originates, make it clear that Article 29 [ICTY Statute] does not create bilateral relations. Article 29 imposes an obligation on Member States towards all other Members or, in other words, an 'obligation erga omnes partes'. By the same token, Article 29 posits a community interest in its observance. In other words, every Member State of the United Nations has a legal interest in the fulfilment of the obligation laid down in Article 29 [. . .]. As for States which are not Members of the United Nations, in accordance with the general principle embodied in Article 35 of the Vienna Convention on the Law of Treaties, they may undertake to comply with the obligation laid down in Article 29 by expressly accepting the obligation in writing. [. . .] [I]n the case of Switzerland, the passing in 1995 of a law implementing the Statute of the International Tribunal clearly implies acceptance of Article 29."[143]

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[138]ICTY *Prosecutor v Kupreškić et al* (Trial Chamber) IT-95-16-T, 14 January 2000, para 517.

[139]*Tams* (n 117) 57–58 who furthermore expands the circle of non-reciprocal treaties to all treaties that require the harmonization of national laws.

[140]See *eg M Ragazzi* The Concept of International Obligations erga omnes (1997); *K Zemanek* New Trends in the Enforcement of erga omnes Obligations (2000) 4 Max Planck UNYB 1; *JA Frowein* Obligations erga omnes in MPEPIL (2009).

[141]*Cf Tams* (n 117) 99, 155 ("legal vademecum").

[142]Whereas *erga omnes partes* obligations stem from an international treaty, the term *erga omnes* obligations is employed to denote universally recognized obligations of international customary law, owed to the international community as a whole, *cf* SR *Crawford* 3rd Report on the Law of State Responsibility UN Doc A/CN.4/507 (2000), para 106 n 195; *Sicilianos* (n 107) 1136.

[143]ICTY *Prosecutor v Blaškić* (Appeals Chamber) (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) IT-95-14 AR, 29 October 1997, para 26.

Coming under the categories of treaty compliance, *erga omnes partes* obligations owed to the community of States Parties are either reciprocal obligations *inter omnes* (→ MN 36) or non-reciprocal obligations (→ MN 37).[144] Accordingly, the spectrum of treaties imposing *erga omnes partes* obligations is broad, ranging from human rights treaties to the WTO agreements.[145] **44**

The concept of obligations *erga omnes partes* is reflected in Art 48 para 1 ILC Articles on State Responsibility,[146] which has no counterpart in the VCLT.[147] **45**

IV. Duty to Perform

1. Good Faith Performance of the Treaty

The ways and means of treaty performance are the outcome of a multifaceted political decision-making process that involves *inter alia* the interpretation of the respective treaty provision.[148] Thus, the legal duty of parties to perform the treaty in good faith necessarily includes the **good faith interpretation** of the respective treaty obligations (→ Art 31 MN 60). **46**

> In the *Gabčíkovo-Nagymaros Project* case the ICJ emphasized that good faith performance implies that "it is the purpose of the treaty, and the intentions of the parties in concluding it, which should prevail over its literal application".[149]

Considering the interdependence between treaty compliance on the international plane and the **national legal situation** in most fields of international law (→ Art 27 MN 9–14), numerous treaties explicitly address the duty to take measures of **domestic implementation** (*eg* Art 2 para 2 ICCPR) without constraining the party's freedom of choice with respect to the manner of domestic implementation.[150] Increasingly, treaties establish treaty-based **mechanisms to induce compliance** with its substantive obligations, above all in the field of human rights, environmental law and disarmament.[151] **47**

[144] *Crawford* (n 142) paras 106–107.

[145] For examples, see the ILC Final Draft on State Responsibility UN Doc A/56/10 (2001), Commentary to Art 48, para 7; *Tams* (n 117) 120–121.

[146] UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83.

[147] *Sicilianos* (n 107) 1135.

[148] *S Rosenne* Developments in the Law of Treaties 1945–1986 (1989) 62.

[149] ICJ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, para 142.

[150] See furthermore Art 1 para 2 of the 1958 UN Convention on Fishing and Conservation of the Living Resources of the High Seas 559 UNTS 285; Art 3 para 1 of the 2005 Council of Europe Convention on the Prevention of Terrorism ETS 196; Art 6 of the 1992 UN Convention on Biological Diversity 1760 UNTS 79.

[151] For details, see *G Ulfstein/T Marauhn/A Zimmermann* Making Treaties Work (2007).

48 **Non-compliance**, *ie* the breach of the legal obligation, entails the international responsibility of the defaulting party according to the law of State responsibility (*cf* Art 2 lit b ILC Articles on State Responsibility).

2. Duty Not to Defeat Object and Purpose of the Treaty

49 In a narrow sense, the good faith performance of a treaty requires the party's compliance with the letters of the legal obligations outlined in respective treaty provisions.[152] However, a party may act in a manner that is **inimical to the object and purpose of the treaty** even though the act itself is not expressly prohibited by its provisions. It was the ILC's understanding that Art 26 includes the party's duty not to defeat the object and purpose of a treaty.[153]

> In the *Nicaragua* case, the ICJ accepted Nicaragua's perception that the principle *pacta sunt servanda* can be violated without the direct breach of a treaty provision.[154] In the given case, the Court found that the United States were in breach of the duty not to deprive the treaty of friendship of its object and purpose because of certain hostile activities undermining the spirit of the bilateral agreement, *ie* the effective implementation of friendship in the fields provided for in the treaty.[155] In the *Gabčíkovo-Nagymaros Project* case, the Court kept loyal to this reading of Art 26 by stating that "[t]he principle of good faith obliges the Parties to apply [the treaty] in a reasonable way and in such a manner that its purpose can be realized".[156]

50 The ICJ's judgment in the *Gabčíkovo-Nagymaros Project* case makes it clear that the violation of the duty to perform a treaty in good faith does not necessarily entail the simultaneous breach of that treaty as long as the **bad faith conduct** will unavoidably result in future non-compliance.[157] In this regard, Art 26 carries on the idea already expressed in Art 18[158]: the early protection of the object and purpose of a treaty serves the ultimate goal of the VCLT – the stability and the reliability of treaty relations.

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[152]Dissenting opinion by Judge *Oda* in ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, 250.

[153]Final Draft, Commentary to Art 23, 211 para 4; see already *Waldock* III 7 (Draft Art 55 para 2): "Good faith, *inter alia*, requires that a party to a treaty shall refrain from any act calculated to prevent the due execution of the treaty or otherwise to frustrate its objects." According to the Commentary, the ILC considered *Waldock*'s para 2 "clearly implicit in the obligation to perform the treaty in good faith".

[154]ICJ *Nicaragua* (n 152) para 270; see also *HWA Thirlway* The Law and Procedure of the International Court of Justice 1960–1989, Part 4 (1992) 63 BYIL 1, 50–51; *Binder* (n 1) 322.

[155]ICJ *Nicaragua* (n 152) para 273; this part of the judgment is not uncontested, see the dissenting opinions of Judge *Oda* at 250 and of Judge *Jennings* at 540–542.

[156]ICJ *Gabčíkovo-Nagymaros Project* (n 149) para 142.

[157]*Ibid*; the detachment of the defeat of the object and purpose from the breach of the treaty gave rise to criticism by Judge *Fleischhauer*, see his dissenting opinion at 205–206.

[158]*Ibid* (dissenting opinion *Fleischhauer*) 206.

V. Compliance (International Relations Theories)

Conceptually, Art 26 differentiates between the issue of **obligation** ("Every treaty in force is binding upon the parties to it. . .") and the issue of **fulfillment** (". . .and must be performed by them in good faith."). The legal command of Art 26, however, leaves the question unanswered *whether* States do in fact obey international law. Furthermore, it does not explain *why* States do in fact obey international law.[159] Several **compliance theories** are dealing with these two issues, most of them developed by political scientists, some of them advanced by international legal scholars with interdisciplinary interest in international relations and economics. With the caveat that some approaches elude classification,[160] the **international relations theories** can be grouped into normative theories,[161] (neo)realism,[162] institutionalist theories,[163] (new) liberal theories[164] and constructivism.[165] Especially but not exclusively, the (neo)realist school assumes that States are solely driven by self-interest, being rational unitary agents in an anarchical world. Consequently, compliance with treaties has the same reason as compliance with non-legal agreements: fear from retaliation, fear from reputational loss or fear from failure of coordination. This rational model of State behaviour ultimately leads to the conclusion that international law does not matter. Not all too remote from the classic self-limitation theories (→ MN 12), the (neo)realist theories consider *pacta sunt servanda* an empty phrase with no impact on the course of world affairs. **51**

[159] *EM Peñalver* The Persistent Problem of Obligation in International Law (2000) 36 Stanford JIL 271, 273–274.

[160] See *eg* the classification in *D Armstrong*/*T Farell*/*H Lambert* International Law and International Relations (2007) 69; *M Burgstaller* Theories of Compliance with International Law (2005) 95.

[161] *T Franck* The Power of Legitimacy Among Nations (1990); *id* Legitimacy in the International System (1988) 82 AJIL 705; *HH Kho* Why Do Nations Obey International Law? (1997) 106 Yale LJ 2599.

[162] *K Waltz* Theory of International Politics (1979); *JL Goldsmith*/*EA Posner* International Agreements: A Rational Choice Approach (2003) 44 VaJIL 113; *H Neuhold* The Foreign Cost–Benefit Analysis Revisited (1999) 42 GYIL 84.

[163] See *eg KW Abbott* International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts (1999) 93 AJIL 361; *A Chayes*/*A Handler Chayes* On Compliance (1993) 47 International Organization 175; *id* The New Sovereignty: Compliance with International Regulatory Agreements (1995) 3: "managerial model".

[164] In particular, adherents of the New Haven School (*eg HD Lasswell*/*MS MacDoughal* The Identification and Appraisal of Diverse Systems of Public Order (1959) 53 AJIL 1), of legal process theories (*eg RA Falk* New Approaches to the Study of International law (1967) 61 AJIL 477) and new liberal theory (*eg AM Slaughter* International Law and International Relations Theory: A Dual Agenda (1993) 87 AJIL 209; *A Moravcsik* Taking Preference Seriously: A Liberal Theory of International Politics (1997) 51 International Organization 513).

[165] See *eg D Kennedy* A New Stream of International Law Scholarship (1988) 7 Wisconsin ILJ 1.

F. The Rule *pacta sunt servanda* Within Domestic Law

52 Being a rule of customary international law (→ MN 20), the principle *pacta sunt servanda* is usually **incorporated** into the domestic legal order in one way or another.

A notable example for an explicit incorporation of the international *pacta sunt servanda* principle is the Constitution of Japan, which in its Art 98 para 2 stipulates that "[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed".[166] The USSR had introduced a similar rule into its national legislation in 1978.[167] Most constitutions contain a general clause on international customary law, *eg* according to Art 10 Italian Constitution, "Italy's legal system conforms with the generally recognized principles of international law".

53 Within the national legal order, even though the principle *pacta sunt servanda* is a **valid rule** *via* incorporation, its **applicability** is another issue. The problem of application is relevant for national courts if the constitution ranks international customary law (including the principle *pacta sunt servanda*) higher than incorporated treaties. Under this condition, national jurisprudence commonly refuses to apply the rule *pacta sunt servanda* to the dispute so as to prevent that any breach of any international treaty incorporated into the national legal order is *per se* unlawful under the incorporated rule *pacta sunt servanda*, which, in fact, would limit the State's scope of external action, *eg* recourse to reprisal.

Before the German Federal Constitutional Court, individual applicants have argued that German courts violate Art 25 German Constitution ("The general rules of international law shall be an integral part of federal law") by not applying a treaty to which Germany is a party (*eg* the GATT). The Constitutional Court dismissed the plea: the rule *pacta sunt servanda* indeed falls within the scope of Art 25 German Constitution and thus takes precedence over statutory law; however, this does not mean that the treaty itself, as a result of *pacta sunt servanda*, comes under Art 25 to the effect that the treaty is binding upon the German legislator.[168] Consequently, individuals cannot enforce the observance of treaties before German courts by pointing at the high-ranking principle *pacta sunt servanda*.[169] A similar legal situation exists in Italy.[170]

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[166] See *eg K Hirobe* Article 98 Paragraph 2 of the Constitution of Japan and the Domestic Effects of Resolutions of the United Nations Security Council (1993) 36 Japanese Annual of International Law 17.

[167] See Art 19 USSR Law No 7770-IX 'On the Procedure for Conclusion, Performance and Denunciation of International Treaties of the USSR', 6 July 1978 [1978] VVS SSSR (Gazette of the Supreme Soviet of the USSR) No 28, item 439. See also the present Art 31 Federal Law No 101-FZ 'On International Treaties of the Russian Federation', 15 July 1995 [1995] SZ RF (Collection of Legislation of the Russian Federation) No 29, item 2757, and the Resolution No 5 of 10 October 2003 adopted by the Plenum of the Supreme Court of the Russian Federation.

[168] Federal Constitutional Court (Germany) 31 BVerfGE 145, 178 (1971), with reference to 6 BVerfGE 309, 363 (1957). Earlier however, other German courts had accepted this implication of *pacta sunt servanda*: Federal Court of Justice (Germany) 5 BGH St 396, 402 (1954); Court of Appeal of Hamm (Germany) [1956] NJW 307, 309 (1955).

[169] Federal Constitutional Court (Germany) 31 BVerfGE 145, 177 (1971); see also Federal Court of Justice (Germany) [1957] NJW Rechtsprechung zum Wiedergutmachungsrecht 361–362.

[170] For references, see *H Mosler* L'application du droit international public par les tribunaux nationaux (1957) 91 RdC 619, 701.

Academic writers put some creativity in their reasoning why *pacta sunt servanda* is rather toothless within the boundaries of national law.[171] The most conclusive rationale is that the incorporation of international treaties into the national legal order is subject to special constitutional rules on parliamentary approval that take precedence over constitutional provisions incorporating rules of customary law (including *pacta sunt servanda*).[172] In addition, it has been argued that the rule *pacta sunt servanda* is lacking domestic significance because its legal command – essentially procedural in nature – is solely addressed to States as subjects of international law, not to individuals or State organs operating on the national plane.[173] Others assert that the application of *pacta sunt servanda* to any municipal law contravening international treaty obligations would undermine the constitutional guarantees of the democracy principle.[174] **54**

G. Member States and Treaty Obligations of International Organizations

Without consent,[175] Member States are not legally bound by an international treaty concluded between their international organization and third parties.[176] The international organization's separate legal personality established by international law bars third parties from piercing the corporate veil for the purpose **55**

[171]For arguments to the contrary see *K Doehring* Völkerrecht (2nd edn 2004) MN 741; *F Münch* Droit international et droit interne d'après la Constitution de Bonn (1950) 19 Revue internationale française du droit des gens 14.

[172]*I Seidl-Hohenveldern* Transformation or Adoption of International Law into Municipal Law (1963) 12 ICLQ 88, 97.

[173]*W Rudolf* Völkerrecht und deutsches Recht (1967) 260–261. Similarly, *Mosler* (n 170) 701–702 argues that *pacta sunt servanda* aims solely at those State organs which are in charge of external relations, *ie* not at the courts.

[174]This seems to be the underlying rationale of the long-standing US constitutional doctrine since at least the Supreme Court's decision in the *Head Money Cases* 112 US 480 (1884), according to which treaties can be overridden by a subsequent Act of Congress (*cf eg Aust* 159). See generally on the potential conflicts between *pacta sunt servanda* and the democracy principle *CB Fulda* Demokratie und pacta sunt servanda (2002), who argues (at 197–198) that a unilateral application of the democracy principle by one treaty partner would not bring any gains in legitimacy, proposing furthermore (at 217) a right to revision under the good faith principle of Art 26; *cf* also *Seidl-Hohenveldern* (n 172) 110.

[175]See the highly disputed Draft Art 36 *bis* in *Reuter* X 69: "The assent of States of an international organization to obligations arising from a treaty concluded by that organization shall derive from (a) the relevant rules of the organization [. . .] which provide that States members of the organization are bound by such a treaty; or (b) the acknowledgement by the States and the organization participating in the negotiation of the treaty as well as the States members of the organizations that the application of the treaty necessarily entails such effects." The provision was deleted due to substantial criticism, *eg* by Bulgaria and Hungary in [1981-II/2] YbILC 184, 188; for the opposite view, see Germany *ibid* 187.

[176]*Reuter* II 91; for an opposite view, see *HG Schermers/NM Blokker* International Institutional Law (2003) § 1787.

of obtaining additional obligors. If the treaty contains a provision which imposes certain obligations on Member States not parties to the treaty, Art 35 is applicable.[177] The rule is without prejudice to a possible (subsidiary) **liability of Member States** for the breach of a treaty obligation derived from other rules of international law.[178]

56 Rarely, the constituent instrument of an international organization explicitly states that treaties concluded by the organization shall be binding for all Member States (*eg* Art 216 para 2 TFEU). If the requirements of Art 36 are not fulfilled, the contracting parties of the international organization cannot rely on this provision (***res inter alios acta***).[179] In contrast, Member States are legally obliged under that provision to observe and implement the international organization's treaty obligations. Even without such explicit provisions, Member States are bound to respect and to support the organization's efforts to comply with its treaty obligations. It is the implicit but fundamental idea of every constituent instrument that Member States shall refrain from frustrating the exercise of the organization's functions (**principle of mutual loyalty**).

57 Within the realm of EU treaty practice, many treaties concluded between the European Union and third parties are so-called **mixed agreements**, *ie* all Member States are parties to the treaty as well.[180] If no understanding between the parties to the agreement indicates the opposite,[181] the EU and its Member States are legally bound to the entire agreement, regardless of the internal division of competences.[182]

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[177]For an opposite view, see Germany in [1981-II/2] YbILC 186–187.

[178]For a detailed analysis of the famous International Tin Council case, see *CF Amerashinge* The Liability to Third Parties of Member States of International Organizations (1991) 85 AJIL 259; *M Hartwig* Die Haftung der Mitgliedstaaten für Internationale Organisationen (1993) 56; *HG Schermers* The Liability of the Member States for the Debts of International Organizations (1996) 1 Legal Issues of European Integration 15.

[179]*Reuter* [1973-I] YbILC 188 paras 72 *et seq*; Canada [1981-II/2] YbILC 183; *H Köck* Völkerrechtliche Verträge im Recht der Europäischen Gemeinschaften (1977) 125–130; for a different approach, see *P Pescatore* Les relations extérieures des communautés européennes (1961) 103 RdC 136; *RJ Dupuy* L'application des règles du droit international général des traités aux accords conclus par les organisations internationales, Rapport provisoire et projet d'articles (1973) 55 AnnIDI 214, 316 (Art 10).

[180]See *eg* the 2000 Cotonou Agreement [2000] OJ L 317, 3 (amended in 2005 [2005] OJ L 209, 27) between the European Community and its Member States on the one hand and African, Caribbean and Pacific States on the other hand.

[181]See *eg* Annex IX Art 4 UNCLOS, 1833 UNTS 397.

[182]*P Eeckhout* External Relations of the European Community (2004) 222; *G Gaja* The European Community's Rights and Obligations under Mixed Agreements in *D O'Keeffe/HG Schermers* (eds) Mixed Agreements (1983) 135; for an opposite view see *C Kaddous* Le droit des relations extérieures dans la jurisprudence de la Cour de justice des Communautés européennes (1998) 173.

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Article 27

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

Contents

A. Purpose and Function

Following close upon the most prominent provision of the Convention (Art 26: *pacta sunt servanda*), Art 27's main purpose is to reassert the fundamental principle that international treaties must be performed in good faith. To this end, it rules out the most mundane justification for non-compliance, the deviant legal situation within a State. Art 27 follows a clear logical imperative, as *Gregory H Fox* put it: given that it is the objective of many law-making treaties (→ Art 2 MN 14) to change the parties' domestic legal situation, treaties would be necessarily doomed to immediate failure if non-performance could be justified with deviating domestic laws.[1] More generally, Art 27 confirms a fundamental rule of the **law of State** **1**

[1] *GH Fox* Constitutional Violations and Treaty Invalidity: Will Iraq Give Lawful Consent to a Status of Forces Agreement? (2008) Wayne State University Law School Legal Studies Research Paper Series No 08–25.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
DOI 10.1007/978-3-642-19291-3_30, © Springer-Verlag Berlin Heidelberg 2012

responsibility, which signifies that a State cannot escape its responsibility on the international plane by referring to its domestic legal situation.[2]

2 Like the principle *pacta sunt servanda*, Art 27 refers to treaties that are **legally valid** on the international level (→ MN 7–8).[3] Consequently, the objection that internal laws foil the performance of a treaty has to be judged on the basis of **Art 46** in the first place. Only if the relevant internal laws do not fall within the scope of this provision or cannot be regarded as manifest pursuant to Art 46 para 2, Art 27 applies as the **secondary rule on international responsibility**. In this regard, Art 27 appears to be a fragmentary reference to a topic the VCLT did not purport to deal with (Art 73).[4]

3 Art 27 excludes the defense of deviant internal law in **international dispute settlement procedures**, provided that the prerequisites of Art 46 for invalidation are not met.

4 In view of long-standing State practice and case law (→ MN 5), Art 27 codifies a rule of **customary law**.[5]

B. Historical Background and Negotiating History

5 Both the justification of non-compliance with national legal constraints and the refusal of this defence strategy have a long tradition in international law.[6] However, it is the constant refusal expressed by representatives of States and international jurisprudence – the *'Alabama' Claims Arbitration* award of 1872[7] serving as an early precedent – that provides evidence for a long-standing **rule of customary law** reflected in Art 27 in conjunction with Art 46 (→ Art 46 MN 77).[8]

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[2]Art 32 ILC Articles on State Responsibility (UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83) is modelled on Art 27 VCLT; Art 3 provides that the characterization of an act as internationally wrongful "is not affected by the characterization of the same act as lawful by internal law"; a similar provision was adopted by the Third Committee of the 1930 Hague Conference, *cf* [1956-II] YbILC 225; for further drafts especially of national associations of international law see SR *Ago* Third Report on State Responsibility [1971-II] YbILC 232 para 102.

[3]See the statement by the President of the Committee of the Whole UNCLOT II 54 para 39; see also *Reuter* I 39 para 5.

[4]For this critique, see the commentary on the draft of today's Art 27 VCLT II [1977-II/2] YbILC 119 para 4.

[5]ICJ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* [2008] ICJ Rep 177 para 124.

[6]In the *'Wimbledon'* case, the German government tried to justify having prohibited the 'Wimbledon' from passing through the Kiel Canal with the German neutrality orders; the PCIJ rejected this argument, stating that "a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace", PCIJ *SS 'Wimbledon'* PCIJ Ser A No 1, 29 (1923).

[7]*'Alabama' Claims Arbitration (United States v United Kingdom)* in *JB Moore* International Arbitration Vol 1 (1898) 495, *GF de Martens* Nouveau recueil général de traités 2e série Vol 20 (1875) 767 para 128 (1872).

[8]Restatement (Third) of the Foreign Relations Law of the United States Vol 1 (1987) reflects exclusively Art 46 VCLT; but see Restatement (Second) of the Foreign Relations Law of the United States (1935) § 140.

Art 23 of the 1935 Harvard Draft Convention specifies: "Unless otherwise provided in the treaty itself, a State cannot justify its failure to perform its obligations under a treaty because of any provisions or omissions in its municipal law, or because of any special features of its governmental organization or its constitutional system."[9] Art 13 of the 1949 ILC Draft Declaration on the Rights and Duties of States stipulates that "[e]very state has the duty to carry out in good faith its obligations arising from treaties [...], and it may not invoke provisions in its constitution or its laws as an excuse for the failure to perform this duty".[10]

Neither the Special Rapporteurs[11] nor the ILC included a provision similar to Art 27 in their drafts.[12] The subject matter was considered to be falling within the law of State responsibility rather than the law of treaties.[13] At the Vienna Conference however, Pakistan[14] deemed it desirable to emphasize the irrelevance of internal law and the pre-eminence of international law in the Convention. The proposed amendment of the *pacta sunt servanda* provision[15] soon met the approval of other delegates[16] and was designed as a separate article by the Drafting Committee.[17] **6**

C. Elements of Article 27

I. Treaties in Force

As far as Art 27 obliges parties to comply with their treaty obligations irrespective of the national legal situation, the provision applies to international treaties (→ Art 2 MN 3–36) that are legally binding on the contracting parties. Thus, the treaty must be either in force for the State (→ Art 26 MN 29) or it must be provisionally applicable pending its entry into force (→ Art 26 MN 31). **7**

If the treaty is void (Arts 52, 53) or rightfully invalidated by the State (Arts 43–51), Art 27 is not applicable. The same holds true for treaties that have **8**

[9]Harvard Draft 1029.

[10]UNGA Res 375 (IV), 6 December 1949, UN Doc A/RES/375 (IV).

[11]But see *SR Fitzmaurice* II 41 para 31.

[12]The ILC had at different times taken different views on the question of the relationship between international and municipal law, at least according to the Delegate of Venezuela *Carmona*: *Lauterpacht*'s view had been that municipal law took precedence over international law whereas *Fitzmaurice* had advanced the opposite thesis that international law prevailed over municipal law; the present Art 46 entered the debate as a compromise formula, see the statement by the representative of Venezuela UNCLOT II 53 para 32. For *Lauterpacht*'s position in his academic work, see *H Lauterpacht* in *E Lauterpacht* (ed) International Law: being the collected papers of Hersch Lauterpacht (1970) 228.

[13]*Waldock* (Expert Consultant) UNCLOT I 158 para 73; see also the statement by the representative of the United States UNCLOT I 151 para 67.

[14]See the statement by the representative of Pakistan UNCLOT I 151 para 58.

[15]UNCLOT III 145 para 233.

[16]UNCLOT I 158 para 76; for critical remarks, see UNCLOT II 53 paras 32–38; the representative of Argentina missed a reference to possible 'constitutional clauses' in treaties para 36; *cf* in this regard the Harvard Draft → MN 5.

[17]UNCLOT II 53 para 30 (Draft Art 23 *bis*).

been terminated or suspended in accordance with the provisions of the VCLT (Art 42). It therefore follows that the justification for the non-performance of the treaty does stem exclusively from international law and the treaty itself.

II. Provisions of Internal Law

9 The term 'internal law' ('droit interne') is not defined in Art 2. With a view to Art 27's purpose (→ MN 1), the term covers the broadest spectrum possible: it refers to all **written** and **unwritten laws** (*eg* common law)**, regulations** and **decrees, orders** and **decisions** adopted within the institutional framework of the State, by whatever authority (legislative, executive and judicial branch, federal or sub-federal) and at whatever level (constitutional or statutory law including administrative regulations and municipal ordinances).[18] The term also encompasses **judicial decisions** applying and interpreting national laws, irrespective of whether they clarify, sharpen or amplify the national legal situation (*eg* judge-made laws).

> In 1997, Guatemala issued a reservation upon its ratification of the VCLT that concerns the scope of 'internal law': "A reservation is hereby formulated with respect to article 27 of the Convention, to the effect that the article is understood to refer to the provisions of the secondary legislation of Guatemala and not to those of its Political Constitution, which take precedence over any law or treaty."[19] Austria, Denmark, Finland, Sweden and the United Kingdom made objections against this reservation: it would call into question well-established and universally accepted norms. Most objecting States considered the reservation incompatible with the objects and purposes of the VCLT (Art 19 lit c).

10 With regard to Member States of the **European Union**, the question arises whether the body of EU law must be regarded, for the purpose of the Convention, as internal law of the Member States to the effect that these laws fall within the scope of Art 27 (and Art 46). Even if EU law derives from a source different from the national legal orders of Member States,[20] a great many rules are directly applicable within all Member States and prevail over conflicting national laws.[21] From the viewpoint of international law, it can be argued the TEU and the TFEU (and the secondary rules derived from it) are still international treaties pursuant to Art 2 lit a VCLT irrespective of whether they have direct effect within the Member States legal orders.[22] The qualification as international law, however,

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[18] *Cf Villiger* Art 27 MN 5–6; *A Schaus* in *Corten/Klein* Art 27 MN 6.

[19] See also the similar reservation of Costa Rica upon ratification in 1996 and the objection of the United Kingdom declared in 1998.

[20] ECJ (CJ) *Costa v ENEL* 6/64 [1964] ECR 585.

[21] *Ibid*; ECJ (CJ) *Internationale Handelsgesellschaft* 11/70 [1970] ECR 1125 para 3; *D Chalmers/G Davies/G Monti* European Union Law (2010) 185 *et seq*, 203–205; for a political science perspective, see *AJ Karen* Establishing the supremacy of European law: the making of an international rule of law in Europe (2001).

[22] The ECJ appears to take a different stance, ECJ (CJ) *Kadi and Barakaat v Council and Commission* C-402/05 P, C-415/02 P [2008] ECR I-6351, para 281 ("constitutional charter").

does not argue against its concurrent character as 'internal law' in terms of Art 27 (and Art 46), given that the national legal order allows supranational law to be just as directly applicable and effective as internal law (→ Art 46 MN 29).

III. Failure to Perform a Treaty

1. Breach of a Treaty Obligation

11 According to the general English usage, the term 'failure' denotes *inter alia* a non-performance of a duty or expected action.[23] This alone indicates the close relation between Art 27 and the law of State responsibility as reflected in Art 2 lit b ILC Articles on State Responsibility.[24] Art 27 applies not only when a State refuses to perform a treaty or parts of it but also when the performance does not produce the results envisaged by the treaty (→ Art 26 MN 47). In sum, any act or omission that is attributable to a States Party and constitutes an **unlawful breach of a treaty obligation** falls within the scope of Art 27. It is the non-compliance of a State that matters, independently of any intention or fault.[25]

2. Reservations Safeguarding Internal Law

12 Frequently, States, when ratifying a treaty, enter into reservations aimed at safeguarding their internal laws, *eg* by stating that the application of the treaty must be compatible with the national constitution or other internal laws. Not too often but still on a regular basis, objecting States invoke Art 27 in challenging the legality of these reservations.

> See the reservation of the United States regarding the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[26]: "[. . .] That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."[27] Ireland, the Netherlands, Estonia and Finland objected to the reservation by referring *inter alia* to Art 27: "The Government of the Kingdom of the Netherlands objects to this reservation on the ground that it creates uncertainty as to the extent of the obligations the Government of the United States of America is prepared to assume with regard to the Convention. Moreover, any failure by the United States of America to act upon the obligations contained in the Convention on the ground that such action would be prohibited by the constitution of the United States would be contrary to the generally accepted rule of international law, as laid down in article 27 of the Vienna Convention on the law of treaties." In reference to a

[23] Merriam-Webster Collegiate Dictionary (11th edn 2003) 449.

[24] Art 2 ILC Articles on State Responsibility (n 2): "There is an internationally wrongful act of a State when conduct consisting of an action of omission: [. . .] (b) Constitutes a breach of an international obligation of the State."

[25] See commentary to Art 2 ILC Articles on State Responsibility [2001-II/2] YbILC 36 para 10.

[26] 78 UNTS 277.

[27] The reservation is attributable to the US Supreme Court decision *Reid v Covert* 354 US 1 (1957).

comparable US internal law reservation to Art 16 ICCPR, Finland declared: "A reservation which consists of a general reference to national law without specifying its contents does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving State to fulfill its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty."[28]

13 The structure of the VCLT does not support the view that Art 27 prohibits internal law reservations. The provision's position in Part III of the Convention (observance of treaties) subsequent to the articles on reservations under Part II (Arts 19–23) reveals that Art 27 applies once the States' obligations under a treaty have been determined.[29] It is, however, the purpose of a reservation to limit treaty obligations beforehand.

14 Internal law reservations may non-etheless be unlawful under Art 19 (→ Art 19 MN 85–87). The **object and purpose of the treaty** (Art 19 lit c) is affected when a reservation generally stipulates that the application of the treaty is subject to the condition that the treaty is compatible with the internal laws in force, given that this kind of reservation is not only of an **undefined character** but amounts in fact to a **total absence of ratification**.[30]

See Iran's reservation to the 1989 Convention on the Rights of the Child,[31] stating that it "serves the right not to apply any provisions or Articles of the Convention that are incompatible with Islamic laws and the internal legislation in effect". Norway objected: "A reservation by which a States Parties limits its responsibilities under the Convention by invoking general principles of national law may create doubts about the commitments of the reserving state to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law."

3. 1986 Convention: Conflicting Rules of International Organizations

15 Contrary to Art 27 of the 1969 Convention, the twinning provision of 1986 was subject to controversial discussion in the ILC. A *mutatis mutandis* replica to the effect that international organizations may not invoke their rules (Art 2 para 1 lit j VCLT II[32]; →Art 46 MN 60–61) as a justification for the failure to perform a treaty

[28] See also the Finnish objection to the reservations of Indonesia, Japan, Pakistan, Qatar and Syria with respect to provisions of the Convention on the Rights of the Child (CRC) 1577 UNTS 3; CRC Committee Rapporteur *Santos Pais* agreed with this reading of Art 27, see UN Doc CRC/C/SR.41, para 24.

[29] *W Schabas* Reservations to the Convention on the Rights of the Child (1996) 18 HRQ 472, 480.

[30] *Ibid* 478.

[31] 1577 UNTS 3.

[32] Art 2 para 1 lit j VCLT II: "'rules of the organization' means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization".

caused resistance under two headings: first, at least one ILC member felt that the rules of international organizations cannot be assimilated with the internal law of States because they **derive from an international treaty**, *ie* the constituent instrument of the international organization.[33] Secondly, the question arises whether the **limits of treaty-making capacity** enshrined in the rules of the organization fall within the scope of Art 27.[34] The second objection was easy to dissipate given that the international organization's lack of treaty-making capacity entails the voidness of the treaty and the lack of treaty-making power has to be judged on the basis of Art 46 para 2 (→ Art 6 MN 32).

16 In contrast, the first objection had a point, at least under the premises that a Member State is subject to binding resolutions of the international organization while having also treaty relations with that organization. The coincident of conflicting obligations leads to the question whether the Member State's obligation under the international organization's binding resolution prevails over the treaty to the effect that it is within the organization's power to modify its treaty relations with Member States. In order to solve this issue, SR *Reuter* proposed an addendum to Art 27 para 2:

> "An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, *unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization*."[35]

The addendum was abandoned by the ILC at the second reading of the draft article. The ILC members reached the understanding that the addressed conflict resolution in favour of the international organization's unilateral powers is implied in the relevant treaty if the **means of interpretation** reveal the intent of the parties in this respect.[36] Hence, Art 27 para 2 contains an unwritten reference to Art 31, read as "Unless a different intention appears from the treaty, an international organization party to a treaty may not invoke. . .".

17 **Art 103 UN Charter** provides for a *lex specialis* conflict resolution in case that a binding Security Council resolution (Arts 25, 48 UN Charter) conflicts with a treaty obligation of the United Nations: Member States may not invoke their treaty rights *vis-à-vis* the United Nations (*eg* arising from a status-of-forces agreement) in order to justify their failure to comply with obligations under the Security Council resolution.

[33] See the commentary on the draft of today's Art 27 VCLT II, ILC Report 29th Session [1977-II/2] YbILC 119 para 2.

[34] *Ibid* 119 para 5.

[35] *Ibid* 118.

[36] Final Draft 1982, Commentary to Art 27, 39 para 7.

D. Legal Consequences

I. No Recognized Ground of Justification

18 Art 27 does not prohibit invoking internal law *stricto sensu* but declares the objection legally irrelevant for the purpose of Art 26. In other words: deviating internal law is not internationally recognized as a valid justification for non-performance. Without prejudice to the fact that a manifest violation of fundamental internal laws allows for the invalidation of the consent to be bound by a treaty (→ Art 46), international law turns a blind eye to internal law.

19 Art 27 is consistent with the law of State responsibility. Even if this body of law recognizes that certain circumstances may preclude the wrongfulness of the non-performance of a treaty (Arts 20–25 ILC Articles on State Responsibility), the demands of internal law do not range among them. This **customary rule** is well documented by counterpleas of State representatives[37] and by international jurisprudence. The clearest judicial decision in this regard – but by far not the only one[38] – is that of the PCIJ in the *Treatment of Polish Nationals* case:

> "[A]ccording to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted. [...] [C]onversely, a State cannot adduce as against another State its one Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[39]

[37] See *eg* the statement by the representative of Hungary before the Council of the League of Nations in the expropriation dispute between Hungary and Romania in (1923) 4 Official Journal of the League of Nations 886, 887: "What would be the object of concluding treaties or of undertaking international obligations if it were open to those who had undertaken them to escape from their effects by a legislative, executive or constitutional act or by any act of any other kind arising from their own authority?" See also the classic statement of US Secretary of State *Bayard* in US Department of State, The Executive Documents of the House of Representatives [1887–1888] Foreign Relations of the United States for the Year 1887 No 491, 751, 753.

[38] See also PCIJ *'Wimbledon'* (n 6); *Greco-Bulgarian Communities* PCIJ Ser B No 17, 32 (1932); *Free Zones of Upper Savoy and the District of Gex* (Second Phase) PCIJ Ser A No 24, 12 (1930); PCIJ Ser A/B No 46, 167 (1932). For arbitral tribunals see the *'Alabama' Claims* case of 1872 (n 7); *Norwegian Shipowners' Claims (Norway v United States of America)* 1 RIAA 307, 331 (1922); *Aguilar-Amory and Royal Bank of Canada Claims (Tinoco Case) (United Kingdom v Costa Rica)* 1 RIAA 369, 386 (1923); *Shufeldt Claim (Guatemala v United States)* 2 RIAA 1079, 1098 (1930). See also the relevant ECJ (CJ) jurisprudence: *Commission v Belgium* C-326/97 [1998] ECR I-6107 para 7; *Commission v Spain* C-274/98 [2000] ECR I-2823 para 19, 20; *Commission v Belgium* C-236/99 [2000] ECR I-5657 para 23.

[39] PCIJ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* PCIJ Ser A/B No 44, 24 (1932).

The ICJ revisited the topic several times,[40] *eg* in the *ELSI* case: **20**

> "Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of a treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian Law, this would not exclude the possibility that it was a violation of the FCN Treaty."[41]

National jurisprudence is not qualified to confute the customary rule reflected in Art 27 (→ MN 4), given that national judicial decisions exclusively reflect the perspective of the **national legal system** that resolves upcoming conflicts between international obligations and national law on the basis of its own rules. Accordingly, the US Supreme Court ruling in *Reid v Covert* that treaty obligations are not valid if they violate a constitutional norm[42] does not contradict the general acceptance of the rule enshrined in Art 27. **21**

Without prejudice to Art 46, Art 27 frustrates the defense that the particularities of the governmental or the constitutional system (*eg* **federal structures**) had defeated any attempts to achieve treaty compliance.[43] If the federal States accept to become a party to treaties whose subject matters fall within the executive competence of the component units, the federal government is barred from pointing at the uncooperativeness of the subunit's government. This is all the more valid since the law of State responsibility considers the conduct of subunit organs an act of the federal State under international law (Art 4 para 1 ILC Articles on State Responsibility). The only way to escape responsibility is to introduce a federal clause in the treaty: **22**

> Art 34 of the 1972 Convention for the Protection of the World Cultural and Natural Heritage[44] provides: "The following provisions shall apply to those States Parties to this Convention which have a federal or non-unitary constitutional system: [. . .] (b) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of individual constituent States, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption."

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[40]ICJ *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, 132; *Nottebohm Case (Liechtenstein v Guatemala)* (Preliminary Objection) [1953] ICJ Rep 111, 123; *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)* [1958] ICJ Rep 55, 67; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* [1988] ICJ Rep 12, para 57; (implicitly) *LaGrand (Germany v United States)* [2001] ICJ Rep 466, para 91.

[41]ICJ *Elettronica Sicula S.p.A. (ELSI) (United States v Italy)* [1989] ICJ Rep 15, para 73.

[42]Supreme Court (United States) *Reid v Covert* 354 US 1 (1957).

[43]ECJ (CJ) *Commission v Belgium* (n 38) para 23; but see also ICJ *LaGrand* (n 40) para 111 with regard to the obligation incumbent upon the United States as a result of the Order of 1999: "The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed [by the State of Arizona]".

[44]1037 UNTS 151.

23 Whereas Art 23 Harvard Draft (→ MN 5) takes note of **treaty provisions explicitly referring to internal laws** as a possible justification for non-performance, Art 27 is silent in this regard without altering the legal situation.[45] Since the term 'failure' presupposes that the non-performance of the treaty must be internationally wrongful (→ MN 11), Art 27 is not applicable to treaties, which by their own terms allow relying on internal law in order to justify the non-performance of treaty obligations.

> *Cf* the 1925 exchange of notes between the United States and Poland (including the Free City of Danzig) according most-favoured-nation treatment in custom matters: "The present agreement shall become operative on the day of signature [. . .]; but should either party be prevented by future action of its legislature for carrying out the terms of this arrangement, the obligation thereof shall thereupon lapse."[46]

II. International Responsibility

24 Without making the law of State responsibility a subject of the Convention (→ Art 73), Art 27 reaches into the field of responsibility. The determination whether a treaty is voidable due to deviating internal law is to be made pursuant to the law of treaties. The evaluation of the extent to which the non-performance of a treaty, qualified as not justifiable under the law of treaties, involves the international responsibility is to be made under the law of State responsibility.[47]

E. International Treaties Within the National Legal Order

25 Art 27 safeguards the **international duty to perform a treaty** without deciding on the proper methods to attain the end Art 26 has in view. Above all, Art 27 does not stipulate that national courts must override deviating internal law. On this basis, the provision's significance within the national legal order is limited.[48] The incorporation of Art 27 into the internal legal system notwithstanding, the provision appears to be unfit to prevent *a priori* that internal law is applied in disregard of treaty obligations: Art 27 addresses States as international actors, not State organs applying internal law domestically.

> For this traditional reading see the UK High Court of Justice Chancery Division's decision in the case of *NEC SemiConductors Ltd et al v Inland Revenue Commissioners* (2003).[49] Most notably, some Latin American courts refer to Art 27 in order to establish supremacy of international human rights treaties over national law, *eg* the Argentine Supreme Court in

[45]This fact has prompted Argentina to vote against Draft Art 23 *bis* (now Art 27), see n 16.

[46](1926) 20 AJIL Supp 112, 114.

[47]ICJ *Gabčikovo-Nagymaros Project (Hungary v Slovakia)* [1996] ICJ Rep 7, para 47.

[48]For a different approach, see *T Buergenthal* International Tribunals and National Courts: Internationalization of Domestic Adjudication in *U Beyerlin* (ed) Festschrift Bernhardt (1995) 687, 399.

[49]High Court of Justice (United Kingdom) *NEC SemiConductors Ltd et al v Inland Revenue Commissioners* [2003] EWHC 2813 (Ch) para 50 per Justice *Park*.

the *Ekmekdjian v Sofovich* case (1992)[50] and the Peruvian Supreme Council of Military Justice in the *Barrios* case (2001).[51] Other courts mobilize Art 27 in conjunction with constitutional provisions in order to justify their direct recourse to international treaties, *eg* the Spanish Supreme Court in the *Guatemalan Genocide Case* (2003).[52]

Whereas the Convention's **hierarchical rank** and **effect** within the national legal order are of minor importance as far as Art 27 is concerned, both rank and effect remain crucial for treaty provisions that are qualified to modify the national legal situation. Since Arts 26 and 27 do not decide on the proper method how to comply best with international treaty obligations (→ Art 26 MN 52), the choice has to be made by each single State within its own constitutional framework. This **freedom of implementation** is circumscribed by the **principle of effectiveness**, which gains special importance in the context of human rights and humanitarian treaty law.[53] **26**

I. Doctrinal Foundations: Monism and Dualism

Most constitutional decisions on the relationship between national law and international law do not follow a specific doctrinal approach. From this viewpoint, one may keep with *Fitzmaurice* who considered the ideologically charged battle between monists and dualists "unreal, artificial and strictly beside the point".[54] However, the **dichotomy** between monism and dualism with all its shades and alleviations is still a helpful starting point for the analysis of the choice of implementation,[55] even if – to a certain extent – State practice can be explained both under monistic and dualistic theory.[56] **27**

The notion of monism has its root in natural law doctrine of the sixteenth and seventeenth century (*eg Hugo Grotius*[57]). The **contemporary monistic approach** **28**

[50]Supreme Court (Argentina) *Ekmekdjian v Sofovich* No E 64 XXIII, 7 July 1992, para 19; relevant passage cited in *WM Ferdinandusse* Direct Application of International Criminal Law on National Courts (2006) 114; for details see *L Patricios* Ekmekdjian v. Sofovich: The Argentine Supreme Court Limits Freedom of the Press with Self-Executing Right of Reply (1993) 24 The Unitersity of Miami Inter-American Law Review 541, 552–554.

[51]Supreme Council of Military Justice (Peru) *Barrios* No 494-V-94, 4 June 2001, reported by *Ferdinandusse* (n 50) 145.

[52]Supreme Court (Spain) *Guatemalan Genocide Case* 42 ILM 686, 699.

[53]*A Seibert-Fohr* Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to Its Article 2 para 2 (2001) Max Planck UNYB 399, 413; see *eg* for the duty to make the incorporated treaty obligations under the ICCPR enforceable by domestic courts Human Rights Committee Concluding Observations on Nepal UN Doc CCPR/C/79/Add.68 para 17 (1996).

[54]*G Fitzmaurice* The General Principles of International Law (1957) 92 RdC 5, 71.

[55]*JH Jackson* Status of Treaties in Domestic Legal Systems: A Policy Analysis (1992) 86 AJIL 310, 314.

[56]*Ferdinandusse* (n 50) 130.

[57]*H Grotius* De jure belli ac pacis (1646) Prolegomena para 16 (FW Kelsey translation 1925) 15: "But the mother of municipal law is that obligation which arises from mutual consent; and since

postulates that international law and national law are two building blocks within one all-embracing legal order.[58] In cases of normative conflicts within this legal order, either national law prevails over international law[59] or international law prevails over national law,[60] depending on the ideological background of the respective school of thought.[61]

29 The foundation of dualism emerged from the treatises of late eighteenth century legal positivists.[62] Contrary to the monistic approach, the **dualist school of thought** considers national and international law to be two essentially different legal systems, deriving from different sources and regulating different subjects.[63] Accordingly, international law cannot invalidate national law nor can international law be directly invoked before municipal courts. In order to fulfill its international obligation, the competent State organs must convert international law into national rules, which then have a life of their own independent of the corresponding international law obligations.

30 Whether the States follow a more monistic or dualistic approach depends largely on the constitutional history and legal practice as well as the respective source of international law. Whereas the incorporation of **international customary law** frequently follows a more monistic concept since its rules are hard to identify and even harder to construe,[64] the **incorporation of international treaties** is closely linked to national legislation.

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this obligation derives its force from the law of nature, nature may be considered, so to say, the great grandmother of municipal law".

[58] *H Kelsen* Les rapports de système entre le droit interne et le droit international public (1926) 14 RdC 231, 299; *A Verdross* Le fondement du droit international (1927) 16 RdC 251, 287.

[59] *GWF Hegel* Grundlinien der Philosophie des Rechts (1821) § 330 *et seq; A Décencière-Ferrandière* Considerations sur le droit international dans ses rapports avec le droit de l'état (1933) 40 Revue générale de droit international public 45, 64 *et seq*; see also *G Jellinek* Die rechtliche Natur der Staatenverträge (1880) 7, 40 and 45 for a more restrained approach.

[60] So-called Vienna School: *J Kunz* The 'Vienna School' and International Law (1934) 11 New York University Law Quarterly Review 370, 396.

[61] *Kelsen* in principal accepted both views as valid from a legal point of view and regarded the question of primacy as being political and not scientific: *H Kelsen* Die Einheit von Völkerrecht und staatlichem Recht (1958) 19 ZaöRV 234, 241; *id* Pure Theory of Law (1960) (Max Knight translation 1976) 333 *et seq*, 344 *et seq*; however, in his work a strong tendency towards primacy of international law is detectable as well, *id* Allgemeine Staatslehre (1925 reprinted in 1966) 132.

[62] *G Slyz* International Law in National Courts (1995/1996) 28 New York University JILP 65, 69.

[63] *H Triepel* Les rapports entre le droit interne et le droit international (1923) 1 RdC 77, 79; *id* Völkerrecht und Landesrecht (1899) 111 arguing that international and municipal law are two circles which touch, but never cut each other; *D Anzilotti* Corso di diritto internazionale Vol 1 (1964) 51; *K Strupp* Les règles générales du droit de la paix (1934) 47 RdC 263, 389, 404.

[64] See *eg* Art 25 Basic Law (Constitution) of Germany of 1949; Art 9 (1) Austrian Federal Constitution of 1920; for details, see *L Wildhaber/S Breitenmoser* The Relationship between Customary International Law and Municipal Law in Western European Countries (1988) 48 ZaöRV 163, 176 *et seq*; implicitly also *A Verdross/B Simma* Universelles Völkerrecht – Theorie und Praxis (3rd ed 1984) 541.

II. Domesticated Treaties: Dualistic Approach

It is inherent to the dualistic concept that international treaties must be transformed to national law. The term '**transformation**' characterizes the national act of converting the international treaty provisions into domestic law. This duplication results in the parallel existence of a treaty governed by international law (→ Art 2 MN 23–31) and its mirror image whose ground of validity rests in the domestic legal order alone. Generally speaking, two methods are available to accomplish the task of transformation[65]: either the international treaty is transformed lock, stock and barrel into statutory law, *ie* the wording and the concept of the treaty remain intact but it now operates as national law (**general or blanket transformation**),[66] or the treaty is redrafted and rearranges to one or several statutes (**special transformation**).[67] In both cases, it is the piece of legislation that has domestic legal effects, not the international treaty. All rights and obligations flow from the national legal source, never the international one. **31**

Several reasons strike for the transformation of international treaties into one over several statutes: the protection of **State sovereignty**, the **separation of powers** within a State and the **imperfection** of the international treaty provisions (→ MN 38).[68] However, the practical disadvantages of transformation are manifold as well. There is always the danger that the national and the international legal situation drift apart due to national-centric **interpretation**, unincorporated **international judicial decisions** and the **latitude** of the national legislator. Above all, **unincorporated treaties** remain legally non-existent within the national legal order. **32**

The undesired disparity of international and national law in mind, dualist States experience a shift away from the strict application of the transformation requirement. Many courts treat the piece of national legislation mirroring the treaty provision as if it were the international instrument, especially when questions of interpretation, reciprocity and validity arise.[69] Other courts have softened the harsh effects of non-transformation by ruling that ratified but still **unincorporated treaties** may influence the national legal situation. **33**

> In the *Ethnic Affairs v Teoh Case,* the High Court of Australia decided that in case of the unincorporated Convention on the Rights of the Child, the act of ratification has created a **legitimate expectation** in Mr *Teoh*'s mind that the immigration panel would place

[65] *Cf Jackson* (n 55) 315.

[66] For example, Art 59 German Constitution of 1949 ("Zustimmungsgesetz").

[67] See *Porter v Freudenberg* [1915] 1 KB 857, 874–880; *Inland Revenue Commissioners v Collco Dealings Ltd* [1962] AC 1; for a literary overview, see *P Malanczuk* Akehurst's Modern Introduction to International Law (1997) 65 *et seq*; *Lord McNair* When Do British Treaties Involve Legislation? (1928) 9 BYIL 59 *et seq*; *FA Mann* The Consequences of an International Wrong in International and National Law (1976–1977) 48 BYIL 1, 20 *et seq*.

[68] *DM Aaron* Reconsidering Dualism: The Caribbean Court of Justice and the Growing Influence of Unincorporated Treaties in Domestic Law (2007) 6 Law and Practice of International Courts and Tribunals 233, 240–241.

[69] *J Delbrück* in *G Dahm*/*J Delbrück*/*R Wolfrum* (eds) Völkerrecht I/1 (2nd edn 1989) 105.

considerable weight on the best interest of his children when **interpreting the statute**, as stipulated in Art 3 of the Convention.[70] The Canadian Supreme Court had to deal with the effects of unincorporated agreements in the *Baker*[71] and *Suresh*[72] cases. In both decisions, the Court emphasized that these agreements are not binding in Canada unless incorporated by enactment, but "the court may be informed by international law",[73] *eg* with regard to values reflected in international human rights law.

34 The line between dualistic and monistic approach blurs when the **parliamentary approval** of ratification and the **publication of the treaty in the national gazette** suffice for the incorporation. The legislative act can be interpreted both ways, as a general transformation (→ MN 31) or as a monistic adoption (→ MN 36).[74]

The Chilean Supreme Court ruled in 1976 in connection with the ICCPR that the lack of enactment of the treaty prevented its legal operation in the domestic legal order.[75] In 1984, the Supreme Court insisted that without publication a treaty has no legal effect in Chile.[76] Promulgation is crucial in most legal systems (*non obligat lex nisi promulgata*), including *eg* Columbia[77] and Austria.[78]

35 Whether the parliamentary approval and publication requirements must be considered an act of general transformation (→ MN 31) appears to be crucial when the international treaty has ceased to exist on the international plane. But even this issue disappears into thin air if one considers the national enactment inoperative in the case that its international benchmark evaporates.

See for this pragmatic stance the decision of the German Reichsgericht concerning the internal validity of the 1918 Peace of Brest-Litovsk (111 RGZ 40, 45): "With regard to the aftermath of a lost war one cannot require the same standards for the publication of the ending of an international treaty's validity under municipal law as under regular conditions. [. . .] With regard to a treaty like the Treaty of Brest-Litovsk, whose political, military, economic and private law contents form a uniform and inseparable whole, no distinction can be made between its validity under international and municipal law, respectively. [. . .]

[70]High Court (Australia) *Minister for Immigration and Ethnic Affairs v Teoh* 183 CLR 273 (1995) per Justice *Mason* and Justice *Deane*.

[71]Supreme Court (Canada) *Baker v Canada* [1999] 2 SCR 817.

[72]Supreme Court (Canada) *Suresh v Canada* [2002] 1 SCR 3.

[73]*Ibid* para 60.

[74]Some legal writers regiment the "general transformation" into the monistic school of thought, references in *T Öhlinger* Der völkerrechtliche Vertrag im staatlichen Recht (1973) 129.

[75]Supreme Court (Chile) No 20187–147, 25 August 1976, *cf FO Vicuña/FO Bauzá* National Treaty Law and Practice: Chile (1999) 20 Studies in Transnational Legal Policy 33, 44.

[76]Supreme Court (Chile) *Fallos del Mes* No 24128–311, 22 October 1984, 588.

[77]*G Cavalier* National Treaty Law and Practice: Colombia (1999) 30 Studies in Transnational Legal Policy 69, 80.

[78]Art 49 Austrian Federal Constitution of 1920; an overview is provided by *T Öhlinger* in *K Korinek/M Holoubek* (eds) Österreichisches Bundesverfassungsrecht Vol 2 (2009) Art 50 B-VG MN 27, 106.

In the autumn of 1918 it was obvious for everyone that the overwhelming course of events had made the treaty meaningless in practice. In this critical situation it could not be expected of the German government to promulgate formally to its citizens the obsolescence of the treaty, even though it had initially been promulgated formally [. . .].“[79]

III. Direct Application of Treaties: Monistic Approach

If an international treaty is readily applicable within the national legal order despite its character as an international legal instrument, the national legal order pursues a monistic approach. Nonetheless, the national legal order must, in one way or another, authorize State organs to directly apply the international treaty. As to that, one current method is to integrate all international treaties binding upon the State by means of a blanket provision (**adoption**[80] or **incorporation**).[81] This being the case, the direct application of a specific international treaty within the national legal order may be subject to further conditions, above all its **self-executing character** (→ MN 38). **36**

Art VI cl 2 US Constitution of 1787: “[. . .] all treaties [. . .] shall be Supreme Law of the land”.

Other national legal orders select a specific treaty for direct application, *eg* the ECHR,[82] and yet others require that a national act **authorizes** the direct application of every single treaty (*Vollzugsbefehl*). The parliamentary approval of ratification is particularly suitable for this effect. Some legal systems deem it necessary that, next to the parliamentary approval, the ratified treaty has to be published in the **official journal** to gain direct applicability (→ MN 34). From the viewpoint of strict monism, the publication requirement unmasks the system as dualistic. Today, however, it may also fall within the rubric of **moderate monism**.[83] **37**

[79]Translation by the author.

[80]For the diverging usage of the term ‘adoption’, see *WE Butler* International and Municipal Law: Some Reflections on British Practice in *WE Butler* (ed) International Law and International System (1987) 67, 68.

[81]*L Wildhaber/S Breitenmoser* The Relationship between Customary International Law and Municipal Law in Western European Countries (1988) 48 ZaöRV 163, 177, 179 *et seq*.

[82]Lov om den Europæiske Menneskerettighedskonvention, Dansk Lovtidende A 1992, 1086; see *R Hofmann* Das dänische Gesetz vom 29. April 1992 zur innerstaatlichen Anwendbarkeit der EMRK (1992) 19 EuGRZ 253, 255.

[83]Within the monistic Swiss legal system, the failure to publish the incorporated treaty does not frustrate the binding force of the treaty (Federal Court (Switzerland) *Frigerio v EVED* ATF 94 I 669 (1968) 97 I BGE 669); however, the non-published treaty cannot create duties for individuals within the Swiss legal order, Joint statement of the Bundesamt für Justiz and the Direktion für Völkerrecht of 26 April 1989, (1990) 27 Schweizerisches Jahrbuch für internationales Recht 139.

IV. Mixed Approach: Transformation à la carte

38 Even if the national constitution arranges for the direct application of international treaties (→ MN 36), it might be difficult to stay the course if only because practical reasons argue for a case-by-case choice between adoption and general transformation respectively (→ MN 31, 36) and special transformation (→ MN 31). Several legal systems with a rather monistic outlook differ between self-executing treaties and non-self-executing treaties. Whereas the former are readily applicable within the national legal order upon ratification, the latter require national acts of special transformation.[84]

> Within the US legal system, the idea of non-self-executing treaties was first advanced by Chief Justice *Marshall* in *Foster & Elam v Neilson* (1828): "Our constitution declares a treaty to be the law of the land. [. . .] But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court."[85]

39 The non-self-executing character of the entire treaty or single provisions can be deduced from the **terms of the international treaty** including attached declarations on the issue (→ Art 31 MN 62–69). Provided that the treaty is noncommittal in this regard, States are free to decline or admit the self-executing character of the treaty within their own national legal sphere.

> The Restatement (Third) of Foreign Relations Law of the United States considers treaties as 'non-self-executing' if one of three conditions is present: "(a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, of (c) if implementing legislation is constitutionally required".[86] Since the late 1970s, the US government attached **non-self-executing declarations** to the ratification of all human rights treaties to which the United States is party.[87] According to the settled case law of the ECJ (in keeping with the United States[88] and Japan[89]), the WTO agreements are not self-executing within the European legal order due to their flexible features.[90] Indeed, a self-executing character of the WTO agreements

[84] See Art 50 para 2 no 3 Austrian Federal Constitution of 1920: "At the time of giving its sanction to a treaty, the National Council can resolve to what extent the treaty in question shall be implemented by the issue of laws." (translation by the author).

[85] Supreme Court (United States) *Foster & Elam v Neilson* (1829) 27 US 253.

[86] Restatement (n 8) § 111.

[87] *MA Waters* Creeping Monism: the Judicial Trend Towards Interpretive Incorporation of Human Rights Treaties (2007) 107 CLR 629, 639.

[88] See the US GATT implementing legislation 19 USC § 102(c).

[89] *Cf JH Jackson/WJ Davey/AO Sykes* Legal Problems of International Economic Relations (1995) 224–226.

[90] Beginning with ECJ (CJ) *International Fruit Company* 21–24/72 [1972] ECR 1219; see also the much-noticed case *Germany v Council* C-280/93 [1997] ECR I-4973, para 110; for an overview *P Ruffley/M Weisberger* The WTO Agreement in European Community Law: Status, Effect and Enforcement (2005).

was not intended by the drafters.[91] WTO parties may non-etheless unilaterally consider the agreement as self-executing within their legal orders, as is the case with the TRIPS provisions (falling within the exclusive competence of EU Member States) within the Austrian legal order.[92]

As a rule, distinction has to be made between the applicability of treaty provisions by State organs and the **right of individuals to directly invoke treaty provisions** within municipal courts.[93] A treaty may be fit for direct application by the executive branch without providing for individual rights enforceable before national courts. **40**

Despite the dualistic approach of the Australian and Canadian legal order, there is consensus that *eg* defense or peace treaties do not require transformative legislation because they do not directly affect individuals but bind the federal government in its conduct of external affairs.[94]

V. Placement Within the National Legal Order

The positioning of incorporated treaties within the national legal order is of decisive importance when the treaty provisions are inconsistent with other rules of the national legal order. Dependent on their placement within the hierarchy of norms, the conflict must be resolved according to the **special conflict resolution** provided by the respective legal order or by means of the **general derogation rules** *lex superior derogat legi inferiori* (the higher ranking law prevails over the lower ranking law), *lex posterior derogat legi priori* (the latter law prevails over the earlier law) and *lex specialis derogat legi generali* (the special law supersedes the general law).[95] **41**

The hierarchical position of international treaties within the national legal order has to be answered for each national system separately, irrespective of whether the State follows a (moderate) monist or dualist approach. Some constitutions directly **42**

[91]The proposal of Switzerland to secure the direct effect of the agreements within WTO Member States was refused; see the communication of Switzerland of 18 January 1990, Doc MTN.GNG/NG13/W/36; for the discussion of the proposal in the negotiating group on dispute settlement, see Doc MTN.GNG/NG13/18 paras 14–22.

[92]See Art 1 TRIPS: "Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice." The Austrian parliament approved the ratification of TRIPS pursuant to Art 50 para 1 of the Federal Constitution and thus has waived the option to order that TRIPS shall be implemented by the issue of laws (Art 50 para 2 no 3 as amended in 2008 Austrian Federal Constitution).

[93]*Jackson* (n 55) 316–318.

[94]For Australia, see High Court (Australia) *Ex parte Lam* [2003] HCA 6 para 100; for Canada, see Judge *Angers* in Supreme Court (Canada) *Ritchie v The King* [1943] 3 DLR 540, 545; for details see *J-G Castel* International Law: Chiefly as Interpreted and Applied in Canada (3rd ed 1976) 973, 977 *et seq*.

[95]On the legal nature of these general principle of conflict solution see *E Vranes* Lex superior, lex specialis, lex posterior – zur Rechtsnatur der 'Konfliktlösungsregeln' (2005) 65 ZaöRV 391; ILC SR *Koskenniemi* Fragmentation of International Law UN Doc A/CN.4/L.682 paras 47 *et seq*.

decide on the hierarchical position of treaty law by defining the rank[96]; others provide for conflict resolutions that imply a certain rank.

> See *eg* Art 15 para 4 **Constitution of the Russian Federation** of 1993 (derogation of statutory law): "If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rule of the international treaty shall apply." For superiority of treaty law see Art 91 para 3 **Constitution of the Netherlands** of 1956 (modification of the Constitution with approval of the *pouvoir constitué*): "Any provisions of a Treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Houses of the States General [Parliament] only if at least two-thirds of the votes cast are in favour."

43 Without an unmistakable constitutional conflict resolution, **national jurisprudence** usually follows the rule that the hierarchical position of the incorporated treaty depends on the respective State organ, which has incorporated the treaty. This is perfectly clear for dualist States given that the treaty is transformed by legislative organs into internal law.[97] Even for moderate monist States the internal act of approval may be decisive for the position of the international treaty within the national legal order.[98]

> For the case-law of US courts with regard to conflict resolution see § 115 Restatement (Third)[99]: "(1) (a) An Act of Congress supersedes an earlier [. . .] provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier [. . .] provision is clear and if the act and the earlier [. . .] provision cannot be fairly reconciled. [. . .] (2) A provision of a treaty of the United States that becomes effective as law of the United States supersedes as domestic law any inconsistent pre-existing provisions of a law or treaty of the United States. (3) [. . .] [A] provision of an international agreement of the United States will not be given effect as law in the United States if it is inconsistent with the United States Constitution."

44 The case law of other legal systems is geared to safeguard international treaty obligations within the national sphere by granting **superiority** to statutory law or even to the constitution.

> Until 1971, Belgian courts held that duly ratified treaties had the rank of statutory law. The position was abandoned by the Supreme Court in the *Le Ski* case: "Where there exists a conflict between a rule of domestic law and a rule of international law which has a direct effect on the domestic legal system, the rule established by the treaty must prevail; [. . .] the

[96] See Art 55 French Constitution of 1958: "Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie." See on the case law of French courts *T Buergenthal* Self-Executing and Non-Self-Executing Treaties (1992) 235 RdC 303, 347.

[97] Art 59 Basic Law (Constitution) of 1949 for the Federal Republic of Germany; Art 80 Italian Constitution of 1947; for Finland see *K Joutsamo* The Direct Effect of treaty provisions in Finnish Law (1983) 52 Nordic JIL 34, 36–37.

[98] Art 50 Austrian Federal Constitution of 1920 as amended in 2008.

[99] Restatement (n 8) § 115.

supremacy of the latter is attributable to the very nature of international conventional law."[100] While the Swiss Federal Constitution of 1999 (Art 190) does not decide on conflicts between international treaties and domestic law, **Swiss courts** are in two minds about the issue. According to recent jurisprudence, international treaties prevail over statutory law.[101]

VI. Pro-treaty Interpretation: Avoiding Conflicts

It is a common principle of jurisprudence that potential conflicts between laws must be resolved by way of interpretation in the first place (**principle of consistent interpretation**). Irrespective of whether the State follows a rather monistic or dualistic stance, this rule is valid for conflicts between treaty provisions and internal law in order to prevent the *lex posterior*/*lex specialis* conflict resolution from overruling international treaty obligation (**pro-treaty interpretation**).[102] **45**

The Supreme Court decided in the *United States v PLO* case: "Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence."[103] See also the *Teoh* decision of the High Court of Australia: "It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law."[104]

The situation is more complex when treaty provisions clash with *lex superior*, *ie* **constitutional law**, given that it is the higher law that usually sets the benchmarks for interpretation. However, since the constitution itself enables the State to enter into international relations, it is presumed that within the limits of constitutional interpretation, conflicts with lower ranking treaties must be avoided as far as possible. However, the constitution's receptiveness to international law must necessarily come to an end when the pro-treaty interpretation endangers individual rights guaranteed by constitutional law. **46**

The German Federal Constitutional Court held in its *Görgülü* decision: "The guarantees of the [ECHR] influence the interpretation of the fundamental rights and constitutional principles of the [German] Basic Law. The text of the Convention and the case-law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a restriction or reduction of protection of the individual's fundamental rights under the Basic Law – and this the Convention itself does not desire (see Article 53 of the Convention)."[105]

[100] Supreme Court (Belgium) *Le Ski* [1971] Pasicrisie belge I-886, 919.

[101] BGE 122 II 485, 487; for details, see *H Keller* Rezeption des Völkerrechts (2003) 355–364.

[102] *Ferdinandusse* (n 50) 147.

[103] US District Court for the Southern District of New York (United States) *United States v PLO* 695 FSupp 1456, 1459 (1988).

[104] High Court (Australia) *Minister for Immigration and Ethnic Affairs v Teoh* (n 70).

[105] Federal Constitutional Court (Germany) *Görgülü* 111 BVerfGE 307 (2004).

F. Treaties Within the Legal Order of International Organizations

I. Inherent Monism

47 Being **legal sub-systems** within the international legal order, each international organization operates first and foremost within its own legal universe,[106] comprising of its constituent instrument, all legal acts derived thereof (**deduced rules**) and the body of international law binding upon the international organization.[107] International treaties concluded by the international organization (→Art 6 MN 26–32) belong to the latter category. Upon their entry into force, international treaties readily find their way into the organization's legal order, forming an **integral part** of the latter without the need for any act of incorporation or transformation.[108] This flawless monistic stance comes naturally to international organizations given their legal character as international subjects whose constituent instruments are international treaties themselves. It depends non-etheless on the constituent instrument whether it departs from the monistic assumption and takes another, more dualistic stance.

II. Placement Within the Hierarchy of International Organization Rules

48 Even if international organizations are creations of and legal sub-systems within international law, Art 27 para 2 VCLT II does not effectuate a top-rank position of treaties within international organizations' hierarchy of rules. The provision's reference to "rules of international organizations" as defined in Art 2 para 1 lit j VCLT II is far too broad and undifferentiated for this purpose.

49 International treaties in force to which an international organization is a party necessarily rank lower than its constituent instruments. Construed otherwise, the international organization would be in the position to modify its constituent instrument by concluding deviating international treaties. This effect, however, would contravene the fundamental rule that the constituent instrument is binding upon all organs of the international organization for the simple reason that the former creates and empowers the latter. An important exception applies to international treaties reflecting general international law of *ius cogens* character: given the invalidating effect of *ius cogens* on deviating constituent instruments (→ Art 53 MN 57–60), it is safe to say that *ius cogens* is not only binding upon all international organizations but also constituting the **apex of the pyramid of rules of international organizations**.

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[106] *Cf* Art 2 para 1 lit j VCLT II.

[107] *K Schmalenbach* International Organizations or Institutions, General Aspects in MPEPIL (2008) para 55.

[108] *HG Schermers/NM Blokker* International Institutional Law (2004) § 1335.

50 According to the case law of the ECJ, treaties to which the European Union is a party take primacy over EU secondary law.[109] Given the special nature of the EU treaties in the eyes of the ECJ, the approach is not qualified for **inductive reasoning**. However, in the light of Art 26 and the international organizations' foundation in international law, it is safe to say that, unless explicitly stated otherwise (*eg* Art 103 UN Charter), the constituent instruments **implicitly** carry the rule that international treaty obligations of the international organization take precedence over conflicting decisions of their organs.

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[109]ECJ (CJ) *Intertanko et al* C-308/06 ECR I-4057 para 42; *Algemene Scheeps Agentuur Dordrecht* C-133/04 [2006] ECR I-609 para 52.

Section 2
Application of Treaties

Article 28

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Contents

A. Purpose and Function

The **scope of a treaty** between States has various limits. They emanate from its parties (application *ratione personae*), its content (application *ratione materiae*), its territorial application (application *ratione loci*) and its temporal applicability (application *ratione temporis*). Therefore, each treaty has a personal, a material, a territorial and a temporal scope. While many articles of the Vienna Convention refer to the personal and material scope (see *eg* Arts 6–18, 34–38, 41 and Arts 19–23, 31–33, 39–40 respectively), both the territorial and temporal scope are governed by only one provision respectively: Art 29 deals with the territorial, Art 28 with the temporal scope. **1**

Art 28 forms part of the so-called **inter-temporal law**, *ie* the rules aim at resolving a temporal conflict of laws. If a new law enters into force, the conflict rules determine whether the new or the old law is applicable to a certain incident. Such conflict rules may have a bilateral or a unilateral character.[1] They are bilateral if they contain provisions on the applicability of the old and the new law. If they regulate only one of the two aspects, they are unilateral. Art 28 provides for the non-applicability of a new treaty. It does not decide on the law to be applied instead. Therefore, Art 28 constitutes a **unilateral** conflict rule.[2] Furthermore, a conflict rule **2**

[1] *B von Hoffmann/K Thorn* Internationales Privatrecht einschließlich der Grundzüge des Internationalen Zivilverfahrensrechts (2007) 177.

[2] *A Bleckmann* Die Nichtrückwirkung völkerrechtlicher Verträge: Kommentar zu Art. 28 der Wiener Vertragsrechtskonvention (1973) 33 ZaöRV 38, 41.

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may be orientated towards past or future incidents, *ie* it may be retroactive or prospective.[3] Art 28 is a **retroactive** conflict rule. Finally, a treaty provision may be formulated in a positive or in a negative manner. Art 28 determines in which cases a new treaty is not applicable. Therefore, Art 28 is a **negative** conflict rule.

3 The VCLT contains another inter-temporal provision: **Art 4** establishes the non-retroactivity of the Convention itself. Art 4 is a supplement to Art 28.[4] By determining that the Convention is only applicable to treaties concluded after its entry into force, it simultaneously establishes that the non-retroactivity as set forth in Art 28 only applies to treaties concluded after 27 January 1980.

4 The non-retroactivity of a treaty, however, does not mean that a treaty, which has not entered into force, has no effects at all. **Art 18** lays down the obligation of the States Parties not to defeat the object and purpose of a treaty prior to its entry into force. Art 18 does not constitute a retroactive provision; it is not an exception to Art 28.[5] It is a rule of good faith. Furthermore, unlike Art 28, the legal effect provided for in Art 18 does not emanate from the treaty itself ("unless a different intention appears from the treaty or is otherwise established") but directly from Art 18.

B. Historical Background and Negotiating History

5 Art 28 **codified an existing rule of public international law**.[6] It is unclear, however, whether the non-retroactivity of treaties was a rule of customary international law[7] or a general principle of law.[8] There are facts that speak in favour of both possibilities. On the one hand, States usually do not provide for retroactivity of the treaties they conclude. This constant State practice is a strong indication for a rule of customary law. On the other hand, non-retroactivity is an essential principle

[3] See *eg* Draft Art 57 as proposed by SR *Waldock* in 1964 (*Waldock* III 10 *et seq*). Art 28 para 1 was retroactive; Art 28 para 2 was prospective.

[4] See *P McDade* The Effect of Article 4 of the Vienna Convention on the Law of Treaties 1969 (1986) 35 ICLQ 499, 501–502. Similarly *M Villiger* Customary International Law and Treaties (1997) 253 by pointing out that Art 4 does not constitute an exception to Art 28.

[5] *Sinclair* 86; *F Dopagne* in *Corten*/*Klein* Art 28 MN 6. During the Vienna Conference, however, Finland proposed to include a reservation referring to Draft Art 15 (the later Art 18), but this proposal was rejected, since Draft Art 15 did not relate to the retroactive application of a treaty, UNCLOT II 428 para S 1.

[6] See ICJ *Ambatielos Case (Greece v United Kingdom)* (Preliminary Objection) [1952] ICJ Rep 28, 40; *F Dopagne* in *Corten*/*Klein* Art 28 MN 6.

[7] Federal Court (Australia) *Victrawl Pty Ltd v AOTC Ltd et al* 117 ALR 347, No 37 (1993); *HW Briggs* Reflections on the Non-Retroactivity of Treaties in Festschrift de Luna (1968) 171, 172.

[8] See Art 1 of the IDI Resolution, The Intertemporal Problem in Public International Law (1975) 56 AnnIDI 536; ECommHR *de Becker v Belgium* App No 214/56 [1958–1959] YbECHR 214, 231 (1958); *D Bindschedler-Robert* De la rétroactivité en droit international public in *Faculté de droit de l'Université de Genève* (ed) Festschrift Guggenheim (1968) 184, 185.

in most domestic legal orders, especially in penal law.[9] Most likely, the principle of non-retroactivity is to be considered as both a rule of customary international law and a general principle of law.[10]

Two different approaches determined the negotiation process.[11] The first approach focused on the provisions on the **entry into force** of a treaty. In 1956, SR *Fitzmaurice* proposed a clause on the non-retroactivity of the entry into force.[12] The intention of the proposal was to reject the ancient US retroactivity doctrine. According to this doctrine, a treaty did not enter into force on the date of its ratification, acceptance, approval or accession, but retroactively on the date of its signature.[13] SR *Waldock*[14] and the Drafting Committee[15] took on board the idea of introducing a clause on the non-retroactivity of the entry into force in 1962, and only changed its wording. In 1965, however, the idea was dropped.[16] **6**

Instead, the second approach concerning the **application and effects of a treaty** was further developed. Draft Art 57, as proposed by SR *Waldock* in 1964, contained a clause on the non-retroactivity of the application of a treaty in para 1 and a clause on its non-prospectivity in para 2.[17] In 1966, the wording and the numbering (Draft Art 57 became Draft Art 56) were discussed and adapted.[18] In the Final Draft, para 2 was deleted and para 1 became Draft Art 24. Furthermore, the wording was slightly changed ("an act" was replaced by "any act").[19] The present Art 28 corresponds to Draft Art 24 of the Final Draft. It was adopted by the Vienna Conference by 97 votes to none, with one abstention.[20] **7**

[9] *Nullum crimen, nulla poena sine lege*. A closer look at domestic law, however, shows that the principle of non-retroactivity is not accorded the same degree of respect and the same mode of operation in every State and in every subject matter, see *JT Woodhouse* The Principle of Retroactivity in International Law (1955) 41 TGS 69 *et seq*.

[10] Similarly *F Dopagne* in *Corten/Klein* Art 28 MN 6.

[11] *Bleckmann* (n 2) 38–40.

[12] See Draft Art 42 para 6, *Fitzmaurice* I 116.

[13] In the United States, the retroactive entry into force of a treaty was deduced from the retroactive entry into force of national laws, see *G Kisker* Die Rückwirkung von Gesetzen: eine Untersuchung zum anglo-amerikanischen und deutschen Recht (1963) 9 *et seq*. A comprehensive list of writers supporting this theory is to be found in the Harvard Draft 799 *et seq*.

[14] Draft Art 21 para 1 lit c, *Waldock* I 71.

[15] Draft Art 20 para 4, [1962-I] YbILC 258. Draft Art 20 para 4 became Draft Art 23 para 4, [1965-I] YbILC 99.

[16] [1965-I] YbILC 273, 285.

[17] *Waldock* III 10 *et seq*.

[18] [1966-I/2] YbILC 38.

[19] Final Draft, Art 24, 211.

[20] UNCLOT II 55 para 48.

C. Elements of Article 28

I. Unless a Different Intention Appears from the Treaty or Is Otherwise Established

8 States are free to give a treaty, or some of its provisions, retroactive effect. The question **is whether this intention has to be explicitly laid down by the treaty**. The ILC deliberately chose the phrase "unless a different intention appears from the treaty or is otherwise established" instead of using the frequently employed clause "unless the treaty otherwise provides". It did so in order to allow for cases where it is not the specific provisions but the "very nature of the treaty" that indicates that it is intended to have retroactive effects.[21] The broader meaning of the phrase used in Art 28 is confirmed when comparing it to similar 'escape clauses' used in other provisions of the Convention.[22]

9 Therefore, three different cases are covered by Art 28.[23] The phrase "unless a different intention appears from the treaty" refers to the case where the retroactivity is **expressly formulated**[24] in a treaty provision.

> A good example is Art 7 para 2 of the 1978 Vienna Convention on Succession of States in Respect of Treaties[25]: "A successor State may, at the time of expressing its consent to be bound by the present Convention or at any time thereafter, make a declaration that it will apply the provisions of the Convention in respect of its own succession of States which has occurred before the entry into force of the Convention in relation to any other contracting State or States Parties to the Convention which makes a declaration accepting the declaration, of the successor State."

10 The formula "unless a different intention appears from the treaty" also applies to cases in which the retroactivity results from the **interpretation** of a treaty provision ("terms of the treaty in their context and in the light of its object and purpose", → Art 31).

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[21] See Final Draft, Commentary to Art 24, 212 para 4. The inclusion of cases in which the retroactivity does not emanate from the text of the treaty itself, was not uncontested. See *eg* the objections of Turkey that proposed the phrase "unless the treaty stipulates otherwise" in order to limit the retroactivity to specific and definite cases, [1966-II] YbILC 63 para 4.

[22] *V Haak* 'Unless the Treaty Otherwise Provides' and Similar Clauses in the International Law Commission's 1966 Draft Articles on the Law of Treaties (1967) 27 ZaöRV 540.

[23] *F Dopagne* in *Corten/Klein* Art 28 MN 28 *et seq*; *Bleckmann* (n 2) 51.

[24] Sometimes, even though there is an explicit clause on retroactivity, its interpretation might lead to difficult questions, see *eg* Appellate Body *Brazil – Measures Affecting Desiccated Coconut* WT/DS22/AB/R para 15 *et seq* (1997) where the retroactivity clause of the Agreement on Subsidies and Countervailing Measures had to be considered in its context and in light of the object and purpose of the WTO Agreement.

[25] 1946 UNTS 3.

An example[26] of such a type of treaty provision is Art VI of the 1871 Treaty of Washington[27]: "In deciding the matters submitted to the Arbitrators they shall be governed by the following three rules, which are agreed upon by the High Contracting Parties as rules to be taken as applicable to the case [. . .]. Her Britannic Majesty has commanded Her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article I arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that, in deciding the questions between the two countries arising out of those claims, the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules."

11 The addition that the intention may also be "otherwise established" refers to cases where the retroactivity emanates from the **nature of the treaty**. Since the nature of the treaty is part of the treaty itself, the notion "otherwise established" is misleading.[28] The nature of a treaty is closely linked to its purpose; therefore, the distinction between the second and the third type of case covered by Art 28 is not always easy to draw.

Usually, two types of treaties with a retroactive nature are mentioned: the first is a treaty aimed at interpreting a prior treaty. In the *Chamizal Tract* case[29] the International Boundary Commission decided that the boundary convention between the United States and Mexico of 1884 was such a treaty. It provided in its Art I that any changes caused by the slow and gradual erosion and deposit of alluvium did not affect the border line lying in the centre of the normal channel of the Rio Grande. This borderline had been established by the prior boundary conventions of 1848 and 1853. Therefore, the nature of the treaty of 1884 was to interpret the two prior boundary conventions.

The second type of treaty with a retroactive nature is a treaty whose provisions extend to legal situations dating from a time previous to its own existence. An example for such a treaty is the Protocol XII[30] to the 1923 Treaty of Lausanne.[31] In the *Mavrommatis Palestine Concessions* case the PCIJ pointed out that the protocol "was drawn up in order to fix the conditions governing the recognition and treatment by the contracting Parties of certain concessions granted by the Ottoman authorities before the conclusion of the protocol."[32] Therefore, even if the protocol did not contain an explicit clause it nevertheless had to be retroactively applied since the protocol would otherwise be ineffective.

[26]This example is mentioned by *F Dopagne* in *Corten/Klein* Art 28 MN 30.

[27]1871 Treaty between Her Majesty and the United States of America, for the Amicable Settlement of All Causes of Difference between the Two Countries ('Alabama' Claims; Fisheries; Claims of Corporations, Companies or Private Individuals; Navigation of Rivers and Lakes; San Juan Water Boundary; and Rules Defining Duties of a Neutral Government During War) 61 BFSP 40.

[28]*F Dopagne* in *Corten/Klein* Art 28 MN 31.

[29]International Boundary Commission *International Title to the Chamizal Tract (United States v Mexico)* (1911) 5 AJIL 785 *et seq*.

[30]1923 Protocol Relating to Certain Concessions Granted in the Ottoman Empire, and Declaration by Turkey [1924] ATS 14.

[31]1923 Treaty of Peace [with Turkey] [1924] ATS 9.

[32]PCIJ *The Mavrommatis Palestine Concessions* PCIJ Ser A No 2, 34 (1924).

II. Bind a Party

12 At first sight, the word "bind" could be interpreted as only referring to **obligations**. In this case the date of the entry into force of a treaty would only lead to the existence of contractual obligations, while contractual **rights** could arise earlier or later. The same would be valid for **all legal effects** of treaties other than rights and obligations (*eg* founding treaties of international organizations or status treaties on interstate frontiers).

13 Such an interpretation of Art 28, however, does not take into account the comprehensive character of the non-retroactivity clause. Furthermore, it would lead to the inconsistent result that the content of a treaty would start to be applicable at different dates, depending on the legal character of each provision. Thus, the word "bind" has to be read as **'have legal consequences' or 'are applicable with respect to a party'**.[33] Hence, the content of a treaty starts to take legal effects as a whole for each party concerned.

14 Furthermore, such an interpretation of the word "bind" clarifies that the retroactive effect of a treaty **only refers to its application** and not to its entry into force. If the parties agree to give a treaty retroactive effect, the treaty will be applicable prior to its entry into force. It will not enter into force earlier than foreseen.[34]

III. Act/Fact

15 Art 28 refers to two different groups of incidents in the past: acts and facts on the one hand and situations on the other hand. Acts and facts are rather brief incidents. Their beginning and their ending are determinable. An **"act"** is **behaviour** that is attributable to a subject of law.[35] The term has to be interpreted in a wide sense. Behaviour may consist of an action or of an omission/toleration. Its character may be legal or factual. Finally, the subjects of law are both those of public international law and those of domestic law.

16 A **"fact"** is either the factual or legal **result of an act** (emissions, damage, prescription, acquisition) or something that **occurs independently of an act** (natural disaster, the passage of time).[36] Like an act, a fact may also have a legal or a factual character. Instead of "fact", it would have been possible to use the term 'event'. The word "facts" was perhaps chosen because it rhymes with "acts".[37]

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[33] *F Dopagne* in *Corten/Klein* Art 28 MN 18; *Bleckmann* (n 2) 43.

[34] *Briggs* (n 7) 171–174.

[35] *Bleckmann* (n 2) 44; *A Buyse* A Lifeline in Time – Non-Retroactivity and Continuing Violations under the ECHR (2006) 75 Nordic JIL 63, 72.

[36] *Bleckmann* (n 2) 44; *Buyse* (n 35) 72. An example for an "act or fact" is the existence of a valid countervailing duty decision, see WTO Panel *United States – Countervailing Duties on Non-Rubber Footwear from Brazil* SCM/94, BISD42 S/208, para 4.10 (1995).

[37] *Bleckmann* (n 2) 44.

IV. Situation

A **"situation"** covers **both an act and a fact**. The difference is that a "situation" lasts for a **longer period of time**.[38] The exact differentiation between a situation and an act (*eg* warfare) as well as between a situation and a fact (*eg* the status of a certain territory) will not always be possible. Nevertheless, the insertion of this additional type of incident makes sense. It gives Art 28 a comprehensive character by including all incidents, regardless of their duration. **17**

The question of **which act/fact/situation is relevant** depends on the provisions of the respective treaty.[39] Only those acts/facts/situations that fall within its personal, material and territorial scope and that are a prerequisite for its provisions have to be taken into account. **18**

V. Took Place/Ceased to Exist

The uncertain delimitation between the terms "acts/facts" on the one hand and "situation" on the other hand has no legal consequences since **all three types of incidents must have been completed before the entry into force of a treaty** in order to render the non-retroactivity clause applicable. They must completely belong to the past.[40] The wording chosen for acts/facts ("took place") corresponds to their determinable beginning and ending (→ MN 15), while the term chosen for situations ("ceased to exist") takes into account that an incident that lasts for a longer period of time often ends smoothly and not at a certain date. **19**

Depending on the type of act/fact/situation, it might be difficult to determine **whether it has ended** by the time of the entry into force of a treaty. This occurs namely when there is a large number of successive acts/facts/situations that together constitute a new, comprehensive incident. In such a case, some of the acts/facts/situations might have already ended, while the overall incident is still going on. The question of whether the act/fact/situation, according to Art 28, belongs to the past can only be answered by reference to its relevance for the treaty (→ MN 18). While some treaties are geared towards single incidents, others are geared towards comprehensive ones.[41] In the first case, the incidents that took place before the entry into force of a treaty do fall within the scope of Art 28, while all the others do not. In the second case, the incident has not ended, so that Art 28 is not applicable. **20**

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[38] See *ibid*. An example for a "situation" is the continued levying of countervailing duties, see WTO Panel *United States – Countervailing Duties on Non-Rubber Footwear from Brazil* (n 36). Another example is a patent that arose from a prior act, see WTO Appellate Body *Canada – Term of Patent Protection* WT/DS170, para 72 (2000).

[39] *Bleckmann* (n 2) 45; *F Dopagne* in *Corten/Klein* Art 28 MN 12.

[40] *Buyse* (n 35) 72.

[41] See, with many examples, *N Gallus* Recent BIT Decisions and Composite Acts Straddling the Date a Treaty Comes into Force (2007) 56 ICLQ 491 *et seq*.

One example is the violation of the right to property. In 1995, the ECtHR had to decide on a case where a Greek Cypriot woman repeatedly tried in vain to gain access to her plots of land situated in the north of the island. The ECtHR did not consider every time she was stopped as a single act but as part of a continuing situation, *ie* as a continuing violation of the right to property.[42] Similar judgments concern the right to trial within a reasonable time. When examining whether a detention has been too long, the ECtHR also takes into account the detention period before the entry into force of the ECHR for the States Parties concerned.[43]

Some difficulties arise in the area of State responsibility. The "composite acts" as laid down in Art 15 ILC Draft Articles on State Responsibility,[44] *ie* several acts which, taken together, amount to a breach of an international law obligation, have to be read together with the non-retroactivity rule of Art 13. As a result, only those acts which occur after the entry into force of the respective treaty may constitute a breach of international law. The acts occurring before that date, however, can be taken into account, *eg* "in order to establish a factual basis for the later breaches or to provide evidence of intent".[45] An analysis of court decisions, especially concerning bilateral investment treaties, shows that there is still a lot of ambiguity and legal uncertainty.[46]

21 However, analyzing whether an act/fact/situation has ended is not enough to determine the exact scope of Art 28. In addition, it is necessary to make a differentiation between past incidents (***facta praeterita***), ongoing incidents (***facta pendentia***) and future incidents (***facta futura***). According to Art 28 a new treaty is not applicable to *facta praeterita*. The applicability of a new treaty to *facta pendentia* and *facta futura*, which seems logical as a converse conclusion, is not expressly provided for in Art 28, since Art 28 is a unilateral, retroactive and negative conflict rule (→ MN 2). Therefore, general principles have to be considered. The applicability of a new treaty to *facta futura* is beyond question.[47] Its applicability to *facta pendentia*, however, is not as obvious. The answer depends on whether there is a principle in public international law providing for the immediate effect of a new rule or, on the contrary, for the survival of the old rule.[48] Both principles form part of the inter-temporal law.[49] If a principle exists on the immediate effect of a new rule, a new treaty will be applicable to *facta pendentia*. If there is a principle on the survival of the old rule, a new treaty will not be applicable to them.

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[42]ECtHR *Loizidou v Turkey* (GC) (Preliminary Objections) App No 15318/89, Ser A 310, paras 99 *et seq* (1995).

[43]ECtHR *Yağcı and Sargın v Turkey* (Preliminary Objections) App No 16419/90, 16426/90, Ser A 319-A, para 49 (1995).

[44]Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) UN Doc A/56/10.

[45]*J Crawford* The International Law Commission's Articles on State Responsibility (2002) 144.

[46]*Gallus* (n 41) 503 *et seq*. For a recent case, see ICSID *MCI Power Group LC and New Turbine Inc v Ecuador* Case ARB/03/6, paras 45 *et seq* (2007).

[47]See *eg* Art 2 Code Napoléon: "La loi ne dispose que pour l'avenir; elle n'a point d'effet rétroactif."

[48]This question is discussed in detail by *Bleckmann* (n 2) 46 *et seq*.

[49]*F Dopagne* in *Corten/Klein* Art 28 MN 13.

The ILC affirmed the existence of the **principle on the immediate effect of a new rule** in public international law. It declared: **22**

> "[If] an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date."[50]

Furthermore, the ILC explained that the **principle on the survival of the old rule did not exist in public international law**. In the Final Draft, it decided to delete the proposed para 2, which had stated that "the provisions of a treaty do not apply to a party in relation to any fact or act which takes place or any situation which exists after the treaty has ceased to be in force with respect to that party".[51] The Drafting Committee was of the opinion that such a clause was closely linked to the legal consequences of the termination of a treaty (→ Art 70) and that it was unnecessary to mention it when dealing with the application of a treaty at a point of time.[52] The ILC added that a treaty that has ceased to be in force **23**

> "[only] continues to have certain effects for the purpose of determining the legal position in regard to any act or fact which took place or any situation which was created in application of the treaty while it was in force."[53]

Therefore, the principle of non-retroactivity means that, unless otherwise provided, a new treaty is not applicable to *facta praeterita*, but it is applicable to *facta pendentia*[54] and to *facta futura*.

The applicability of a treaty provision to *facta pendentia* is of special importance for the **jurisdiction of international courts or tribunals**. The jurisdictional clause of a treaty as well as a State's declarations of acceptance of jurisdiction[55] may regulate in detail on which incidents the court in question shall have jurisdiction. If this is not the case, the question arises whether the international court has jurisdiction over all disputes brought before it after the entry into force of the respective **24**

[50] Final Draft, Commentary to Art 21, 212 para 3.

[51] [1966-I/2] YbILC 38.

[52] [1966-I/2] YbILC 169.

[53] Final Draft, Commentary to Art 24, 213 para 5.

[54] See ICSID *Mondev International Ltd v United States* Case ARB(AF)/99/2, para 72; *Gallus* (n 41) 499; *Aust* 177. Some writers classify the application of a treaty to *facta pendentia* as an exception to the principle of non-retroactivity, see *eg A Chua/R Hardcastle* Retroactive Application of Treaties Revisited: Bosnia-Herzegovina v Yugoslavia [1997] NILR 414–415; *Buyse* (n 35) 70–71.

[55] Under the pre-reform system of the ECHR, *eg*, both the individual complaint with the Commission and the jurisdiction of the Court were subject to an explicit recognition by the States Parties. Some of them included a limitation in time in their declaration in order to allow jurisdiction only for incidents that took place after the date of the declaration. The problems arising out of this situation are described by *P Tavernier* L'actualité du principe de non-rétroactivité dans le cadre de la Convention européenne des droits de l'homme in *J-F Flauss/M Salvia* (eds) La Convention européenne des droits de l'homme: Développements récents et nouveaux défis (1997) 113, 115 *et seq*.

treaty, all disputes that arose after this date or all disputes relating to incidents that occurred after that date. Many international courts had to face this problem, and their judgements all go in the same direction: if jurisdictional clauses do not otherwise provide, an international court has jurisdiction over all disputes existing at the date of the entry into force of the treaty in question.

> In numerous cases the ECommHR held that it was not competent to entertain complaints regarding alleged violations of the ECHR that occurred before the entry into force of the convention with respect to the State in question.[56] If there were fresh proceedings or recurring applications of the alleged violations, however, the Commission had assumed jurisdiction.[57] The ECtHR has adopted this attitude.[58] If there is a "continuing violation" of human rights, and not only an "instantaneous act or fact" with continuing effects, it has always affirmed jurisdiction over the case.[59] The UN Commission on Human Rights declared several times that it could not consider an alleged violation of human rights said to have taken place prior to the entry into force of the Covenant for a States Parties, unless it was a violation that continued after that date or had effects which themselves constituted a violation of the Covenant after that date.[60]

25 In the preliminary objections of the *Genocide* case, the ICJ strengthened the applicability of jurisdictional clauses to facta pendentia by **inverting the burden of proof**.[61] If the States do not explicitly otherwise provide, an international court has jurisdiction over all cases brought before it, even if the incidents occurred before the entry into force of the respective treaty.

> "Yugoslavia, basing its contention on the principle of the non-retroactivity of legal acts, has indeed asserted [. . .] that, even though the Court might have jurisdiction on the basis of the Convention, it could only deal with events subsequent to the different dates on which the Convention might have become applicable as between the Parties. In this regard, the Court will confine itself to the observation that the Genocide Convention – and in particular Article IX – does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis,* and nor did the Parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement. The Court thus finds that it has jurisdiction

[56]ECommHR *X v Germany* App No 254/57 [1955–1957] YbECHR 150 (1957); *de Becker v Belgium* (n 8) 231; *X v Belgium* App No 369/58 [1958–59] YbECHR 376 (1959); *X v Belgium* App No 347/58 [1958–59] YbECHR 407, 412 (1959); *X v Belgium* App No 458/59 [1960] YbECHR 222; *X v Germany* App No 655/59 [1960] YbECHR 280; *X v Belgium* App No 793/60 [1960] YbECHR 444; *Decision of the Commission as to the Admissibility of Application No 788/60 Lodged by the Government of the Federal Republic of Austria Against the Government of the Republic of Italy* [1961] YbECHR 116, 132–145; *X v Germany* App No 892/60 [1961] YbECHR 240, 248–251; *X v Belgium* App No 1028/61 [1961] YbECHR 324.

[57]ECommHR *de Becker v Belgium* (n 8) 230–235; *X v Germany* App No 655/59 (n 56) 284–289.

[58]*Buyse* (n 35) 83 *et seq*.

[59]See *eg* ECtHR *Loizidou v Turkey* (GC) (n 42) paras 99 *et seq*; *Kalashnikov v Russia* App No 47095/99 [2002-VI] ECHR 93, para 111; *Posti and Rahko v Finland* App No 27824/95 [2002-VII] ECHR 301, para 39; *Blečić v Croatia* (GC) App No 59532/00, paras 73 *et seq* (2004).

[60]HRC *Gueye et al v France* Comm No 196/1985, UN Doc Supp No 40 A/44/40, 189, 191–192 (1989).

[61]*Chua/Hardcastle* (n 54) 418 *et seq*.

in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina."[62]

VI. Entry into Force of the Treaty with Respect to That Party

At first glance, the wording of Art 28 seems to be unequivocal. It refers to the **entry into force** of a treaty as provided for in Art 24. However, the question arises whether it also refers to the **provisional application** of a treaty as laid down in Art 25. Since the word "bind" has to be read as 'have legal consequences' or 'is applicable with respect to a party' (→ MN 13) the answer is clear: a treaty becomes binding on a party at the moment it becomes applicable to that party, *ie* at the moment of its provisional application or, at the latest, at the moment of its entry into force.[63] **26**

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[62]ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Reports 595, 617. This judgment has been criticized by some scholarly writers, see *eg S Maljean-Dubois* L'Affaire relative à l'application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslawie) Arrêt du 11 juillet 1996, exceptions préliminaires [1996] AFDI 357, 372–373; *F Dopagne* in *Corten/Klein* Art 28 MN 16. In their view, the ICJ applied the Genocide Convention retroactively.

[63]SR *Waldock* explained that the term "entry into force" covered both the entry into force generally and the entry into force provisionally and proposed to include such a clarification (*Waldock* III 10). This proposal was rejected by the Drafting Committee since the term seemed self-evident and since the introduction of a clarification would make the article unnecessary complicated ([1966-I/2] YbILC 39 *et seq*).

Article 29
Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Contents

A. Purpose and Function

Art 29 deals with the territorial scope of treaties. The personal, material and temporal scope is regulated by other provisions (→ Art 28). In spite of its apparently comprehensive heading, Art 29 **does not intend to cover the entire issue** regarding the application of treaties to territory.[1] It is limited to providing for the binding force of a treaty with respect to the territory of its parties. **1**

Even though questions of State succession are not covered by Art 29 but by Art 73,[2] State succession may be one of many possible reasons for territorial changes. Each **alteration of State boundaries** influences treaty borders. Therefore, insofar as State succession, like other forms of addition or loss of territory, leads to territorial changes, the 'moving treaty frontiers' rule (→ MN 26), implicitly embodied in Art 29,[3] applies. All other aspects of State succession, especially those affecting the identity of a State, are not governed by the law of treaties but by special rules (→ Art 73). **2**

[1] Final Draft, Commentary to Art 25, 213 para 5.

[2] *Ibid* 214 para 6.

[3] See *E Klein* Treaties, Effect of Territorial Changes (2000) 4 EPIL 941, 942.

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B. Historical Background and Negotiating History

3 Art 29 is regarded as setting out a **rule of customary international law**. Both State practice[4] and scholarly literature[5] agree on this fact. The discussions of the Final Draft in the General Assembly mirror the same consensus.[6] The congruity went so far that some members of the ILC and delegations of States even proposed to delete the provision since it was deemed to be unnecessary.[7]

4 In spite of its acceptance as a customary rule, the wording of the provision underwent **some important changes** during the negotiation process. The draft presented by SR *Fitzmaurice* in 1959 consisted of four articles (Draft Arts 25–28), each with at least three paragraphs, dealing with the territorial application of treaties.[8] The length and complexity of the provisions were due to the fact that they concentrated on special questions regarding metropolitan territory and dependent territories. It was SR *Waldock* who proposed in 1964 to deal with the territorial application of treaties in one single article (Draft Art 58)[9] by leaving aside all references to special types of territory. The provision stated in its first part that a treaty applies with respect to all the territory or territories for which the parties are internationally responsible. In its second part, it mentioned three cases in which a contrary intention may be established. The ILC simplified SR *Waldock*'s proposal by drafting Art 57, which stated that the scope of application of a treaty extends to the entire territory of each party, unless the contrary appears from the treaty.[10]

5 SR *Waldock's* proposal of 1964 constituted the basis of the later Art 29. The Final Draft of 1966 only changed its number (Draft Art 57 became Draft Art 25) and the order of its content by placing the exceptions at the beginning.[11] The new proposal stated that unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party. The Drafting Committee changed the wording slightly in 1968 by replacing the notion of "application" by the formula that a treaty is "binding" upon each party in respect of its entire territory. The new wording was considered

[4] 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, paras 102–103; Final Draft, Commentary to Art 25, 213 para 2.

[5] *K Doehring* The Scope of the Territorial Application of Treaties (1967) 27 ZaöRV 483, 484; *MB Akehurst* Treaties, Territorial Application (2000) 4 EPIL 990; *S Karagiannis* in *Corten/Klein* Art 29 MN 10–13.

[6] [1966-II] YbILC 70–73.

[7] See the commentary of *Tunkin* [1964-I] YbILC 49, or the Finnish and the Greek proposals [1966-II] YbILC 70.

[8] *Fitzmaurice* IV 47–48.

[9] *Waldock* III 12.

[10] [1964-II] YbILC 179.

[11] Final Draft, Art 25, 213.

preferable.[12] Art 25 was adopted by the Vienna Conference by 97 votes to none.[13] The present Art 29 corresponds to the adopted Art 25.

C. Elements of Article 29

I. Unless a Different Intention Appears from the Treaty or Is Otherwise Established

The wording used in Art 29 to define the exceptions to the general rule is the same as in Art 28. The addition "or is otherwise established" was introduced at a **late stage of the negotiating process**. It did not appear anywhere before the Final Draft of 1966. In prior drafts, SR *Waldock* proposed inserting the addition "or the circumstances of its conclusion". This proposal, however, met with opposition.[14] Without further explicit discussion, it was replaced by the formula "or is otherwise established" in 1966.[15] According to the ILC, the wording guarantees the "necessary flexibility to the rule to cover all legitimate requirements in regard to the application of treaties to territory".[16] The phrase did not lead to later controversy either.[17] **6**

The **question on how to interpret the formula** has not yet been decided by an international tribunal; nor did the ILC explain its meaning in the commentaries. In scholarly literature, the first part of the formula "unless a different intention appears from the treaty" is not scrutinized. It seems to be obvious that it covers the wording and the interpretation of treaty provisions. With regard to the interpretation of the second part of the formula "or is otherwise established", however, different views are to be found. One of them stipulates that it refers to further agreements between the parties concluded outside of the treaty in question.[18] Such a broad approach, however, leaves aside the focus on the treaty itself.[19] Another point of view is that the second part of the formula indicates that the judge has to free himself from the **7**

[12]UNCLOT I 429 para 54.

[13]UNCLOT II 55.

[14][1964-I] YbILC 167–169.

[15][1966-II] YbILC 64 *et seq*.

[16]Final Draft, Commentary to Art 25, 213 para 4.

[17]See the positive reactions of the delegations of Australia and the Netherlands, UNCLOT I 163 paras 54 *et seq*. Only the delegation of the Philippines had some doubts and pointed out that the phrase might seem to open the door to a party evading its obligations, see UNCLOT I 164 para 2. The new wording was adopted by the Drafting Committee without any discussion, see UNCLOT I 428 para 53. The same occurred when the provision was adopted by the Vienna Conference, see UNCLOT II 55.

[18]*Doehring* (n 5) 485–486.

[19]Furthermore, the author misinterprets an opinion of SR *Waldock*. The opinion cited by the author in n 9 does not refer to the formula "or is otherwise established" but to the formula "unless a different intention appears from the treaty", see [1964-I] YbILC 235.

classical forms of interpretation recognized by the VCLT[20] by taking into account, *inter alia*, the preparatory work of a treaty. The approach is narrower, but mainly refers to the supplementary means of interpretation as set forth in Art 32.

8 A systematically coherent approach requires a different view. In order to achieve coherent application of the Vienna Convention the formula used in Art 29 is to be **interpreted in the same way as the identical formula in Art 28**. Therefore, States are free to determine the territorial scope of a treaty. They may decide not to apply the general rule that a treaty is binding upon each party in respect of its entire territory. Such an intention may be either expressly stated in a treaty provision or result from the interpretation of a treaty provision ("unless a different intention appears from the treaty") or emanate from the nature of the treaty ("or is otherwise established") (→ Art 28). This view is confirmed by the practice of the Secretary-General as depositary of multilateral agreements. When deciding on the territorial application of a treaty he not only analyses the treaty provisions and their interpretation, but also the nature of the treaty.[21]

9 There are different types of **treaty provisions regulating the territorial scope** of a treaty (territorial clauses). Some of them are formulated in a rather neutral way by determining that any party may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which the treaty in question shall apply (general territorial clauses).[22] Others contain a detailed list of the territories to which the respective treaty is applicable[23] or not applicable[24] (specified territorial clauses).

10 Some treaties provide for a **possible extension** of their application to territories for whose foreign relations a contracting party is responsible (colonial extension clauses). The territorial extension is accomplished when the party in question has submitted a declaration to the depositary.[25] As the number of colonies and dependent territories has rapidly decreased since 1960, the instances of application of treaties to such territories have become fewer. The heated debates on the lawfulness of colonial clauses as well as the difficulties encountered[26] have lost much of their importance. Modern treaties[27] often contain a different, more neutral type of formula by providing that any party may, by a declaration addressed to the depositary, extend the application of the respective treaty to any other territory specified in

[20] *S Karagiannis* in *Corten/Klein* Art 28 MN 18.

[21] Summary of Practice (n 4) para 277.

[22] See *eg* Art 5 para 1 of the 1983 Protocol No 6 to the ECHR concerning the Abolition of the Death Penalty ETS 114; Art 2 para 1 of the 2000 Protocol No 12 ECHR ETS 177.

[23] See, *eg*, Art 52 TEU, Art 355 TFEU.

[24] See *eg* Art 23 of the 1983 Australia New Zealand Closer Economic Relations Trade Agreement [1983] ATS 2.

[25] See *eg* Art XII of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277; Art 56 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5.

[26] *Akehurst* (n 5) 991.

[27] See the explanation of *Aust* 203.

the declaration (general extension clauses).[28] Sometimes, the possibility to extend the application of a treaty is limited to a specific territory (specified extension clauses).[29]

Rarely do treaties provide for the **possible exclusion** of territories from their application. Such territorial clauses may refer to territories for the international relations of which a party is responsible (colonial exclusion clause).[30] In this case, the relevant party can declare that the treaty in question shall not apply to those dependent territories. Treaty provisions providing for the possible exclusion of any territory specified in the declaration (general exclusion clauses) scarcely exist. Sometimes, however, treaties contain a clause allowing the exclusion of a certain territory (specified exclusion clauses).[31] **11**

A special type of territorial clauses is **federal clauses**.[32] They are to be found in treaties whose subject matter falls within the legislative jurisdiction of the territorial units of some of the parties. They usually stipulate that any party may declare at any time that the relevant treaty is to extend to all its territorial units or only to one or more of them.[33] **12**

The question remains whether there are cases where the intention not to apply a treaty to the entire territory of the parties has been "otherwise established". States Practice shows that where a territorial clause is lacking, States often make **unilateral declarations** when signing or ratifying a treaty.[34] In this way, they either extend the application of the treaty in question to certain territories or they exclude them from its scope. The Secretary-General as depositary of multilateral agreements, when deciding on the acceptance of such declarations, focuses on the nature of the treaty in question. If the nature of the treaty or other special circumstances do not mandate the non-acceptance, the Secretary-General usually considers such declarations as reservations[35] (→ Art 19 *et seq*). According to the Secretary-General, unilateral declarations are not inconsistent with Art 29. The constant practice of certain States in respect of territorial application and the general absence **13**

[28]See *eg* Art 5 para 2 Protocol No 6 to the ECHR (n 22); Art 2 para 2 Protocol No 12 to the ECHR (n 22).

[29]Good examples would be the so-called Berlin clauses that were included in most of the treaties signed by the Federal Republic of Germany before the reunification in 1990. Some of them allowed Germany to extend the application of the respective treaty to Berlin, see *eg* Art 18 para 2 of the 1966 Protocol to the European Convention on Establishment of Companies ETS 57.

[30]See *eg* Art 12 of the 1956 Convention on the Recovery Abroad of Maintenance 268 UNTS 3.

[31]Some of the Berlin clauses provided for the possibility to exclude Berlin from the application of a treaty, see *eg* Art 19 of the 1958 Cultural Convention between the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany 343 UNTS 241

[32]See the various examples provided by *Aust* 209 *et seq*.

[33]See *eg* Art 93 para 1 of the 1980 UN Convention on Contracts for the International Sale of Goods 1489 UNTS 3.

[34]See the various examples provided by *Sinclair* 90–91; *Aust* 205–206 and in Summary of Practice (n 4) paras 277 *et seq*.

[35]See Summary of the Practice para 277; *Akehurst* (n 5) 991.

of objections to such practices are in conformity with the second part of the formula of Art 29: the different intention "is otherwise established".[36]

> There are examples where a unilateral declaration of a State Party excluding certain territories from the scope of the treaty in question has not been accepted. In the *Ilascu* case[37] the ECtHR had to decide on a declaration made by Moldavia at the time of ratification of the ECHR. The declaration on territorial exemption concerned Transdniestria and was based on the fact that Moldavia had no control or jurisdiction over that part of its territory since it was under Russian occupation. The Court came to the conclusion that such a declaration was incompatible with Art 1 ECHR which obliges States Parties to secure to everyone within their jurisdiction the rights and freedoms of the Convention. The Court stated that "where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State. Nevertheless, such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory. The State in question must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention."[38]

II. Treaty

14 In the absence of an explicit territorial clause or a different intention that can be otherwise established, the general rule set forth in Art 29 applies.[39] It only refers, however, to **treaties that have a territorial scope**. Most treaties belong to this category. Conventions on environmental issues, protection of culture, extradition or trade questions, *eg*, are intended to be applied to the territory of the States Parties. Only few treaties do not refer to the State as a territory but as a subject of public international law.[40] Arbitration treaties or treaties establishing a duty to pay compensation are examples of treaties lacking a territorial scope in the ordinary sense.

15 Furthermore, there are specific treaties that **expressly relate to a particular territory or area**. A well-known example is the Antarctic Treaty.[41] Other, even

[36] See Summary of the Practice para 285.

[37] ECtHR *Ilaşcu et al v Moldavia and Russia* App No 48787/99 [2004-VII] ECHR 318.

[38] *Ibid* para 333. For further information, see *L Lijnzaad* Trouble in Tiraspol: Some Reflections on the Ilascu Case and the Territorial Scope of the European Convention on Human Rights (2002) 15 Hague YIL 17–38; *S Karagiannis* Le territoire d'application de la Convention européenne des droits de l'homme: vaetera et nova (2005) 61 RTDH 33, 69 *et seq*.

[39] Final Draft, Commentary to Art 25, 213 para 2.

[40] *Sinclair* 87.

[41] 1959 Antarctic Treaty 402 UNTS 71.

more striking examples are the Moon Treaty[42] or the Outer Space Treaty.[43] Such cases, in which a territory or an area constitutes the object to which the treaty applies, are **not be confused with the territorial scope as set forth in Art 29**.[44] SR *Waldock* made a clear distinction by pointing out that:

> "in that event the territory or area in question is undoubtedly the object to which the treaty applies. But this is not what the territorial application of a treaty really signifies, nor in such a case is the application of the treaty confined to the particular territory or area. The 'territorial application' of a treaty signifies the territories which the parties have purported to bind by the treaty and which, therefore, are the territories affected by the rights and obligations set up by the treaty. Thus, although the enjoyment of the rights and the performance of the obligations contained in a treaty may be localized in a particular territory or area, as in the case of Antarctica, it is the territories with respect to which each party contracted in entering into the treaty which determine its territorial scope."[45]

Therefore, a distinction has to be made between the territory in which the treaty is applied and the territory upon which the treaty is binding. Only the latter question is governed by Art 29.

Another necessary distinction refers to **treaties and their protocols**. They have to be regarded as two different documents. Each of them might have a different territorial application depending on the existence of territorial clauses and on their wording.[46] Still, the question remains as to which rule is to be applied if a treaty contains a territorial clause whereas its protocol does not. The question is of special importance if the protocol in question amends the treaty. According to the practice of the Secretary-General as depositary of multilateral agreements: **16**

> "when a State becomes a party to such a protocol it becomes a party to the convention as amended as soon as the amendments have entered into force. If the State had extended the application of the original convention to certain of its non-metropolitan Territories, the amended convention, once in force, applies only to those same Territories."[47]

III. Bind

The formula that a treaty "is binding" upon each party was added by the Drafting Committee in 1968 (→ MN 5). The Final Draft still proposed – like all other previous drafts – using the formula that "the application" of a treaty extends to **17**

[42] 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies 18 ILM 1434.

[43] 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies 610 UNTS 205.

[44] *S Karagiannis* in *Corten*/*Klein* Art 29 MN 7.

[45] *Waldock* III 12. SR *Waldock* emphasized this point again during the discussions, see [1964-II] YbILC 49.

[46] All protocols to the ECHR, *eg*, have their own territorial clauses. However, they correspond to the territorial clause of the Convention itself.

[47] Summary of the Practice para 271.

the entire territory of each party. The reason for this **change of wording** was the higher precision and clarity achieved with the new formula. Many Committee members had agreed during the discussions that some of the objections made to the provision could be overcome by the new formula.[48]

18 The **difference between being 'applied' and being 'binding'** is strongly connected with the object to which the treaty refers. It is necessary to distinguish between the object to which the treaty applies and the territory with regard to which the treaty is binding. If the object of a treaty consists in a **particular territory or area**, like in the case of the Antarctic or the Moon Treaty (→ MN 15), the difference between being 'applied' and being 'binding' is obvious. The geographical application of the relevant treaty and the geographical reach of its binding force[49] differ.

> The corresponding treaties are applied in Antarctica or on the Moon respectively. However, they bind the States Parties and all institutions/persons on their territory.

19 If the object is not a particular territory but **an item situated within the territory of a State Party** the geographical application of the treaty and the geographical extension of its binding force correspond with each other, so that the difference between being 'applied' and being 'binding' is more difficult to conceive.

> The European Convention on Architectural Heritage,[50] *eg*, refers to monuments, groups of buildings and sites as defined in Art 1 which are to be found on the territory of the States Parties. The objects to which the treaty applies are monuments, groups of buildings and sites. Its binding force covers the entire territory of the States Parties – subject to the provisions of the territorial clause contained in Art 24.

20 Therefore, the **heading of Art 29** "Territorial scope of treaties" is more precise than the headings used in the Final Draft of 1966 or in all other previous drafts. All of them opted for the misleading concept of 'application' of a treaty to a territory. The heading adopted by the Vienna Conference in 1969,[51] however, is well chosen and takes into account the two geographical aspects of treaties.

IV. Entire Territory of Each State Party

21 It seems that in the view of the ILC, the expression "entire territory" was self-explanatory. There were no debates on its content, and the commentary of the Final

[48] See the opinions of *Lachs* and SR *Waldock* [1964-I] YbILC 168.

[49] The existence of two geographical aspects of treaties is pointed out by *S Karagiannis* in *Corten/Klein* Art 29 MN 4.

[50] 1985 Convention for the Protection of the Architectural Heritage of Europe ETS 121.

[51] The final title of Art 29 appeared for the first time in the document distributed and adopted by the Vienna Conference in 1969, see UNCLOT II 55. Even the Drafting Committee still employed the term "application" in 1968, see UNCLOT I 428 para 53.

Draft was quite short. According to the ILC, the term refers to all "**the land, the appurtenant territorial waters and the air space which constitute the territory of the State**".[52] This explanation, however, lacks clarity. Two questions arise: the first concerns the distinction between metropolitan and non-metropolitan territories of a State. The second refers to the exact meaning of the words employed. The answers to both questions depend on the importance attributed to the notion of sovereignty in this context. According to the understanding of the UK delegate in the discussions in 1968, "the expression 'its entire territory' applied solely to the territory over which a party to the treaty in question exercised its sovereignty".[53] This understanding was not challenged by any other delegate.

22 The question of whether the expression "entire territory" comprises **metropolitan and non-metropolitan territories** of a State was not explicitly decided upon by the ILC. The negotiating history, however, shows that it was the intention of SR *Waldock* to establish a general rule stating that a treaty applies to all territories over which a State exercises sovereignty, including non-metropolitan territories, *ie* colonies that fall within the scope of the sovereignty of the mother country. According to his commentary, States practice showed that in the absence of a territorial clause, treaties were applied to all metropolitan and non-metropolitan territories of a State.[54] Therefore, he proposed to use the formula that "a treaty applies with respect to all the territory or territories for which the parties are internationally responsible". The ILC preferred the expression "its entire territory". However, this new wording was only chosen to avoid the association of the first term with the colonial clauses.[55] The contents of both expressions were considered equivalent. The Secretary-General as depositary of multilateral agreements confirmed the States practice described by SR *Waldock*.[56] Therefore, as a general rule, a treaty is binding in respect of all territories over which a State exercises sovereignty.

23 This result helps to answer the second question. While the words "land" and "air space" do not raise any problems, the term "**appurtenant territorial waters**" does not exist in contemporary public international law. The law of the sea as set forth in UNCLOS distinguishes between 'internal waters', the 'territorial sea', the 'contiguous zone', the 'exclusive economic zone' and the 'continental shelf'. According to Art 2 para 1 UNCLOS the sovereignty of the coastal State extends beyond its land territory and internal waters to the territorial sea. Therefore, the term "appurtenant territorial waters", established long before the comprehensive codification of the law of the sea, is to be interpreted as referring to the internal waters and the territorial sea of a coastal State.[57]

[52]Final Draft, Commentary to Art 25, 213 para 3.

[53]UNCLOT I 429.

[54]*Waldock* III 13 *et seq*.

[55][1964-II] YbILC 179; Final Draft, Commentary to Art 25, 213 para 3.

[56]See Summary of the Practice para 276.

[57]This is also the result of the analysis of *S Karagiannis* in *Corten/Klein* Art 29 MN 57; *Aust* 201.

24 Both questions, however, have **not led to significant problems in States practice**. In general, treaties in which one or both of the questions become relevant contain specific clauses regulating the territorial scope. They are adapted to the nature and the content of the respective treaty.

> A good example is Art 2 Chicago Convention on Civil Aviation.[58] It reads: "For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State." Another example is the Basel Convention on the Transboundary Movement of Wastes.[59] According to its Art 2 para 3 "transboundary movement" means "any movement of [wastes] from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State". "Area under the national jurisdiction of a State" is defined in Art 2 para 9 as "any land, marine area or airspace within which a State exercises administrative and regulatory responsibility in accordance with international law in regard to the protection of human health or the environment".

25 **Aircraft and ships** do not constitute a part of the "entire territory" of a State, even though they consist of a space/an area. They have the nationality of the State in which they are registered,[60] whose flag they are entitled to fly.[61] The State exercises its jurisdiction and control over aircraft and ships having its nationality. Therefore, aircraft and ships are not regarded as "territories"; they fall under the nationality principle. [62]

V. 'Moving Treaty Frontiers' Rule

26 The 'moving treaty frontiers' rule constitutes a **generally recognized principle of international customary law**.[63] Aspects of the rule are to be found both implicitly in Art 29 and explicitly in the Vienna Convention on State Succession in Treaties[64] (Art 15, Art 31 para 2, Art 35). Although the rule has been explicitly included in the convention on State succession, it is not a rule of State succession. As SR *Waldock* clearly stated in his second report on succession in respect of treaties in 1969:

> "the rule provides that, on a territory's undergoing a change of sovereignty, it passes automatically out of the treaty regime of the predecessor sovereign into the treaty regime of the successor sovereign. It thus has two aspects, one positive and the other negative. The positive aspect is that the treaties of the successor State begin automatically to apply in

[58] 1944 Convention on International Civil Aviation 15 UNTS 295.

[59] 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1673 UNTS 125.

[60] Art 17 Convention on International Civil Aviation (n 58).

[61] Art 91 UNCLOS.

[62] See *S Karagiannis* in *Corten*/*Klein* Art 29 MN 64.

[63] *Klein* (n 3) 941; *Doehring* (n 5) 485; SR *Waldock* [1972-I] YbILC 43.

[64] 1978 Vienna Convention on Succession of States in Respect of Treaties 1946 UNTS 3.

respect of the territory as from the date of the succession. The negative aspect is that the treaties of the predecessor State, in turn, cease automatically to apply in respect of the territory. The rule thus assumes a simple substitution of one treaty regime for another, and denies altogether any succession in respect of treaties."[65]

The reason for nevertheless **including the 'moving treaty frontiers' rule in the Vienna Convention on State Succession in Treaties** was the fact that the law of State succession is mainly concerned with the exceptions to the rule. Therefore, it was considered necessary to include the 'moving treaty frontiers' rule as a basic provision of the law of State succession in the special convention.[66] **27**

The introduction of the rule in the Vienna Convention on State Succession in Treaties, however, does not mean that the rule is not **implicitly included in Art 29** as well. The wording of Art 29 does not mention the rule explicitly, but it does not exclude it either. In fact, if the 'moving treaty frontiers' rule was not included in Art 29, a treaty would only be binding upon each States Parties in respect of its territory at the time of the conclusion of the treaty.[67] The intention of Art 29, however, is not to 'freeze' the territorial scope of a treaty at the time of its entry into force, but to provide for the application of the relevant treaty on the "entire" territory of each States Parties. This is only possible if geographical changes affecting the States Parties are taken into account.[68] Therefore, the formula "its entire territory" is **to be read as 'its entire territory at any given time'**.[69] **28**

Whereas the law on State succession invokes the 'moving treaty frontiers' rule from the State's perspective (→ MN 26), the law of treaties looks at the rule from the treaty's perspective. Therefore, even though its content does not change, the circumscription of the rule is necessarily a different one. The rule as embodied in Art 29 states that **any territorial change affecting a States Parties after the entry into force of a treaty alters the treaty frontiers**.[70] Neither the treaty regime itself nor the number or identity of the States Parties is affected. Only the territorial scope of the treaty changes, since it depends on the geographical expansion of the States Parties. **29**

Territorial changes may have many reasons. Usually, five different modes of, acquisition and loss of territory are distinguished: occupation of *terra nullius*, subjugation, accretion, prescription and cession.[71] Sometimes, especially in the latter case, the territorial change is regulated by a treaty. Such a treaty may either clarify uncertain boundaries or provide for a cession of territory. Another event that **30**

[65]SR *Waldock* Second Report on Succession in Respect of Treaties [1969-II] YbILC 52.

[66]*Ibid.*

[67]*Doehring* (n 5) 489.

[68]See the contribution of *Camara* on the draft of the Convention on the Succession of States in Respect of Treaties, [1972-I] YbILC 44: "Since that article stated that a treaty was binding upon each party 'in respect of its entire territory', it followed that, if the territory of a party to a treaty was extended, the treaty would apply to the extended territory."

[69]Similarly *Klein* (n 3) 942.

[70]*Doehring* (n 5) 489; *Klein* (n 3) 942; *Akehurst* (n 5) 991.

[71]*MN Shaw* International Law (2003) 417.

entails territorial changes is State succession.[72] Jurisprudence of international courts regarding the 'moving treaty frontier' rule to be applied in these cases does not exist. However, there are many examples of States practice.

> One example is the case of Newfoundland, a British dominion which became a province of Canada in 1949. Concerning the territorial scope of the treaties concluded by Canada the Canadian government, it was stated that "Newfoundland became part of Canada by a form of cession and that, consequently, in accordance with the appropriate rules of international law [. . .] Newfoundland became bound by treaty obligations of general application to Canada".[73]

31 The 'moving treaty frontiers' rule, however, also has **certain limits**. Depending on the object or the purpose of the treaty, a territorial change may render its execution impossible. In this case, the rule does not apply.

> Art 26 Harvard Draft took into account these limits. It read: "A change in the territorial domain of a State, whether by addition or loss of territory, does not, in general, deprive the State of rights or relieve it of obligations under a treaty, unless the execution of the treaty becomes impossible as a result of the change."[74]

Treaties providing for an objective territorial regime, such as demilitarization treaties, may serve as an example. If a States Parties loses the territory in question, it no longer has the capacity to apply the treaty. In such a case, the provision on the impossibility of performance (→ Art 61) may be invoked. The State concerned may terminate or withdraw from the treaty. The obligations which it had to fulfil cease to exist and may only be transferred to another State according to the law of State succession.[75]

32 In **States practice**, especially when a territorial change is carefully planned, the territorial scopes of each of the treaties concluded by the States involved in a territorial change are determined in detail.[76] When Hong Kong became a Special Administrative Region of China with effect of 1 July 1997, the governments of China and the United Kingdom sent a note to the Secretary-General determining the application of treaties to the territory of Hong Kong. In 1984, China and the United Kingdom had agreed that Hong Kong would enjoy a high degree of autonomy, except in foreign and defence affairs, which would be the responsibility of China. Furthermore, international agreements to which China was not a party but which

[72] One of the few authors to point out the close relationship between territorial changes and State succession is *RY Jennings* General Course on Principles of International Law (1967) 121 RdC 440–441.

[73] (1968) 6 CanYIL 276.

[74] See Harvard Draft 657 *et seq*.

[75] See *Klein* (n 3) 943.

[76] For further examples of States practice in the case of a transfer of territory, see *AMJ Heijmans* The Netherlands and State Succession with Regard to Treaties in *HF van Panhuys* (ed) International Law in the Netherlands (1978) 405, 410 *et seq*.

were implemented in Hong Kong would continue to be implemented in Hong Kong.[77] Therefore, the note read as follows:

> "I. The treaties listed in Annex I to this Note, to which the People's Republic of China is a party, will be applied to the Hong Kong Special Administrative Region with effect from 1 July 1997 as they:
> (i) are applied to Hong Kong before 1 July 1997; or
> (ii) fall within the category of foreign affairs or defence or, owing to their nature and provisions, must apply to the entire territory of a State; or
> (iii) are not applied to Hong Kong before 1 July 1997 but with respect to which it has been decided to apply them to the Hong Kong Special Administrative Region with effect from that date (denoted by an asterisk in Annex I).
>
> II. The treaties listed in Annex II to this Note, to which the People's Republic of China is not yet a party and which apply to Hong Kong before 1 July 1997, will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997.
>
> The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force beginning from 1 July 1997."[78]

In **cases of State succession,** the 'moving treaty frontiers' rule and the law on State succession are usually applied simultaneously. A good example is the reunification of Germany. The German Democratic Republic (GDR) ceased to exist as a sovereign State, and its territory was integrated into the Federal Republic of Germany (FRG).[79] From the point of view of the FRG an enlargement of its territory took place. At the same time, the FRG became the successor State of the GDR. **33**

> Consequently, the Unification Treaty[80] provided for two different rules. Art 11 applied the 'moving treaty frontiers' rule by stating that treaties concluded by the FRG, except for some agreements listed in an annex, became binding upon the territory of the former GDR ('moving treaty frontiers' rule). Art 12 dealt with the treaties concluded by the former GDR. It stated that the FRG would enter into consultation with each one of the States Parties in order to decide together on the continuation, amendment or extinction of the treaty in question (special rules on State succession).[81]

[77]For further information, see *R Mushkat* The International Legal Status of Hong Kong under Post-Transitional Rule (1987) 10 Houston JIL 1, 14 *et seq*.

[78]Letter of Notification of Treaties Applicable to Hong Kong after 1 July 1997, Deposited by the Government of the People's Republic of China with the Secretary-General of the United Nations on 20 June 1997, 36 ILM 1675**.**

[79]For further details, see *K Hailbronner* Legal Aspects of the Unification of the Two German States (1991) 2 EJIL 18–41.

[80]1990 Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity 30 ILM 457.

[81]For further details concerning the application of Art 12, see *D Papenfuß* The Fate of the International Treaties of the GDR Within the Framework of German Unification (1998) 92 AJIL 469–488.

VI. Extra-Territorial Application of Treaties

34 Art 29 only concerns the binding force of a treaty upon the territory of the States Parties. It **neither regulates nor excludes the extra-territorial scope** of treaties. Even though many members of the ILC suggested including a provision on this topic, the ILC decided to leave such questions aside. It stated that:

> "[i]n its view, the law regarding the extra-territorial application of treaties could not be stated simply in terms of the intention of the parties or of a presumption as to their intention; and it considered that to attempt to deal with all the delicate problems of extra-territorial competence in the present article would be inappropriate and inadvisable."[82]

Therefore, strictly speaking, the matter of extra-territorial application of treaties does not fall under the scope of Art 29.

35 Nevertheless, since the extra-territorial application of a treaty constitutes, in a way, the opposite or the counterpart of its territorial scope, it has to be mentioned in this connection. The best examples of treaties that were drafted to apply extra-territorially are the **four Geneva Conventions**.[83] According to their common Art 2, the conventions shall apply to all international armed conflicts. Their common Art 3, which provides for basic rules in case of an internal armed conflict, constitutes an "almost unintended extension" of their common Art 2.[84] Therefore, the conventions are intended to be applied primarily to the territory of other States.

36 Another frequent but more difficult constellation concerns **human rights treaties**. The reason for their extra-territorial application lies in the formulation of their general legal obligation. Besides territorial clauses, the most important human rights treaties contain a provision obliging the States Parties to secure to everyone within their jurisdiction the rights and freedoms set forth in the respective treaty.[85] 'Jurisdiction' is a wider concept than 'territory'. A State does not only have jurisdiction within its own territory; it may also have jurisdiction outside of it. It has

[82] Final Draft, Commentary to Art 25, 214 para 5.

[83] 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31; 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85; 1949 Geneva Convention Relative to the Treatment of Prisoners of War 75 UNTS 135; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287.

[84] *JS Pictet* The Geneva Conventions of 12 August 1949 Vol I (1952) 38.

[85] See *eg* Art 1 ECHR; Art 2 para 1 of the 1969 American Convention on Human Rights 1144 UNTS 123; Art 2 para 1 ICCPR. The ICESCR does not contain such a clause, but its territorial application is rather vague due to the formulation in Art 2 para 2 that each States Parties undertakes to take steps, "through international assistance and co-operation" to achieve the full realization of the Covenant rights. Other human rights treaties, like the 1981 African Charter on Human and Peoples' Rights 21 ILM 58 do not contain references to jurisdiction.

scarcely been questioned whether the human rights treaties containing such a clause have an extra-territorial application. The scope of its extent, however, remains controversial.[86]

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[86]See *V Mantouvalou* Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality (2005) 9 IJHR 147–163; *M Gondek* Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization? (2005) NILR 347–387; *MJ Dennis* Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation (2005) 99 AJIL 119–141.

Article 30

Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States Parties to both treaties the same rule applies as in paragraph 3;

(b) as between a States Parties to both treaties and a State Party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

Contents

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A. Purpose and Function

1 Conflicts between norms relating to the same subject matter are no peculiarity of public international law. However, while such conflicts can be solved quite clearly in domestic law due to its hierarchical structure, the same problem gives rise to many difficulties at international level. Public international law is characterized by the lack of a central legislator and, therefore, by the lack of a comprehensive hierarchical order as well as by the lack of continuity and systematic congruency in international law making. Public international law is a **'fragmented' legal order** where the probability of contradictions and the need for rules of conflict resolution is extremely high.[1] Colliding treaties are, therefore, no new phenomenon in public international law. The rapidly increasing number of treaties, however, has aggravated the dimension of the problem dramatically.[2]

2 Rules aimed at solving conflicts between treaties not only enhance legal certainty and clarity; by delimiting the rights and obligations of States Parties to various treaties, they also contribute to the observance of treaties and, therefore, to the observance of public international law. There are **many rules and principles** which are theoretically applicable. The most important of these are the hierarchical principle, the *lex posterior* rule, the *lex prior* rule and the *lex specialis* rule.[3] The Convention, however, does not embody all of them.[4] The *lex prior* and the *lex specialis* rules have not been codified and the hierarchical principle has only found rudimentary codification.

3 The **structure of Art 30** follows a logical pattern. After an express affirmation of the primacy of the UN Charter (para 1), reference is made to conflict clauses concluded by the States Parties (para 2). Where a conflict clause is lacking, Art 30 establishes a set of rules differentiating between situations in which the States Parties to successive treaties are identical (para 3) and situations in which this is not (completely) the case (para 4). Finally, Art 30 contains rules on State responsibility where the observance of a priority treaty should lead to the breach of an inferior treaty (para 5).

4 Art 30 is closely **linked to many other provisions of the Convention**. The main decision to be taken is whether a conflict of treaties leads to the invalidity

[1] In 2002, the ILC established a Study Group to examine the topic of "Fragmentation of International Law". In 2006, the Study Group presented its conclusions (18 July 2006, UN Doc A/CN.4/L.702). One of the sub-topics of fragmentation was the question of the application of successive treaties relating to the same subject matter.

[2] See *M Zuleeg* Vertragskonkurrenz im Völkerrecht Teil I: Verträge zwischen souveränen Staaten (1977) 20 GYIL 246; *Sinclair* 93; *W Karl* Treaties, Conflicts between (2000) EPIL 935, 936; *F Paolillo* in *Corten/Klein* Art 30 MN 2; *A Boyle/C Chinkin* The Making of International Law (2007) 248.

[3] See *Karl* (n 2) 936–937. *Sinclair* 96 refers to *Nascimento e Silva* and lists two further principles: the principle of autonomous operation and the principle of legislative intent.

[4] See *Sinclair* 96; *G Dahm/J Delbrück/R Wolfrum* Völkerrecht Vol I/3 (2nd edn 2002) 687; *N Matz-Lück* Treaties, Conflict Clauses in MPEPIL (2008) MN 3; *Karl* (n 2) 938.

(Art 46 *et seq*) of the inferior treaty. The question whether a conflict exists or not, largely depends on the interpretation (Art 31 *et seq*) of the respective treaty provisions. If a treaty has been terminated or suspended (Art 59), however, there is no room for a conflict since there is no valid treaty that could collide with another. If a multilateral treaty has been amended between certain of the parties only (Art 41), on the contrary, there are successive treaties with diverging States Parties leading to a rather complicated legal situation. Finally, if the solution to a conflict leads to the infringement of the treaty rights of another States Parties, the latter may terminate or suspend the treaty according to Art 60, or invoke the international responsibility of the State that has infringed its treaty rights.

B. Historical Background and Negotiating History

Art 30 is counted among the most debated provisions within the ILC.[5] It took some time until the general approach to the issue was found. SR *Lauterpacht* considered the existence of successive treaties dealing with the same subject matter to be a problem of **validity**. Therefore, his first report of 1953 included a provision based on the principle 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 (Draft Art 16 para 1).[6] Such a rule would imply that a State which has concluded a treaty governing certain subject matter loses its capacity to conclude subsequent inconsistent treaties.[7] Since this approach was already rather contested at that time, SR *Lauterpacht* included certain exceptions to the rule (Draft Art 16 paras 3 and 4). In his second report of 1954, he slightly specified the wording without changing the general concept.[8] **5**

SR *Fitzmaurice* softened this approach. Even though the provisions he proposed were still to be found in the section dealing with the validity of treaties, they were based on the principle that incompatibility with the provisions of a previous treaty gave rise to a conflict of obligations rather than to the invalidity of the treaty (Draft Art 16 para 3).[9] Depending on the **type of previous treaty,** the legal consequences of the conclusion of a later inconsistent treaty differed: bilateral treaties and multilateral treaties of the reciprocating type, providing for a mutual interchange of benefits between the parties, should generally not lead to the invalidity of the later treaty (Draft Art 18), whereas multilateral treaties of the interdependent type, where a fundamental breach of one of the obligations of the treaty by one party would justify a corresponding non-performance by the other parties, or multilateral **6**

[5] An overview of the negotiating history of Art 30 is offered by *F Paolillo* in *Corten/Klein* Art 30 MN 1–15; *Karl* (n 2) 937–938 and (briefly) *Sinclair* 93–94.

[6] *Lauterpacht* I 156.

[7] *F Paolillo* in *Corten/Klein* Art 30 MN 5.

[8] *Lauterpacht* II 133.

[9] *Fitzmaurice* III 26–27.

treaties of the integral type, where the force of the obligation was self-existent, absolute and inherent for each party, would make subsequent conflicting treaties null and void (Draft Art 19).

7 This rather complicated proposal was not only simplified but also completely changed by SR *Waldock*. In his view, the problem of successive treaties dealing with the same subject matter was not a question of validity. It was rather a question of the **priority** to be given to conflicting legal provisions as well as a question of state responsibility resulting from the breach of a treaty obligation. Therefore, in his second report of 1963, he proposed one single provision stating that, apart from some exceptions, in the case of a conflict with an earlier treaty the later treaty should not be invalidated by the fact that some or all of its provisions were in conflict with those of the earlier treaty (Draft Art 14 para 1).[10] He emphasized this shift in legal thinking in his third report of 1964 by incorporating the provision in the section dealing with the application of treaties.[11] The proposed Art 65 constituted the basis for Art 26 of the Final Draft of 1966.

8 After the lengthy debates which took place within the ILC during the negotiation process, there were **almost no discussions during the Vienna Conference** with regard to the proposed Art 26. The Drafting Committee changed the wording of Draft Art 26 only slightly by uniting para 4 lit b and lit c in one single para 4 lit b.[12] Art 26 was adopted by the Vienna Conference by 90 votes to none, with 14 abstentions.[13] Maybe the high number of abstentions was due to the confusing complexity of the rule still present. Not surprisingly, the application of successive treaties relating to the same subject matter has been called a "particularly obscure aspect of the law of treaties".[14]

9 Whether Art 30 reflects rules of **customary international law** is not easy to determine. State practice and international jurisprudence are scarce and not entirely conclusive.[15] However, the few decisions of international tribunals seem to be opposed to the idea that a treaty is automatically void if it conflicts with an earlier treaty.[16] Therefore, international jurisprudence at least confirms that the problem addressed by Art 30 is not one of validity but one of priority application. Scholarly literature obviously agrees on the fact that Art 30 is to be regarded as a codification of certain well-established principles of customary international law like the

[10] *Waldock* II 53.

[11] *Waldock* III 34.

[12] UNCLOT II 252–253.

[13] UNCLOT II 57.

[14] *Sinclair* 93.

[15] *Lauterpacht* I 156; *Waldock* II 57, 60; *F Paolillo* in *Corten/Klein* Art 30 MN 18; *Aust* 215.

[16] See PCIJ *The Mavrommatis Palestine Concessions* PCIJ Ser A No 2, 31 (1924); *Jurisdiction of the European Commission of the Danube* PCIJ Ser B No 14, 23 (1927); *Oscar Chinn Case* PCIJ Ser A/B No 63, 80 (1934) together with the dissenting opinion of Judge *Hurst* 122–123.

lex posterior rule or the *pacta tertiis* rule and is, therefore, part of customary international law.[17]

C. Elements of Article 30

I. Successive Treaties 10

Art 30 refers to **all kinds of treaties**, independent of their content, their nature and the number of their respective States Parties. The only requirement is that they bind the same States Parties on the same subject matter, that they have been concluded at different times and that they are still in force.[18] Therefore, Art 30 not only applies to bi- and multilateral treaties but also to charters of international organizations. It may occur that a State is bound both by a regular treaty and by the obligations resulting from its membership in an international organization.[19] In such a case, the rules laid down in Art 30 apply. This is even valid for the TFEU.

> See *eg* the judgment of the ECJ in the *Open Skies Agreements* case.[20] The Court first analyzed whether the subordination clause of Art 234 EC Treaty (now Art 351 TFEU) applied. After answering this question in the negative, it decided on the basis that both treaties are in force and valid, that the United Kingdom had failed to fulfill its obligations under Art 52 EC Treaty (now Art 49 TFEU) , to which it became bound in 1973, by concluding and applying an Air Services Agreement signed in 1977 with the United States. This fact entailed a responsibility of the United Kingdom. The question whether the EC Treaty is to be regarded as an 'ordinary' international treaty falling under the scope of Art 30 or whether it should be regarded as 'internal law' falling under Art 27, however, remains controversially discussed in scholarly literature.[21]

The term "successive" implies that there is **an earlier and a later treaty**. This differentiation becomes particularly important for the rules established in paras 3 and 4 (→ MN 22). In order to determine which treaty is the earlier one and which is the later one, it is possible to focus either on the date of adoption, the date of entry into force, the date of the provisional entry into force or the date of ratification by each of the States Parties.[22] According to the ILC, the decisive date is that of the adoption of the treaty, since the adoption of a treaty always constitutes a 11

[17] *JB Mus* Conflicts between Treaties in International Law (1998) NILR 208, 211–212; *F Paolillo* in *Corten/Klein* Art 30 MN 18; *Aust* 228. However, not all scholars agree: according to *N Matz* Wege zur Koordinierung völkerrechtlicher Verträge: Völkervertragsrechtliche und institutionelle Ansätze (2005) 316, Art 30 does not reflect customary international law. According to *Villiger* Art 30 MN 21, however, "Art 30 may be considered as being customary as a whole".

[18] *F Paolillo* in *Corten/Klein* Art 30 MN 16, 21–22; *Aust* 228; Final Draft, Commentary to Art 30, 216 para 9.

[19] *Karl* (n 2) 940.

[20] ECJ (CJ) *Commission v United Kingdom* C-466/98 [2002] ECR I-9427.

[21] See *M Lička* European Exceptionalism in International Law (2008) 19 EJIL 463, 469 *et seq*.

[22] See the very clear questions and examples provided by Sinclair (United Kingdom), UNCLOT I 165. For a detailed reproduction of the discussions within the ICJ, see *EW Vierdag* The Time of the

new legislative intention.[23] Most legal scholars share this view.[24] The decisiveness of the date of adoption, however, does not alter the fact that the rules laid down in Art 30 have effect for a States Parties only as of the date of entry into force of the treaty in question.[25]

II. Relating to the Same Subject Matter

12 The formulation "relating to the same subject matter" in the heading of Art 30 was explicitly chosen by the ILC in order to allow for a **wide concept**.[26] This decision, however, was taken at a rather late stage of the negotiation process. All drafts presented by SR *Lauterpacht*, SR *Fitzmaurice* and SR *Waldock* exclusively employed notions such as "conflict", "conflicting treaty provisions" or "treaties having incompatible provisions". The expression chosen for the Final Draft 1966 is much wider. Treaties relating to the same subject matter are not necessarily incompatible with each other. They may also simply diverge from each other, *eg* by being applicable under different circumstances, by offering a choice or by being supplementary to each other.[27] The wide concept chosen by the ILC met with some opposition during its last meetings, especially from the representative of the United Kingdom who voiced his support for a strict interpretation based on the *lex specialis* rule.[28] He suggested that the formulation should only cover cases in which treaties refer to the same specific subject matter. If a general treaty, however, "impinged indirectly on the content of a particular provision of an earlier treaty", Art 30 should not be applicable.[29] Most legal scholars have followed this point of view.[30]

13 The exact delimitation of the formulation "relating to the same subject matter", however, may also be left aside since the notion of **(in)compatibility** remains the issue of crucial importance. Even though it has been eliminated from the heading of Art 30, it is still to be found in the wording of paras 2–5, thus governing the

'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions (1988) BYIL 75, 92 *et seq.*

[23]See the proposal of Sinclair (United Kingdom), UNCLOT II 222 and the confirmation by the Expert Consultant *Waldock*, UNCLOT II 253. See also the statement of Pinto (Ceylon), UNCLOT II 56.

[24]See *Aust* 229; *Zuleeg* (n 2) 256; *Matz-Lück* (n 4) MN 25. According to *Vierdag* (n 22) 96, however, the date of entry into force is the decisive one. This view is strongly criticized by *Mus* (n 17) 221–222.

[25]*Sinclair* 98; *Aust* 229; *Zuleeg* (n 2) 256.

[26]Final Draft, Commentary to Art 30, 214 para 1, 217 para 13.

[27]*Karl* (n 2) 936; *F Paolillo* in *Corten/Klein* Art 30 MN 27 *et seq.*

[28]*Zuleeg* (n 2) 257.

[29]The explanation was that such cases constituted questions of interpretation rather than questions of application of treaties, see *Sinclair*, UNCLOT II 222; Sinclair (United Kingdom) 98. SR *Waldock* confirmed this view, see UNCLOT II 253.

[30]*Aust* 229; *F Paolillo* in *Corten/Klein* Art 30 MN 26; *Boyle/Chinkin* (n 2) 251.

application of large parts of the provision. The explanation is obvious: if two treaties are not incompatible, *ie* if they are compatible with each other (and just regulate the same subject matter differently), there is no necessity of deciding on the priority to be given to one of them. [31] Treaties are incompatible with each other if their obligations cannot be complied with simultaneously, *ie* if a States Parties to both treaties cannot comply with one of them without breaching the other.[32] Many apparent conflicts, however, can be solved by interpretation. If the apparently conflicting treaty provisions can be interpreted in such a way that they are compatible with each other, this approach is the first to be chosen.[33]

III. Primacy of the UN Charter (para 1)

14 Art 30 para 1 embodies the **hierarchical principle.** According to this general conflict rule, a treaty of a higher legal rank prevails over all treaties of a lower legal rank, irrespective of their date of adoption.[34] Whether there exists a hierarchy of treaties in international law is a problem that has been largely discussed in scholarly literature.[35] According to Art 30 para 1, however, the hierarchical principle only applies to the UN Charter. All problems relating to successive treaties dealing with the same subject matter are subject to Art 103 UN Charter, which determines that the UN Charter shall prevail over all conflicting treaty obligations of the Member States. Art 30 para 1 does not prejudice in any way the interpretation of Art 103 UN Charter,[36] especially the question whether a conflict with the UN Charter leads to the invalidity or the inapplicability of the conflicting treaty provision.[37] It only explicitly recognizes and reinforces the essential importance of Art 103 UN Charter by establishing that the rules laid down in paras 2–5 apply to all conflicts between treaties except to conflicts with the UN Charter.

15 The hierarchical principle is also to be found in Art 53 and Art 64. If a treaty conflicts with a rule recognized as ***ius cogens,*** it is void. In such a case, however,

[31] *F Paolillo* in *Corten/Klein* Art 30 MN 24, 28.

[32] See *Karl* (n 2) 936; *Paolillo* (n 2) 1265–1266; *Matz-Lück* (n 4) MN 5. A detailed analysis of the notion of conflict is made by *SA Sadat-Akhavi* Methods of Resolving Conflicts between Treaties (2003) 5 *et seq*.

[33] *Aust* 216; *Matz-Lück* (n 4) MN 20; *Sadat-Akhavi* (n 32) 25 *et seq*.

[34] *Matz-Lück* (n 4) MN 90; *Karl* (n 2) 936; *Matz* (n 17) 249 *et seq*; *Villiger* Art 30 MN 9.

[35] Most scholars agree that there is no general hierarchy either between the different sources or between the different treaties in public international law. Some scholars, however, classify the UN Charter as the "Constitution" of public international law that has a higher rank than the other treaties, see *eg B Fassbender* The United Nations Charter as Constitution of the International Community (1998) 36 Columbia JTL 529–619*; P-M Dupuy* The Constitutional Dimension of the Charter of the United Nations Revisited (1997) 1 Max Planck UNYB 1–33.

[36] See Final Draft, Commentary to Art 30, 214 para 3.

[37] For more details, see *Dahm/Delbrück/Wolfrum* (n 4) 689 *et seq*; *Mus* (n 17) 216–217; *WH Wilting* Vertragskonkurrenz im Völkerrecht (1996) 56 *et seq*.

there is no conflict between treaties in the strict sense (→ Art 53 MN 54–55).[38] First, most rules of *ius cogens* form part of customary international law. Second, even if a rule of i*us cogens* is laid down in a treaty, the conflicting treaty is void, *ie* it is not in force. A conflict between treaties, however, does only exist when the treaties in question are both still in force (→ MN 22).

IV. Conflict Clauses (para 2)

16 The provisions laid down in Art 30 are residuary rules[39]; if a treaty contains special clauses regulating its relation to other treaties (conflict clauses, savings clauses or compatibility clauses),[40] Art 30 does not apply. Therefore, para 2 states the obvious[41] by declaring that when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. This formulation, however, only includes subordination clauses, *ie* clauses **conceding priority** to other treaties.

> One example for such a subordination clause is Art 73 para 1 Vienna Convention on Consular Relations.[42] It reads: "The provisions of the present Convention shall not affect other international agreements in force as between States Parties to them." Another example of a subordination clause is Art 351 TFEU.[43]
>
> A special type of subordination clause is the so-called 'most favourable clause' which has been incorporated into many human rights treaties. Art 5 para 2 of the ICCPR and of the ICESCR *eg* read: "There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any States Parties to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent". By subordinating the conventions to all norms providing for a higher human rights standard the clauses aim at achieving the highest possible human Rights level in each of the States Parties.[44]

17 Nevertheless, subordination clauses only constitute one special type of conflict clauses. There is another type of conflict clauses not mentioned in para 2: clauses **claiming priority** over other treaties.[45] The fact that they are not included in para 2

[38] *Dahm/Delbrück/Wolfrum* (n 4) 687.

[39] See Final Draft, Commentary to Art 30, 214 para 4; *Sinclair* 97; *F Paolillo* in *Corten/Klein* Art 30 MN 19; *Aust* 227.

[40] *Matz-Lück* (n 4) MN 1.

[41] *Karl* (n 2) 939. For a detailed analysis of the debate within the ILC during the negotiation process, see *F Paolillo* in *Corten/Klein* Art 30 MN 36.

[42] 1963 Vienna Convention on Consular Relations 596 UNTS 261.

[43] *P Manzini* The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law (2001) 12 EJIL 781, 782.

[44] *Karl* (n 2) 939–940; *Dahm/Delbrück/Wolfrum* (n 4) 701 *et seq.*

[45] For the different types of conflict clauses, see *Aust* 219 *et seq*; *Matz-Lück* (n 4) MN 7 *et seq*; *Mus* (n 17) 214 *et seq*; *Dahm/Delbrück/Wolfrum* (n 4) 696 *et seq*; *Wilting* (n 37) 67 *et seq*; *Sadat-Akhavi* (n 32) 84 *et seq; Villiger* Art 30 MN 11 *et seq*.

does not impede States from establishing provisions claiming primacy of the treaty in question.[46]

> A good example of a conflict clause claiming priority over existing treaties is to be found in UNCLOS. Its Art 311 para 1 reads: "This Convention shall prevail, as between the States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958." A conflict clause claiming priority over later treaties is Art 8 NATO Treaty[47]: "Each Party [. . .] undertakes not to enter into any international engagement in conflict with this Treaty." The most far reaching conflict clause claiming priority over all earlier and later treaties is Art 103 UN Charter: "In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

All types of conflict clauses may concern the relationship to a specific treaty or to any treaties; furthermore, they may refer to earlier, to later or to both earlier and later treaties.[48] Due to the increasing number of treaties and the growing probability of treaty contradictions, conflict clauses have continued to gain practical relevance. They may be the **best mechanism** to prevent or solve contradictions between various treaties. Still, some difficulties remain.

18 One of the difficulties arises in their **relative nature**.[49] Conflict clauses are always incorporated in a specific treaty. Therefore, they only bind the parties to this treaty (first treaty). According to the *pacta tertiis* rule (Art 34), a third State cannot be bound by a treaty concluded by other States. If the States Parties to the first treaty are identical with the States Parties to the treaty in relation to which the clause is applicable (second treaty), the relationship between both treaties is clear. If they are not identical, however, especially if the second treaty has more States Parties than the first treaty, the priority or subordination contained in the conflict clause only becomes relevant to the States Parties to both treaties.

19 Another difficulty concerns the relationship between **colliding conflict clauses**. If, for example, both conflict clauses of two incompatible treaties claim priority over the other treaty, or if, on the contrary, both concede priority to the other treaty, the legal situation is unclear. The only reasonable solution is to treat both conflict clauses as non-existent and to apply the general rules on the conflict of treaties laid down in Art 30 paras 3–5 or in customary public international law.[50] Thus, colliding conflict clauses cancel out one another.

20 Another difficulty results from the **limited legal effect of conflict clauses claiming priority over later treaties**.[51] As a general rule,[52] a State that has concluded a treaty on certain subject matter does not lose its capacity to conclude

[46]Final Draft, Commentary to Art 30, 214 *et seq*.; *Matz-Lück* (n 4) MN 10.

[47]1949 North Atlantic Treaty 34 UNTS 243.

[48]Final Draft, Commentary to Art 30, 214 para 2.

[49]*Matz-Lück* (n 4) MN 4; *Mus* (n 17)) 216; *Karl* (n 2) 939.

[50]*Matz-Lück* (n 4) MN 10.

[51]Final Draft, Commentary to Art 30, 216 para 9; *Karl* (n 2) 939; *Matz-Lück* (n 4) MN 15.

[52]The only exception may be Art 103 UN Charter. According to some legal scholars it has the effect of making treaties void where they are not compatible with the UN Charter, see *eg*

later inconsistent treaties (→ MN 5) – even if the treaty in question prohibits later incompatible agreements. Therefore, later treaties conflicting with the earlier treaty remain valid and give States Parties the opportunity to incorporate a colliding conflict rule, which, as a consequence, may even cancel the first conflict clause (→ MN 19).

V. Treaties Lacking a Conflict Clause (paras 3 and 4)

21 If none of the colliding treaties contains a conflict clause, the rules laid down in paras 3 and 4 apply.[53] While para 3 concerns situations in which the States Parties to both treaties are identical, para 4 lays down the rules to be observed in case that they are not (completely) identical. Both provisions are based on the ***lex posterior* principle** according to which the later treaty prevails over the earlier one.[54] Art 30 para 4 additionally embodies the principles of ***pacta sunt servanda*** (Art 26) and ***pacta tertiis*** (Art 34).

22 Art 30 para 3 determines that where the **States Parties to conflicting treaties are identical**, the later treaty prevails. Two different cases, however, have to be distinguished. The first is where the earlier treaty has been terminated or suspended by the States Parties (Art 59). In this case, there is no conflict of treaties since the earlier treaty is no longer in force and respectively no longer applicable.[55] The second is the case of where the intention to terminate or to suspend the earlier treaty does not appear from the later treaty or is otherwise established, in which case the *lex posterior* rule applies. In this case, there exists a conflict between two treaties. It is solved by applying the earlier treaty only to the extent of its compatibility. Thus, the earlier treaty remains in force and is applicable, but only to the extent that its provisions are compatible with those of the later treaty.

> When deciding on its jurisdiction in the *Mavrommatis Palestine Concessions* case, the PCIJ had to base its deliberations on the Mandate for Palestine conferred on His Britannic Majesty on 24 July 1922 (earlier treaty), which contained a jurisdiction clause, and on Protocol XII annexed to the Peace Treaty of Lausanne of 24 July 1923 (later treaty), which lacked such a clause. The Court stated that "the provisions of the Mandate and more particularly those regarding the jurisdiction of the Court are applicable in so far as they are compatible with the Protocol."[56]

23 The application of the *lex posterior* principle between the States Parties identical to both treaties does not affect the possibility of third States becoming parties to the

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Dahm/Delbrück/Wolfrum (n 4) 685–686. Most legal scholars do not share this view, see *eg Mus* (n 17) 216; *F Paolillo* in *Corten/Klein* Art 30 MN 34.

[53] *F Paolillo* in *Corten/Klein* Art 30 MN 39.

[54] For a historical overview of the development of the *lex posterior* principle in public international law, see *Karl* (n 2) 937.

[55] *Mus* (n 17) 9; *F Paolillo* in *Corten/Klein* Art 30 MN 41.

[56] PCIJ *The Mavrommatis Palestine Concessions* (n 16) 31.

later treaty but not to the earlier one.[57] Whether the earlier treaty has been **terminated or suspended or whether it remains partly applicable**, however, may be difficult to decide. It mainly depends on the interpretation of the later treaty and on the separability of treaty provisions (→ Art 44).[58]

When the **States Parties to conflicting treaties are not completely identical**, the rules laid down in para 4 apply. According to this provision, two different relationships have to be distinguished: the relationship between States which are parties to both treaties (lit a) and the relationship between a State which is party to both treaties and a State which is a party to only one of the two treaties (lit b). In the first relationship, the same rules apply as in para 3 (→ MN 22). The second relationship is only governed by the treaty to which both States are parties – regardless of whether the respective treaty constitutes the earlier or the later one.[59] **24**

Even though para 4 solves the conflict of treaties from a legal perspective, its application may still lead to certain dilemmas.[60] The clearest constellation is present in the case of an **increasing membership**. If the earlier treaty is concluded by States A, B and C and the later between States A, B, C and D, the legal relationships between all four states are governed by the later treaty (A, B and C according to lit a; D according to lit b). **25**

The case of **decreasing membership** often occurs when the States Parties to a treaty adopt a protocol amending the treaty. Usually, the protocol is only ratified by some of the States Parties to the treaty. In such a constellation, the States Parties to both the treaty and the protocol are bound by the later treaty (lit a), *ie* by the treaty as amended by the protocol. The States Parties only to the treaty remain bound by the treaty in its original form (lit b). Decreasing membership requires an agreement to modify a multilateral treaty between only certain parties. The question whether such an *inter se* agreement is legal or not, depends on the provisions of the multilateral treaty allowing or prohibiting such an agreement (→ Art 41). However, even if such an *inter se* agreement should be illegal, it is still valid and thus governs the relationship between its States Parties.[61] **26**

The most difficult constellation, however, is present in the case of **mutually overlapping membership**. If *eg* States A, B and C are parties to the earlier treaty **27**

[57] *Vierdag* (n 22) 95–96; *Mus* (n 17) 219.

[58] *Karl* (n 2) 938; *Wilting* (n 37) 99 *et seq*.

[59] *F Paolillo* in *Corten/Klein* Art 30 MN 47. The Final Draft suggested the inclusion of two separate provisions, one for earlier treaties (lit b) and one for later treaties (lit c). The Drafting Committee, however, united lit b and lit c in one single lit b, see UNCLOT II 252–253.

[60] For the three constellations regulated by para 3 lit b and the problems resulting in each case, see *Karl* (n 2) 938–939. See also *Matz-Lück* (n 4) MN 24. It is worth mentioning that the Secretary-General as depositary of UN Conventions has in a way 'capitulated' in view of the large number and the complexity of possible situations that may result from the application of both the earlier and the later treaty by various States. He declared that he "does not specify between which States the treaties apply and, when notifying the parties of the deposit of an instrument in respect of the said treaties, restricts himself to recalling the relevant provisions of the treaties concerned", see 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, para 262.

[61] *Mus* (n 17) 225; *Karl* (n 2) 939.

and States A, B and D are parties to the later treaty, the mutual legal relationships are structured as follows: As between A and B the later treaty applies (lit a). The later treaty also applies as between A and D (lit b). As between A and C, however, the earlier treaty applies (lit b). If the implementation of one treaty implies violating the other treaty, State A has to decide which of the two treaties to comply with. In any case, the implementation of any treaty will ensure the responsibility of State A as a consequence of a breach of a treaty.

28 The case of a mutually overlapping membership clearly shows the limits of the rules laid down in para 4: they determine the mutual rights and obligations of the States Parties **merely as between themselves**.[62] If the conclusion or application of a treaty constitutes an infringement of the rights of States Parties to another treaty, all consequences of a breach of a treaty will follow. This fact is explicitly provided for in para 5 (→ MN 29).

VI. State Responsibility (para 5)

29 Art 30 para 5 lists the provisions which remain unaffected by the rules solving a conflict between treaties. All of them mainly deal with **State responsibility**. This last paragraph of Art 30 constitutes the logical last step in the set of rules on conflict resolution. Once the ILC decided that the problem of successive treaties relating to the same subject matter was not a question of validity but a question of priority application of two existing treaties (→ MN 7), it was clear that a rule resolving a conflict between colliding treaties may lead to the international responsibility of a State as a consequence of the breach of one of the treaties – especially in the cases falling under para 4 lit b.[63] In view of Art 73, the introduction of para 5 may be deemed unnecessary.[64] Nevertheless, an explicit reference to international State responsibility does make sense. It makes clear that States which conclude a new treaty that is incompatible with an earlier treaty must be aware of the fact that such a step may not entail the invalidity of one of the treaties but of their international responsibility.

30 The first provision remaining unaffected concerns agreements to modify multilateral treaties between certain of the parties only, a rule laid down in Art 41. They are of special importance in cases of decreasing membership of successive multilateral treaties (→ MN 26). Art 41 establishes the conditions under which such an *inter se* agreement is legal or illegal. An illegal *inter se* agreement does not affect the rules on conflict resolution laid down in para 4. Nonetheless, it does entail the international responsibility of the States Parties to the *inter se* agreement towards the **States Parties to the earlier treaty**.[65]

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[62] Final Draft, Commentary to Art 30, 217 para 11; *Aust* 228; *Karl* (n 2) 938.

[63] Final Draft, Commentary to Art 30, 217 para 11.

[64] *F Paolillo* in *Corten/Klein* Art 30 MN 56.

[65] *Mus* (n 17) 225 *et seq.*

The second and third rules mentioned in para 5 refer to the **rights of States Parties to any inferior treaty** – regardless of whether it is the earlier or the later treaty.[66] If the conclusion or the application of a priority treaty leads to the violation of an inferior treaty, the States Parties to the latter have the right to terminate or to suspend the treaty according to Art 60, and equally the right to invoke the international responsibility of the State which has infringed their treaty rights. 31

By referring **not only to the application but also to the conclusion** of a priority treaty, para 5 goes beyond the heading of Art 30.[67] No explicit explanation is to be found in the negotiation records for this enlargement of the scope of Art 30. However, the ILC explicitly referred to the application as well as to the conclusion of a treaty when dealing with questions of State responsibility.[68] There may indeed be cases where the very conclusion of a new treaty constitutes the breach of another treaty. One example is represented by clauses claiming priority over later treaties (→ MN 17). 32

VII. Unresolved Treaty Conflicts

Art 30 is often called an **unsatisfactory provision**, since it does not solve all questions arising in the case of a conflict of treaties.[69] One of these unsolved questions is how to deal with treaties concluded simultaneously. Another one is the problem of colliding conflict rules (→ MN 19). Some scholars also criticize the results obtained when applying Art 30, especially para 4 lit b, which does not really solve a conflict but instead inevitably leads to the breach of one of the treaties (→ MN 29).[70] Most critical remarks concern the overly rudimentary character of Art 30, which renders the provision inadequate to deal with the complicated nature of many treaty conflicts (*eg* no differentiation between regional and universal treaties, between treaties and treaty obligations, between the time of the treaty and the time of the treaty obligation, or between 'normal obligations' and *erga omnes* obligations).[71] Finally, attention is drawn to cases where the treaties in question are compatible with regard to their substantive provisions but provide 33

[66] *F Paolillo* in *Corten/Klein* Art 30 MN 57.

[67] Particularly critical remarks on this point are made by *F Paolillo* in *Corten/Klein* Art 30 MN 60–61.

[68] Final Draft, Commentary to Art 30, 217 para 11.

[69] See *eg Boyle/Chinkin* (n 2) 250–251; *Sinclair* 98; *Vierdag* (n 22) 110; *Mus* (n 17) 227 *et seq*; *C Yamada* Priority Application of Successive Treaties Relating to the Same Subject Matter in *N Ando/E McWhinney/R Wolfrum* (eds) Festschrift Oda (2002) 763, 768 and especially *CJ Borgen* Resolving Treaty Conflicts (2005) 37 George Washington International Law Review 573 *et seq*.

[70] *Mus* (n 17) 227 *et seq*; *Sadat-Akhavi* (n 32) 70 *et seq*; *Dahm/Delbrück/Wolfrum* (n 4) 694.

[71] *Sinclair* 98; *Vierdag* (n 22) 110; *M Benzing* US Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties (2004) 8 Max Planck UNYB 181, 226; *Sadat-Akhavi* (n 32) 82 *et seq*.

for different dispute settlement procedures, thus leading to so-called 'forum shopping'.[72]

34 The fact that Art 30 does not give comprehensive answers, however, does not mean that the conflicts will remain unsolved. First, there are still many additional principles and techniques (→ MN 2) either to avoid or to complement the application of Art 30.[73] Second, since Art 30 is residuary in character (→ MN 16), States are free to decide on the relationship between diverging treaties anyway. Third, a careful and detailed interpretation of treaty provisions may provide in many cases that there is no conflict to be solved, thus rendering the application of Art 30 unnecessary.

D. Legal Consequence

35 As far as Art 30 is concerned (for the legal effects of Art 103 UN Charter in conflicting treaties see → MN 14), the conflict between successive treaties does not entail the invalidity of the earlier treaty (→ MN 20 and 22). Art 30 para 2, read in conjunction with para 3, exclusively concerns the **applicability of the prevailing treaty** and the inapplicability of the earlier treaty. To the extent that the earlier treaty is compatible with the later treaty, the earlier treaty applies (→ MN 22).

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[72] *Yamada* (n 69) 763 *et seq*; *P Zapatero* Modern International Law and the Advent of Special Legal Systems (2005) 23 AJICL 55, 63 *et seq*. Consequently, *Yamada* pleads for the preparation of new guidelines to supplement Art 30 in order to allow for an adequate choice of dispute settlement procedures in a single and identical dispute falling under two compatible treaties.

[73] *Borgen* (n 69) 583 *et seq*, 634 *et seq*; *Sadat-Akhavi* (n 32) 99 *et seq*, 197 *et seq*.

Section 3
Interpretation of Treaties

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Contents

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A. Purpose and Function

1 No legal text drafted by man can possibly be perfect in a way that it never gives rise to any doubt as to its scope or actual meaning. That is why every legal text, on the international as well as on the national level, needs to be interpreted by those working with it. The application of a legal rule in practice presupposes that the person applying it has got a certain understanding of its scope, contents and relevance, thus **interpretation is indispensable** not only for understanding a rule, but also for the process of applying or implementing it. Since the most important rules of international law are today laid down in treaties, the interpretation of treaties has become of utmost significance for the practice of international law.

2 Interpretation is the process of **establishing the true meaning** of a treaty. The VCLT rules on interpretation, it is rightly said, reflect an attempt to designate the elements to be taken into account in that process, and to assess their relative weight in it, rather than to describe, let alone prescribe, the process of interpretation itself.[1] Art 31 in laying down the so-called general rule of interpretation formulates a couple of generally accepted principles on the elements and means of treaty interpretation. These principles are mostly drawn from international judicial and arbitral practice, as it had developed since the late nineteenth century, and they were adopted by the ILC as a pragmatic compromise avoiding to follow one particular doctrine or theory of treaty interpretation. Also, since it considered the interpretation of documents to be to some extent an art, not an exact science, the Commission also disavowed the idea of proposing an elaborate code or canon of interpretation, but deliberately confined itself to **some fundamental rules** recourse to which is, moreover, discretionary rather than obligatory.[2]

3 The task of interpretation is, as *McNair* put it, "giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances."[3] If thus interpretation is always directed at bringing to bear the intention of the parties, it can only do so to the extent that that intention has found adequate expression in the text of the treaty. Also, the other way round, the wording of a treaty has in the **textual approach** followed by Art 31 para 1 the prime role in interpretation because it is presumed to be an authentic expression of the intention of the parties.[4] This is confirmed in the ICJ practice when the Court points out that interpretation must be based "above all upon the text of the treaty".[5] To be ascertained by interpretation is thus the intention in

[1] *Sinclair* 117.

[2] *Cf* Final Draft, Introductory Commentary to Arts 27–28, 218 para 4.

[3] *McNair* 365 (emphasis omitted).

[4] Final Draft, Commentary to Art 27, 220 para 11.

[5] *Cf eg* ICJ *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, para 41; *Legality of the Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) [2004] ICJ Rep 279, para 100.

the sense of the true meaning of the treaty rather than the intention of the parties distinct from it.[6]

On the other hand, the text of a treaty as it stands since the time of its conclusion is not all that matters for an interpretation *lege artis*. Art 31 para 3 requires taking account of subsequent developments, agreements between the parties and practice in applying the treaty, and thus seems to focus on the **current consensus of the parties** in understanding the treaty. That consensus, which exists at the time of interpretation, may in some cases even override the original understanding of the text of the treaty, which prior to the subsequent developments may have appeared perfectly clear. **4**

In order to structure the process of interpretation, Art 31 is designated to contain 'the general rule' of treaty interpretation. The singular mode emphasizes that the provision **contains one single rule**, that contained in para 1, and that its three main elements, wording, context and object and purpose, as well as the guiding principle of good faith, constitute integral parts of that rule and have to be applied in a single combined operation.[7] Art 31 paras 2 and 3 specify what is meant by "context" and are thus closely linked to para 1. Both provisions may appear to draw a distinction between intrinsic and extrinsic means of interpretation: para 2 sets out certain integral elements of the context rule, as it lists what is "comprised" by the context, whereas para 3, rather than designating yet other elements of context, lists interpretative means to be used along with the context. However, despite that different wording, both paragraphs are designed to incorporate the elements of interpretation set out therein into the general rule contained in para 1.[8] Art 31 para 4 contains an exception to para 1 for cases where the parties have agreed, even implicitly, to replace the ordinary meaning of a term contained in a treaty provision by a special meaning. **5**

It is by now generally recognized that the provisions on treaty interpretation contained in Arts 31 and 32 **reflect pre-existing customary international law**. For many years now, the ICJ has applied the rules of interpretation laid down in the Convention as codified custom to virtually every treaty that came before it.[9] The first explicit endorsement of the customary character by the Court seems to have been in the 1991 judgment on the *Arbitral Award of 31 July 1989 (Guinea Bissau v Senegal)*, where the Court stated that the pre-existing principles of treaty interpretation **6**

> "are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point".[10]

[6] *RK Gardiner* Treaty Interpretation (2008) 6.

[7] Thus Final Draft, Commentary to Arts 27-28, 219–220 para 8.

[8] Final Draft, Commentary to Arts 27-28, 220 para 8.

[9] This process of growing acceptance is aptly described by *S Torres Bernárdez* 'Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties' in *G Hafner* (ed) Festschrift Seidl-Hohenveldern (1998) 721 *et seq*.

[10] ICJ *Arbitral Award of 31 July 1989* (Judgment) [1991] ICJ Rep 53, para 48.

Affirmations to the same effect can be found throughout the subsequent jurisprudence of the Court, with the words becoming more sweeping in more recent cases.[11] Despite the hesitation seemingly expressed in the quoted phrase of 1991 ("in many respects"), the ICJ never attempted to differentiate between rules contained in Arts 31 and 32 that are and those that are not binding customary law. While in practice, the Court often relied only on the first paragraph of Art 31, it also had the opportunity to confirm the customary law character of para 3[12] and even that of para 3 lit c[13] of that article. Although it hardly ever mentioned Art 33 in this context, the Court occasionally applied the rules laid down in that provision as equally reflecting customary international law.[14] The view of the ICJ that the Vienna rules of interpretation are without any distinction universally binding as customary international law is **widely shared by other international courts**, such as ITLOS,[15] the ECtHR,[16] the ECJ[17] and the dispute settlement bodies of the WTO,[18] as well as by many arbitral

[11] *See eg* ICJ *Territorial Dispute* (n 5) para 41; *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep 1045, para 18; *LaGrand (Germany v United States)* [2001] ICJ Rep 466, para 99; *Avena and Other Mexican Nationals (Mexico v United States)* [2004] ICJ Rep 12, para 83; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 94; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* 26 February 2007, para 160; *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* 13 July 2009, para 47; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* 20 April 2010, para 65.

[12] *Cf* ICJ *Kasikili/Sedudu Island* (n 11) para 48; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)* [2002] ICJ Rep 625, para 37.

[13] *Cf* ICJ *Oil Platforms (Iran v United States)* (Merits) [2003] ICJ Rep 161, para 41.

[14] *Cf* ICJ *Kasikili/Sedudu Island* (n 11) para 25; *LaGrand* (n 11) para 101.

[15] ITLOS (Seabed Disputes Chamber) *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion), 1 February 2011, para 57.

[16] For the first time in ECtHR *Golder v United Kingdom* App No 4451/70, Ser A 18, para 29 (1975); more recently *eg* in *Loizidou v Turkey* (GC) (Merits) App No 15318/89, ECHR 1996-VI, para 43; *Litwa v Poland* App No 26629/95, ECHR 2000-III, para 57; *Al-Adsani v United Kingdom* (GC) App No 35763/97, ECHR 2001-XI, para 55; *Mamatkulov and Askarov v Turkey* (GC) App No 46827/99 and 46951/99, 6 February 2003, para 99; *Saadi v United Kingdom* (GC) App No 13229/03, 29 January 2008, paras 61–62; *Demir and Baykara v Turkey* (GC) App No 34503/97, 12 November 2008, para 65; *Al-Saadoon and Mufhdi v United Kingdom* App No 61498/08, 2 March 2010, para 126.

[17] The ECJ usually refers to the rules of Vienna Convention when it interprets agreements of the European Community/Union, *cf* ECJ (CJ) *Opinion 1/91* [1991] ECR I-6079, para 14; *Metalsa* C-312/91 [1993] ECR I-3751, para 12; *El-Yassini* C-416/96 [1999] ECR I-1209, para 47; *Jany* C-268/99 [2001] ECR I-8615, para 35; *Brita* C-386/08, 25 February 2010, paras 41–42. Explicitly labelling Art 31 a codification of general international law ECJ (CJ) *Axel Walz* C-63/09, 6 May 2010, para 23.

[18] *Cf* the WTO Appellate Body *eg* in *Japan – Taxes on Alcoholic Beverages II*, WT/DS 8, 10–11/AB/R, Part D, 10–12 (1996); *United States – Hot-Rolled Steel Products from Japan,* WT/DS184/AB/R, para 57 (2001); *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS 285/AB/R, para 159 (2005); *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* WT/DS344/AB/R, para 76 (2008); *China – Measures Affecting Imports of Automobile Parts* WT/DS339, 340, 342/AB/R, para 145 (2008); *China –*

institutions.[19] Finally, the customary character of the Vienna rules has by now found expression in treaty practice itself.

> *Eg* in Art 14.16 of the Free Trade Agreement concluded between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part on 16 October 2010 directs the arbitration panel, that is to be established in case of disputes, to interpret the Agreement "in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties.[20]

Therefore, if the rules laid down in Arts 31–33 reflect universal custom, they **7**
can in principle be **applied to all treaties outside the scope of the Convention**. This concerns, first, treaties concluded before the Convention entered into force (1980),[21] and, second, treaties between States that are not all parties to the Convention,[22] which is also acknowledged by third States not party to the Convention, such as the United States or France: the diplomatic practice of the US administration, as well as the overwhelming part of US court practice, reflects the view that the Arts 31–33 VCLT do express binding customary norms.[23] France has acknowledged the same at the occasion of arbitral proceedings.[24] Third, the Convention rules on interpretation can as customary rules be applied to instruments that due to their character fall outside the scope of the Convention, such as unwritten treaties or treaties between States and other entities treated as subjects of international law.

The provisions on treaty interpretation in the **1986 Vienna Convention** are **8**
identical to those in the 1969 Convention, as in the ILC and at the 1986 Conference the established rules were simply replicated and inserted into the text of the VCLT II without debate.[25]

Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R, para 348 (2009).

[19] *Cf eg* the *Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands)* 27 RIAA 35, para 45 (2005); *Audit of Accounts Between the Netherlands and France in Application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976 (Netherlands v France)* 25 RIAA 267, paras 58–62 (2004); Iran-United States Claims Tribunal *United States, Federal Reserve Bank of New York v Iran, Bank Markazi* Case A 28 (2000) 36 Iran-US Claims Tribunal Reports 5, para 53; *Young Loan Arbitration on German External Debts (Belgium, France, Switzerland, United Kingdom and United States v Germany)* 59 ILR 494, para 16 (1980).

[20] OJ 2011 L 127, 6, at 68.

[21] *Cf eg* ICJ *Kasikili/Sedudu Island* (n 11) para 20 (interpretation of treaty of 1890); *LaGrand* (n 11) para 99 (ICJ Statute); *Avena* (n 11) para 83 (Vienna Convention on Consular Relations); *Construction of a Wall* (n 11) para 95 (Geneva Convention IV); *Navigational Rights* (n 11) para 47 (treaty of 1885); *Pulp Mills* (n 11) para 65 (treaty of 1975); ITLOS *Responsibilities and Obligations of States* (n 15) para 58 (UNCLOS).

[22] *Cf* explicitly ICJ *Kasikili/Sedudu Island* (n 11) para 18; *Sovereignty over Pulau* (n 12) para 37.

[23] *Cf* the references given by *E Criddle* The Vienna Convention on the Law of Treaties in US Treaty Interpretation, (2004) 44 VaJIL 431, 443–447.

[24] *Cf Audit of Accounts* (n 19) para 57.

[25] *Cf* [1982-I] YbILC 22 and 260; UNCLOTIO I 15–16.

B. Historical Background and Negotiating History

9 Since interpretation is an indispensable operation in applying and implementing treaties, the problem of treaty interpretation has been part of international law for as long as treaties have been concluded between entities as subjects of international law. It is generally said that it was with *Grotius*, *Pufendorf* and *Vattel* in the seventeenth and eighteenth centuries that the **first efforts** were made to identify detailed rules for treaty interpretation and to shape them into codes.[26] Increasing resort to arbitration from the late nineteenth century onwards resulted in a growing repository of decisions interpreting treaties, while interpretative practice on the universal level gained momentum with the **case law of the PCIJ**. Its approach to treaty interpretation foreshadowed several elements of what later became the rules of the VCLT. Those elements included, *eg*, the natural meaning of terms reflecting their ordinary usage,[27] taking into account as context other provisions of the same treaty and provisions of similar treaties,[28] considering the manner in which a treaty has been applied,[29] the historical development of the particular area of law,[30] the nature and purpose of treaty clauses,[31] the supplementary value of preparatory work[32] or the harmonization of different language versions of a treaty.[33]

10 One of the first well-known efforts in codifying the law of treaties was undertaken under the auspices of the Harvard Law School and resulted in the **Harvard Draft Convention** on the Law of Treaties published in 1935.[34] It contained not only proposed provisions on interpretation but also detailed commentaries expounding and analyzing legal literature and case law on the subject.[35] Its provision on interpretation (Art 19) was based on a rigorous teleological approach in that it placed major emphasis on achieving the "general purpose which the treaty is tended to serve".[36] In order to determine that purpose, several elements were to be

[26] *Gardiner* (n 6) 52.

[27] *For example,* PCIJ *Exchange of Greek and Turkish Populations* PCIJ Ser B No 10, 20 (1925); *Polish Postal Service in Danzig* PCIJ Ser B No 11, 37 (1925); *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53, 49 (1933).

[28] *Cf eg* PCIJ *Competence of the ILO in Regard to International Regulation of the Conditions of the Persons Employed in Agriculture* PCIJ Ser B No 2, 23 (1922); *SS* 'Wimbledon' PCIJ Ser A No 1, 23 and 25–28 (1923).

[29] *Cf* PCIJ *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials Who Have Passed into the Polish Service, Against the Polish Railways Administration)* PCIJ Ser B No 15, 18 (1928).

[30] *Cf* PCIJ *The Factory at Chorzów (Claim for Indemnity)* (Jurisdiction) PCIJ Ser A No 9, 24 (1927).

[31] *Ibid* 24–25.

[32] *Cf eg* PCIJ *SS 'Lotus'* PCIJ Ser A No 10, 16–17 (1927).

[33] *Cf* PCIJ *The Mavrommatis Palestine Concessions* PCIJ Ser A No 2, 19 (1924).

[34] *Cf* (1935) 29 AJIL Supp 657 *et seq*.

[35] *Ibid* 937–977.

[36] *Ibid* 661.

considered, such as the "historical background of the treaty, *travaux préparatoires*", "the circumstances of the parties at the time the treaty was entered into", "the subsequent conduct of the parties" in applying the treaty and "the conditions prevailing at the time interpretation is being made".

11 Under the UN Charter, the **ICJ in its early years** developed its techniques of treaty interpretation mainly by building on the jurisprudence of the PCIJ, but at the same time extending and refining the main principles. In his famous analysis *Fitzmaurice* deduced **six major principles** from the Court's case law during the 1950s[37]: according to the *principle of actuality or textuality,* treaties are to be interpreted as they stand, and on the basis of their actual texts. This maxim is as fundamental as the *principle of the natural and ordinary meaning* which the Court formulated for the first time in the *Competence of Admission* case:

> "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur."[38]

This preference for the natural and ordinary meaning of the terms of a treaty can be found in several of the Court's early cases.[39] In the quoted passage, the ICJ, by pointing to the context of the treaty, also underlined the *principle of integration*, *ie* that a treaty must always be read as a whole. The *principle of effectiveness* according to which treaties are to be interpreted with reference to their declared or apparent objects and purposes, was applied by the Court at many occasions, among the first being the *Corfu Channel* and the *Reparation for Injuries* cases. While in the former, the Court, referring to the case law of the PCIJ, held quite generally that

> "[i]t would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect,"[40]

in the latter, it inferred a certain status and capacity of the United Nations Organization from the fact that without them, it could not discharge the functions it was clearly intended to have.[41] That object and purpose rule was affirmed and applied in several other of those early cases.[42] A further principle clearly applied very early by the ICJ is that of *subsequent practice*, *ie* the Court looked at the way in which a

[37] *Cf GG Fitzmaurice* (1951) 28 BYIL 1, 9–22; *id* (1957) 33 BYIL 203, 210–227.

[38] ICJ *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4, 8.

[39] *Cf eg* ICJ *Interpretation of Peace Treaties (Second Phase)* (Advisory Opinion) [1950] ICJ Rep 221, 227; *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, 279.

[40] ICJ *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4, 24.

[41] *Cf* ICJ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179 *et seq*.

[42] *Cf eg* ICJ *Reservation to the Convention on the Prevention and Punishment of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 24; *Rights of Nationals of the United States of America in Morocco (France v United States)* [1952] ICJ Rep 176, 196.

treaty has actually been applied or operated by its parties[43] or by organs authorized to do so.[44] The sixth principle which *Fitzmaurice* proposed to extract from the Court's early case law was that of *contemporaneity*, *ie* that treaty terms must be interpreted according to the meaning which they possessed at the time of its conclusion. It had been applied rather prominently in the *Morocco* case.[45]

12 The formulation of these six principles had considerable influence on the later work of the ILC on the law of treaties, as **SR *Waldock,*** the first and only of the four Special Rapporteurs on the law of treaties who in this function took up the subject of interpretation, considered them as an important source of inspiration and introduced them in his work on the topic.[46] The provisions on treaty interpretation, which he **proposed in 1964,** corresponded to a large extent to the principles formulated by *Fitzmaurice*. *Waldock*'s draft Art 70 para 1 combined four principles in one rule, those of ordinary meaning, context, contemporaneity and of good faith. As subsidiary means of interpretation, *Waldock* proposed recourse to the object and purpose of the treaty, the preparatory work and the subsequent practice of the parties.[47] Instruments drawn up in connexion with the conclusion of the treaty were to be considered part of the context, rather than mere preparatory work (draft Art 71 para 1). The rule of effectiveness was laid down in a separate provision (draft Art 72) as being subject to the ordinary meaning and the object and purpose of a treaty, thus indicating its proper limits, or, as *Waldock* pointed out in his commentary, containing it "within the four corners of the treaty", still leaving room for some legitimate measure of teleological interpretation.[48] Finally, *Waldock* drafted a separate provision (draft Art 73) to the effect that treaty interpretation must "take account" (not more than that!) of possible alterations in the legal relations between the parties.

13 Although in the view of SR *Waldock,* the inter-temporal aspect of interpretation (contemporaneity) was simply one of the conditions for determining the natural and ordinary meaning,[49] and indeed a matter of common sense,[50] it was deleted from the draft during the **discussion in the ILC**, as it was thought that the correct application of the temporal element would normally be indicated by the interpretation in good faith.[51] Also, the rule of effectiveness was dropped as a separate article, as the majority in the Commission considered it to be included in the principle of

[43] *Cf eg* ICJ *International Status of South-West Africa* (Advisory Opinion) [1950] ICJ Rep 128, 135–136; *Rights of US Nationals in Morocco* (n 42) 210–211.

[44] *Cf eg* ICJ *Competence for Admission* (n 38) 9; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 160 and 165.

[45] *Cf* ICJ *Rights of US Nationals in Morocco* (n 42) 189.

[46] *Cf Waldock* III 55–56 para 12.

[47] *Waldock* III 52 (draft Art 70 para 2, draft Art 71 para 2).

[48] *Waldock* III 61 para 30.

[49] *Waldock* III 56 para 15.

[50] *Waldock* VI 94, 96 para 7.

[51] *Cf Waldock* VI 94, 97 para 13; Final Draft, Commentary to Art 27, 222 para 16.

good faith and the object and purpose rule.[52] In reaction to certain comments by governments, the Commission emphasized that it considered the process of interpretation a unity and that laying down various rules on interpretation did not mean establishing any legal hierarchy among them.[53]

The **Vienna Conference** adopted the ILC's proposals on treaty interpretation with only minor changes of drafting and one of substance, that is inserting what is now Art 33 para 4. There was considerable debate in the Committee of the Whole on proposals to amalgamate the general rule of interpretation and that on supplementary means into a single provision, but those proposals gained little support.[54] **14**

C. General Issues of Treaty Interpretation

I. Interpretation Is Always Required

Every treaty needs interpretation and is open to it. Even if its scope and the meaning of its terms may appear evident and clear, this is a result of an interpretative operation. Interpretation is thus **not a secondary process**, which only comes into play when it is impossible to make sense of the plain terms of a treaty,[55] and it is not superfluous only because the relevant words in their natural and ordinary meaning seem to make sense in their context.[56] This argument, even if it goes back to a famous dictum of *Emer de Vattel*,[57] is circular, because to know whether the wording is clear or 'makes sense' presupposes a process of interpretation and cannot, therefore, preclude that operation. Whenever a subject of international law invokes, applies or goes about implementing a treaty, it can only do so on the basis of a certain understanding of its terms, *ergo* on the basis of an interpretation. As *Schwarzenberger* has rightly said: **15**

> "Any application of a treaty, including its execution, presupposes [...] a preceding conscious or subconscious interpretation of the treaty."[58]

[52] *Cf* the debate in [1954-I] YbILC 275, 288–291.

[53] *Cf* Final Draft, Commentary Arts 27–28, 219–220 paras 8–9.

[54] UNCLOT I 191–193; *Gardiner* (n 6) 73.

[55] This was the view of *McNair* 365 n 1.

[56] Referring to the well-known phrase in ICJ *Competence for Admission* (n 38) 8: "If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter".

[57] *E de Vattel* Le droit des gens ou principes de la loi naturelle Vol II (1758) § 263: "La première maxime générale sur l'interprétation est qu'il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation."

[58] *G Schwarzenberger* Myths and Realities of Treaty Interpretation (1968) 9 VaJIL 1, 8. Similar *M Sorel* in *Corten/Klein* Art 31 MN 3.

II. The Points of Reference for Interpretation

16 The search for the true meaning of a treaty can have very different objects. Considering the questions that can in practice arise with regard to the legal effects of a treaty, we might *grosso modo* distinguish **four points of reference** for the process of treaty interpretation: interpretation can be directed at establishing the treaty-character of a document, the scope and the contents of a treaty and its effects in the internal law of its parties. Since neither the Convention rules nor customary international law appears to contain any distinction in this respect, the same rules and methods apply to all those objectives of interpretation.

17 First, it may be established through interpretation whether a document is a treaty in the sense of the VCLT at all, *eg* whether the common will expressed is meant by the parties to be binding (→ Art 2 MN 32–36). Secondly, the scope of a treaty can be ascertained by applying the rules of interpretation, that is to whom, to what situations and from which moment in time are its provisions meant to apply. Thirdly, the normative substance of a treaty, *ie* the rights and obligations of its parties, or the rules of the objective regime set up by the treaty, can be determined through interpretation. Fourthly and finally, we may enquire whether treaty provisions are suited to be directly applicable in the legal order of the parties to the treaty, and whether they demand a certain rank in that internal legal order. If the treaty can in the end develop direct effect, preference must, of course, be determined according to the rules of that internal order itself.

III. Who Is Competent to Interpret a Treaty?

18 The question of who is competent to interpret a treaty is not dealt with by the VCLT, although the issue had been raised in the ILC's discussion on the topic.[59] It had not been taken up by the Commission, probably because the answer is all too obvious: since interpretation is necessarily implied in any act of applying or implementing a treaty (→ MN 15), **every person or organ concerned with a treaty** is by necessity competent to interpret it. Since the international legal order is in principle still a decentralized system[60] that allows every subject of law to apply the relevant norms of international law pertaining to it, it is also an open system of treaty interpreters. The latter will very often be national courts and authorities, since due to their specific contents, many treaties are likely to be applied – and thus interpreted – chiefly within national legal systems.[61] Treaties concluded as constituent instruments of international organizations or within such organizations will

[59] *Cf Tsuruoka* [1964-I] YbILC 280, para 72.

[60] *Cf P Malanczuk* Akehurst's Modern Introduction to International Law (7th edn 1997) 3–7.

[61] Obvious examples are private law conventions, but also treaties engaging domestic procedures such as those on extradition, double taxation or State immunity. On treaty interpretation in national legal systems, see *Gardiner* (n 6) 126–138.

regularly be applied – and thus interpreted – by the competent organs of those organizations.

Quite a few treaties provide that disputes about their interpretation or application may be referred to **settlement before an international court or tribunal**. Some treaties establish a permanent body other than a tribunal with the (explicit or implicit) power to interpret the treaty. **19**

> *Eg* the International Convention on the Harmonized System, adopted within the World Customs Organization I 1983 (as amended in 1986)[62] the 1989 European Transfrontier Television Convention empowers in Art 21 lit c the Standing Committee to "examine, at the request of one or more parties, questions concerning the interpretation of the Convention."[63] Going further than that, Art IX para 2 of the 1994 WTO Agreement[64] provides that "the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."

Those organs then regularly assume an authoritative role in determining the actual meaning of the treaty provisions, the more so when their decisions concerning the interpretation are given binding force in the treaty itself.[65] The consistent jurisprudence of an authorized tribunal or the practice of other organs in interpreting the treaty may in turn be considered subsequent practice for the purpose of interpretation.[66] In its decision in the *Diallo* case the ICJ explicitly acknowledged the weight which the jurisprudence of independent treaty bodies carries with regard to the interpretation of the treaties under which they are established, when it held:

> "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled. Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question."[67]

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[62](To be found at www.wcoomd.org.), provides for "Explanatory Notes, Classification Opinions or other advice as guides to the interpretation of the Harmonized System" (Art 7) and for "recommendations to secure uniformity in the interpretation and application of the Harmonized System" (Art 8) to be prepared by the Committee and to be approved by the Council.

[63]1966 UNTS 265.

[64]1994 Agreement Establishing the World Trade Organization 1867 UNTS 154.

[65]As, for example, does Art 50 para 3 of the 2008 Protocol on the Statute of the African Court of Justice and Human Rights 48 ILM 317.

[66]For the purpose of interpreting the UN Charter the ICJ regularly puts major emphasis on the practice of UN organs under it, → MN 85.

[67]*Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, 30 November 2010, paras 66–67).

20 Even if a separate treaty organ is set up with the power to interpret the treaty, it is merely the parties to a treaty themselves which can give an **authoritative or authentic interpretation** to the treaty. As the PCIJ pointed out in its *Jaworzina* opinion of 1923:

> "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body which has the power to modify or suppress it."[68]

Thus, as a consequence of their continuing right to modify the treaty by consent (→ Art 39 MN 1), the parties can always override any interpretation given by a treaty organ established for that purpose. The parties acting in consensus remain the masters of their treaty and can, therefore, determine its meaning with binding force.[69] This is why issues over treaty interpretation are commonly a matter for discussion, negotiation and agreement between the parties, and why subsequent practice and subsequent agreements among the latter is of utmost importance in establishing the true (current) meaning of a treaty. In some instances, it may be difficult to distinguish then between an agreed interpretation of a treaty and an (implicit) treaty amendment by agreement among the parties.

21 **Resolutions of the UN Security Council** raise particular issues of interpretation, since when adopted pursuant to Chapter VII of the UN Charter, they have a mandatory character and are binding upon all UN Member States (*cf* Arts 25 and 48 UN Charter). Does this mean that the Council is, as part of its function to maintain international peace and security, empowered to interpret the Charter with an authoritative effect, thus binding on the Member States and other UN organs? The text and concept of the Charter do not seem to corroborate such an understanding, since the Security Council is merely authorized to adopt binding 'decisions', *ie* measures in an individual case or situation, and not interpretative guidelines of a binding character. Neither does the mandate of the Security Council cover the authoritative interpretation of other treaties than the UN Charter. However, the interpretation which necessarily underlies every decision adopted under Chapter VII will always carry special weight for understanding the Charter because of the binding force of those decisions.

22 Apart from their interpretative value, Security Council resolutions themselves are very often **the object of interpretation**. While in legal doctrine, it is usually thought to be convenient to basically interpret them in accordance with the rules of the VCLT,[70] the ICJ accepted in its *Kosovo* opinion that Arts 31, 32 VCLT "may provide guidance" in this respect, but at the same time pointed to decisive differences between UNSC resolutions and treaties, which, in the Court's view, mean that the interpretation of those resolutions "require that other factors to be taken into

[68] PCIJ *Question of Jaworzina (Polish–Czechoslovakian Frontier)* PCIJ Ser B No 8, 37 (1923).

[69] *Villiger* Art 31 MN 16.

[70] *Gardiner* (n 6) 113; *MC Wood* Interpretation of Security Council Resolutions (1998) 2 Max Planck UNYB 73, 85–86; A *Orakhelashvili* Unilateral Interpretation of Security Council Resolutions: UK Practice (2010) 2 GoJIL 823, 825–26.

account". In particular, the Court held that the interpretation of UNSC resolutions may require

> "to analyse statements of representatives of SC members made at the time of their adoption, other resolutions of the SC on the same issue, as well as the subsequent practice of relevant UN organs and of States affected by those given resolutions."[71]

Other practical examples for SC resolutions being the object of interpretation are, of course, the **statutes of ICTY and ICTR**, both being contained in annexes to SC resolutions and both being interpreted by the Tribunals with explicit reference to Art 31 VCLT.[72] Also other secondary legal instruments, such as the Regulations adopted by the Deep Seabed Authority under UNCLOS, are interpreted by the relevant instances according to the Vienna rules.[73]

IV. The Temporal Element of Interpretation

One of the most important general questions of treaty interpretation is to what moment in time the process of interpretation refers, *ie* the meaning of treaty provisions at what time it is trying to establish. Two different approaches can be distinguished in this respect: The **static approach** asks for the meaning of treaty provisions and the circumstances prevailing at the time of the conclusion of the treaty. It is also called the **principle of contemporaneity**, according to which the terms of a treaty are to be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded.[74] Opposed to that is the **dynamic approach**, very often also labelled 'evolutionary' interpretation, which seeks to establish the meaning of a treaty at the time of its interpretation. The temporal aspect of interpretation was discussed in the ILC but finally omitted from the adopted text (→ MN 13), so that Arts 31–33 VCLT do not address the issue explicitly. **23**

Both temporal concepts can be found in international judicial practice, which, on the whole, seems to follow the **static approach as a basic rule** and as a particular application of the doctrine of inter-temporal law. As such, it has been applied by the ICJ at several occasions, *eg* when the Court looked into linguistic usages at the time when the treaty was concluded[75] or into the intention of the parties at that same **24**

[71]ICJ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion), 22 July 2010, para 94.

[72]*Cf eg* ICTY *Prosecutor v Aleksovski* (Appeals Chamber Judgment) IT-95-14/1-A, 24 March 2000, para 98; ICTR *Prosecutor v Bagosora et al* (Apppeals Chamber) ICTR-98-37-A, 8 June 1998, paras 28–29.

[73]Thus explicitly ITLOS *Responsibilities and Obligations of States* (n 15) paras 59–60.

[74]Thus formulated by SR *Fitzmaurice* in his six principles (→ MN 11), reported in *Waldock* III 55, para 12.

[75]ICJ *Rights of US Nationals in Morocco* (n 42) 189; *Navigational Rights* (n 11) paras 55–56.

moment in time.[76] Moreover, the approach figures very prominently in several arbitration cases.

> Thus, the **Eritrea-Ethiopia Boundary Commission** followed in its decision regarding delimitation of the border between the two countries the 'doctrine of contemporaneity', which it described as requiring "that a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded. This involves giving expressions (including names) used in the treaty the meaning that they would have possessed at that time."[77]

In the words of SR *Waldock*, the requirement to interpret a treaty basically by reference to the linguistic usage current at the time of its conclusion is one both of common sense and good faith.[78] Similarly, the ICJ in its recent decision on the *Dispute Regarding Navigational and Related Rights* pointed out that

> "[i]t is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion. That may lead a court seised of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties' common intention."[79]

25 As an exception to that rule, the **dynamic approach** is being used **for interpreting generic terms**, *ie* terms in a treaty whose content the Parties expected would change through time and which they, therefore, presumably intended to be given its meaning in light of the circumstances prevailing at the time of interpretation. This approach was for the first time applied by the ICJ in the *Namibia* opinion to the phrase "sacred trust of civilisation"[80] and in the *Aegean Sea Continental Shelf* case to the formula 'territorial status'.[81] Also, judicial practice in the WTO adopted the evolutionary method for interpreting concepts such as 'natural resources'[82] or 'sound recording' and 'distribution'.[83] More recently, the ICJ applied the dynamic method to the Spanish term 'comercio' and in a general statement underlined that

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[76]ICJ *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria)* [2002] ICJ Rep 303, para 59. See also *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 Rep 16, para 53 (at the beginning).

[77]Eritrea–Ethiopia Boundary Commission Delimitation of the Border Between Eritrea and Ethiopia (*Eritrea v Ethiopia*) 25 RIAA 83, 110 (2002).

[78]*Waldock* VI 96 para 7.

[79]ICJ *Navigational Rights* (n 11) para 63.

[80]ICJ *Namibia* (n 75) para 53.

[81]ICJ *Aegean Sea Continental Shelf Case (Greece v Turkey)* (Jurisdiction) [1978] ICJ Rep 3, para 77.

[82]*Cf* WTO Appellate Body *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R, para 130 (1998).

[83]WTO Appellate Body *China – Measures Affecting Trading Rights* (n 18) para 369.

> "where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning."[84]

In such instances, it is indeed in order to respect the common will of the parties that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.[85]

26 Viewed in the light of those examples, dynamic or evolutionary treaty interpretation appears in fact to be a **two-tier process**: first, it is to be established whether a term is meant by the parties to be interpreted in a dynamic manner. If no particular intention to this effect has been expressed, this must be taken to be the case if a concept is embodied in the treaty that is, from the outset, evolutionary. Second, the term in question must be given the meaning which it possesses at the time of interpretation, considering the development of linguistic usage, international law and other relevant circumstances up to that moment.

27 A particular application of the dynamic approach lies at the heart of the established jurisprudence of the ECtHR to consider **the ECHR a 'living instrument'** and, as a consequence, to interpret it "in the light of present-day conditions".[86] Here, the dynamic approach to treaty interpretation, rather than being founded on – and confined to – a certain category of terms used in the treaty, follows from the quasi-constitutional character of the ECHR and the need to receive directions from it for effectively implementing human rights guarantees in a modern world.[87] However, the Court also acknowledged that this approach to the Convention and its Protocols has its limits, because it "cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset".[88]

28 The dynamic approach to the interpretation of treaties must be distinguished from the **use of dynamic means of interpretation**. Some of the methods provided for in Art 31 are *per se* dynamic, such as subsequent agreements (para 3 lit a) or subsequent practice (para 3 lit b), but they do not as such determine to what moment in time the interpretation in question refers. The practice of the ICJ shows that dynamic means of interpretation can also be used for applying the static approach,

[84]ICJ *Navigational Rights* (n 11) para 66.

[85]*Ibid* para 64.

[86]*For example,* ECtHR *Tyrer v United Kingdom* App No 5856/72, Ser A 26, para 31 (1978); *Marckx v Belgium* App No 6833/74, Ser A 32, para 41 (1979); *Loizidou v Turkey* (Preliminary Objections) App No 15318/89, Ser A 310, para 71 (1995); *Öcalan v Turkey* (GC) App No 46221/99, 12 March 2003, para 193; *Mamatkulov and Askarov* (GC) (n 16) para 121; *Demir and Baykara* (GC) (n 16) para 68.

[87]On the dynamic interpretation of the ECHR *cf HJ Cremer* in *R Grote*/*T Marauhn* (eds) EMRK/GG (2006) ch 4 paras 35–116.

[88]ECtHR *Johnston et al v Ireland* App No 9697/82, Ser A 112, para 53 (1986); *Emonet et al v Switzerland* App No 39051/03, 13 December 2007, para 66.

ie to establish the meaning of treaty provisions at the time of their conclusion. For example, in the *Corfu Channel* case, the Court held that:

> "The subsequent attitude of the Parties shows that it was not their intention [. . .]."[89]

Also, in the *Kasikili/Sedudu Island* case, the ICJ applied the static approach by using dynamic means, when it established the historical intentions of the parties to a treaty concluded in 1890 by "taking into account the present-day state of scientific knowledge".[90] Thus, the interpretative means used do not in principle prejudice the temporal point of reference of the process of interpretation.

V. Does One Size Fit All?

29 Every treaty needs interpretation, but do the same rules of interpretation apply to all types of treaties? Or are there **special rules for certain kinds** of them? Although Arts 31–33 do not contain any hint to this effect, it is often argued that the general rules of interpretation undergo some modifications when they are applied to certain types of treaties.[91] If, for example, States assume obligations in relation to one another, but the beneficiaries, or even the true addressees, of the treaty provisions are individuals (**human rights treaties**), that special feature and the latter's interests must be taken into account in the process of interpretation.[92] However, it is submitted that this does not require different rules, but simply a reasonable understanding of the "object and purpose" of the respective treaty when applying the general rule laid down in Art 31.

30 Differing rules may be applicable to treaties operating as the **constituent instrument of an international organization** or concluded within such an organization. Art 5 VCLT offers some flexibility in this respect, as it holds the rules of the Convention to be applicable to those kinds of treaties "without prejudice to any relevant rules of the organization". As the ICJ pointed out in its *Nuclear Weapons (WHO)* opinion:

> "Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret constituent treaties."[93]

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[89] ICJ *Corfu Channel Case* (Merits) (n 40) 25.

[90] ICJ *Kasikili/Sedudu Island* (n 11) para 20.

[91] *Gardiner* (n 6) 21.

[92] The ECtHR regularly points out that, when interpreting the ECHR, "the Court must be mindful of the Convention's special character as a human rights treaty", but so far no real consequences seem to follow from that, *cf eg* ECtHR *Loizidou* (GC) (Merits) (n 16) para 43; *Al-Adsani v United Kingdom* (GC) (n 16) para 55.

[93] ICJ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, para 19.

Nevertheless, as a matter of principle, the general rule of interpretation applies to constituent treaties, subject perhaps to three modifications that have arisen in practice: first, in interpreting the constituent document of an international organization, the effective fulfillment of the organization's functions is of major importance; thus the **object and purpose rule** will in these cases be geared almost exclusively towards the effective performance of the organization and its organs. This became apparent, for example, in the ICJ's jurisprudence with regard to the powers of UN organs,[94] and it also lies at the bottom of the case law of the ECJ concerning the functioning of the European Union (*effet utile*).[95] Second, the **subsequent practice of the organization** itself, rather than that of its Member States, in applying the constituent treaties usually proves to be of critical importance for the latter's interpretation. In some cases, the result reached by the interpreting court even seems to be exclusively based on that practice, especially when it tends to deviate from the wording of the treaty. Examples for this can be found in the *Namibia* and the *Construction of a Wall in the Occupied Palestinian Territory* opinions of the ICJ.[96] Thirdly and finally, if an organ has been empowered to interpret the constituent treaty of the organization, it usually tends to emphasize the need for an **autonomous interpretation**, *ie* one that is independent from national legal concepts, traditions and terminologies. A prime example for this approach to treaty interpretation is, of course, the jurisprudence of the ECJ[97] which in recent years seems to regard the autonomous interpretation of the European Union treaties as a constitutional principle of the Union itself.[98] **31**

Finally, it is submitted that the general rule of interpretation in principle also applies to the **interpretation of interpretation clauses**, *ie* to treaty provisions that stipulate themselves rules for the interpretation of the treaty they are contained in. **32**

> An example is Art 2 of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008)[99] which underlines that in the interpretation of the Convention regard must be had to its international character, to the need of its uniform application and to the observance of good faith in international trade.

Depending upon the exact contents of the provision in question, it may in certain cases be taken to be *lex specialis* vis-à-vis the rules of the VCLT, and thus

[94] *Cf* ICJ *Reparation for Injuries* (n 40) 182–183; *Certain Expenses* (n 44) 168.

[95] *Cf LN Brown/T Kennedy* The Court of Justice of the European Communities (2000) 343. *TC Hartley* The Foundations of European Community Law (2003) 79–80 calls this approach "decision-making on the basis of judicial policy".

[96] ICJ *Namibia* (n 75) para 22; *Construction of a Wall* (n 11) paras 27–28. With a contrary result, the ICJ bases in *Use of Nuclear Weapons* (n 93) para 27 the denial of an extensive interpretation, *inter alia*, on a "consideration of the practice of the WHO".

[97] *R Barents* The Autonomy of Community Law (2004) 289.

[98] *Cf eg* ECJ (CJ) *Linster* C-287/98 [2000] ECR I-6917, para 43; *Jaeger* C-151/02 [2003] ECR I-8389, para 58; *European Patents Court* Avis 1/09, 8 March 2011, paras 67 and 76; ECJ (CFI) *Hosman-Chevalier v Commission* T-72/04 [2005] ECR II-3265, para 40; EU Civil Service Tribunal *Klein v Commission* F-32/08, 20 January 2009, paras 35–36.

[99] Adopted by UNGA Res 63/122, 11 December 2008, UN Doc A/C.6/63/L.6.

effectively prevent the latter from applying to the treaty in question. But in order to establish just that, every interpretation clause would need to be interpreted, thus be subjected to the application of the rules laid down in Arts 31–33 VCLT. Also, treaty provisions which explicitly lay down the purpose of their treaty[100] can be interpreted in accordance with the general rules, although in this case, the object and purpose test would probably be rather meaningless. In any case, such a **purpose clause** cannot prevent the treaty interpreter from establishing, by applying the general rule of interpretation, whether the purpose of the treaty has been laid down accurately and what exactly the stipulated purpose means.

VI. Rules of Interpretation Outside the VCLT?

33 There are much more rules of treaty interpretation applied in international practice and diplomacy than are codified in Arts 31–33 VCLT. The Convention's rules of interpretation are **not exclusive** in a way that they prevent the interpreter from applying other principles compatible with the general rule laid down in Art 31. It is thus in his or her discretion to have recourse to established customary interpretation rules or at least to the wealth of material on treaty interpretation, which preceded the Convention.[101] The question seems in many cases to be whether the proposed rule of interpretation is in fact one that lies outside the Convention's system or whether it is encompassed by the latter's provisions.

34 One of the traditional *formulae* of treaty interpretation is the principle ***in dubio mitius***, also called the **principle of restrictive interpretation**, according to which treaties are to be interpreted in favour of State sovereignty: where a treaty's provisions are open to doubt, the interpretation that entails the lesser obligation for sovereign States should be selected, and if an obligation is not clearly expressed, its less onerous extent is to be preferred.[102] The PCIJ applied that principle explicitly in the *'Wimbledon'* and *Free Zone* cases, when it interpreted limitations on sovereignty restrictively, and that only because of their limiting effect.[103] In the *River Oder* case, the Permanent Court was already much more reluctant and applied *in dubio mitius* as a subsidiary principle when it pointed out that

[100] Such as Art II of the 1975 Convention for the Establishment of a European Space Agency 1297 UNTS 186; Art 1 of the 2000 UN Convention Against Transnational Organized Crime 2225 UNTS 209; Art 1 of the 2003 UN Convention Against Corruption 2349 UNTS 41; Art 1 para 1 of the 2006 UN Convention on the Rights of Persons with Disabilities, UNGA Res 61/106, 13 December 2006.

[101] *Gardiner* (n 6) 51.

[102] *Cf* the explanation and references given by *H Lauterpacht* Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties (1949) 26 BYIL 48 *et seq*.

[103] *Cf* PCIJ *'Wimbledon'* (n 28) 24; *Free Zones of Upper Savoy and the District of Gex* PCIJ Ser A/B No 46, 167 (1932).

> "it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States."[104]

Traces of that approach can still be found in the case law of the WTO.[105] The ICJ, however, never adopted it, and also the PCIJ in *'Wimbledon'* emphasized clear limits to restrictive interpretation, when it felt "obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted". Moreover, in a recent decision, the ICJ made it very clear that a treaty provision, which has the purpose of limiting the sovereign powers of a State, must be interpreted like any other provision of a treaty,[106] thus there can be no such principle as *in dubio mitius* in treaty interpretation. It is not only of little value for treaty interpretation itself,[107] but, above all, does not constitute a rule of customary international law.

Another unwritten *topos* of interpretation that figures rather prominently in international practice is the **rule of effectiveness**, in view of its Latin origin also phrased as *ut res magis valeat quam pereat*. It says that treaty provisions are to be interpreted so as to give them their fullest weight and effect and in such a way that a reason and a meaning can be attributed to every part of the text.[108] The principle was applied already in the early jurisprudence of PCIJ[109] and ICJ[110] and has, according to the latter in *Fisheries Jurisdiction* (1998), "an important role in the law of treaties".[111] In its recent *CERD* case concerning Georgia and Russia, the ICJ applied the well-established principle in treaty interpretation that words ought to be given appropriate effect" to the phrase "which is not settled" in Art 22 of the Convention and discarded a reading of that phrase which would render it meaningless and devoid of any effect.[112] In the judicial practice of the WTO, the principle is usually

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[104]PCIJ *Territorial Jurisdiction of the International Commission of the River Oder* PCIJ Ser A No 23, 26 (1929).

[105]*Cf* WTO Appellate Body *EC – Measures Concerning Meat and Meat Products*, WT/DS26 and DS48/AB/R, para 165 (1998); much more reluctant now *China – Measures Affecting Trading Rights* (n 18) para 411.

[106]ICJ *Navigational Rights* (n 11) para 48.

[107]To this effect, *cf* also *Iron Rhine* Arbitration (n 19) para 53; Iran-United States Claims Tribunal *Federal Reserve Bank of New York v Bank Markazi* (n 19) para 67; *R Bernhardt* Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights (1999) 42 GYIL 11, 14.

[108]Thus described by *Fitzmaurice* in his six principles of interpretation (→ MN 11), reprinted in *Waldock* III 55 para 12.

[109]*Cf Mavrommatis Palestine Concessions* (n 33) 34; *Free Zones of Upper Savoy and the District of Gex* PCIJ Ser A No 22, 13 (1929).

[110]→ MN 11. *Cf* also ICJ *Anglo-Iranian Oil Co Case (United Kingdom v Iran)* (Preliminary Objection) [1952] ICJ Rep 93, 105; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 160.

[111]ICJ *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 432, para 52.

[112]ICJ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections), 1 April 2011, paras 133–34.

taken to prohibit the adoption of a reading of WTO provisions "that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[113] However, effectiveness as an interpretative topos is not an isolated goal or concept, but is closely linked to the object and purpose of the treaty in question[114]: it is the latter the fulfillment of which is to be made possible or effectuated through interpretation. Thus, the principle of effectiveness is in reality no more than a particular application of the object and purpose test and the good faith rule and, therefore, an **integral part of the general rule of interpretation** laid down in Art 31.[115] As such, the principle has been applied by the ICJ, *eg*, in the *LaGrand* case when the Court determined the object and purpose of Art 41 ICJ Statute to be

> "to prevent the Court from being hampered in the exercise of its functions [. . .]."[116]

36 The same is true for the alleged rule that **exceptions** to a general rule have, for the reason alone of being an exception, **to be interpreted restrictively**. This interpretative *topos* can already be found in early international jurisprudence,[117] and is still being applied today.[118] Since the principle is meant to enhance the implementation, and thus the effectiveness of the general rule to which exceptions are being made in the treaty, it also constitutes a particular application of the object and purpose rule, relating to the *telos* of the general rule.[119]

37 The ICJ in the *Fisheries Jurisdiction* case thought it possible that the ***contra proferentem*** **rule** "may have a role to play in the interpretation of contractual provisions", but denied its application to declarations of acceptance of the Court and reservations made thereto.[120] However, the rule according to which a text that is ambiguous must be construed against the party who drafted it,[121] has not been very prominent in international practice[122] and in relation to treaties indeed does not appear to be very persuasive: treaties are usually the result of a common effort and the product of negotiations, they do not originate from drafts imposed by one party,[123] so there is no proper reason for holding the ambiguity of one of its elements against the party who introduced it into the negotiation process.

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[113] *For example* WTO Appellate Body *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R, 21 (1996); Panel *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* WT/DS207/R, para 7.71 (2002).

[114] See *Iron Rhine* Arbitration (n 19) para 49.

[115] *Cf* Final Draft, Introductory Commentary to Arts 27–28, 219 para 6.

[116] ICJ *LaGrand* (n 11) para 102.

[117] *Cf* PCIJ *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) PCIJ Ser B No 4 25 (1923).

[118] *Cf* ECtHR *Litwa* (n 16) para 59.

[119] *W Heintschel von Heinegg* in *Ipsen* Völkerrecht (5th edn 2004) § 11 MN 19.

[120] ICJ *Fisheries Jurisdiction* (n 111) para 51.

[121] *Verba ambigua accipiuntur contra proferentem.*

[122] The PCIJ relied on it once, but with regard to an instrument that was not an international treaty, *cf Payment in Gold of Brazilian Federal Loans Contracted in France* PCIJ Ser A No 21, 114 (1929).

[123] *Lauterpacht* (n 102) 64.

D. Elements of Art 31

I. The General Rule (para 1)

The general rule of treaty interpretation contained in Art 31 para 1 is **based on the textual approach**, *ie* on the view that the text must be presumed to be the authentic expression of the intentions of the parties. Consequently, the starting point of every interpretation is the elucidation of the meaning of the text,[124] rather than of any external will of the parties. **38**

Art 31 para 1 contains **three separate principles** and combines them in one single rule of interpretation. The first, interpretation in good faith, flows directly from the rule *pacta sunt servanda* (Art 26). The second requires every interpretation to have recourse to the ordinary, as opposed to a special, meaning of the terms used in the treaty, and the third principle is that the ordinary meaning is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose.[125] The general rule of interpretation does not describe some hierarchical or chronological order in which those principles are to be applied, but sets the stage for a **single combined operation** taking account of all named elements simultaneously (→ MN 5). As *Gardiner* aptly describes it: **39**

> Any treaty provision "is to be read selecting the ordinary meaning for the words used. But finding the ordinary meaning typically requires making a choice from a range of possible meanings. The immediate and more remote context is the next textual guide, with good faith and the treaty's object and purpose as further aids to this phase of an exercise in interpretation."[126]

To the same effect, the WTO Appellate Body described the process of treaty interpretation as

> "an integrated operation, where interpretative rules and principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise."[127]

1. Ordinary Meaning of the Terms

The first element of the general rule of interpretation requires giving an ordinary meaning to the "**terms of the treaty**". Considering the textual approach underlying the whole operation (→ MN 38), it seems quite natural that the "terms" to which the meaning is to be given refer to what has been written down by the parties, *ie* the words and phrases used in the treaty, rather than the bargain struck by the parties.[128] This is confirmed by Art 31 para 4 and Art 33 para 3 where "term(s)" is clearly **40**

[124] Final Draft, Commentary to Art 27, 220 para 11.

[125] *Ibid* 221 para 12.

[126] *Gardiner* (n 6) 202.

[127] WTO Appellate Body *China – Measures Affecting Trading Rights* (n 18) para 399.

[128] *Gardiner* (n 6) 163–164.

being used with reference to the meaning of written language. Therefore, as the ICJ underlines in its jurisprudence, interpretation must be based "above all" upon the text of the treaty.[129]

41 The point of departure in the process of interpretation is the linguistic and grammatical analysis of the text of the treaty, looking for the **ordinary meaning**, *ie* the meaning that is "regular, normal or customary".[130] In this respect, account can be taken of the kind of treaty involved, thus the test is not so much any layman's understanding, but what a person reasonably informed on the subject matter of the treaty would make of the terms used. In order to establish that kind of meaning, international judicial bodies quite often turn to **dictionaries**, general or more specialized ones,[131] even though those typically aim to catalogue *all* – and not just the ordinary – meanings of words.[132]

42 A consideration of the **grammatical form** of a treaty term encompasses the tense in which a specific provision has been phrased. Thus, the WTO Appellate Body has underlined the relevance of the use of present perfect tense:

> "We agree with Chile that Article 4.2 of the Agreement on Agriculture should be interpreted in a way that gives meaning to the use of the present perfect tense in that provision – particularly in the light of the fact the most of the other obligations in the Agreement on Agriculture and in the other covered agreements are expressed in the present, and not in the present perfect, tense. In general, requirements expressed in the present perfect tense impose obligations that came into being in the past, but may continue to apply at present."[133]

In the *CERD case* (*Georgia v Russia*) the ICJ had to interpret the phrase "which is not settled" and, among others, referred to its grammatical form in the French version:

> "The Court also observes that, in its French version, the above-mentioned expression employs the future perfect sense, whereas the simple present tense is used in the English version. The Court notes that the use of the future perfect tense further reinforces the idea that a previous action (an attempt to settle the dispute) must have taken place before another action (referral to the Court) can be pursued."[134]

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[129] *Cf eg* ICJ *Territorial Dispute* (n 5) para 41; *Legality of the Use of Force* (n 5) para 100.

[130] *Gardiner* (n 6) 164.

[131] *Cf eg* ICJ *Oil Platforms (Iran v United States)* (Preliminary Objection) [1996] ICJ Rep 803, para 45; *Kasikili/Sedudu Island* (n 11) para 30; ECtHR *Golder* (n 16) para 32; *Luedicke, Belkacem and Koç v Germany* App No 6210/73, 6877/75, 7132/75, Ser A 29, para 40 (1978); WTO Appellate Body in *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R para 153 (1999); EC *and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R para 658 (2011).

[132] Critical, therefore, as to that approach the WTO Appellate Body in *United States – Measures Affecting Gambling* (n 18) paras 164–167; *China – Measures Affecting Trading Rights* (n 18) para 348.

[133] WTO Appellate Body *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* WT/DS207/AB/R, para 206 (2002) (footnote omitted).

[134] ICJ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections), 1 April 2011, para 135.

In determining the ordinary meaning of terms, two connected aspects, which have been mentioned earlier, must be taken into account: the **temporal aspect** of the ordinary meaning test refers to the question of static or dynamic interpretation (→ MN 23); except where the parties have used a generic term, interpretation must look for the ordinary meaning at the time the treaty was concluded. The **language aspect** follows from Art 33: each authentic treaty language has to be consulted for the ordinary meaning of the term at issue and each of them is of equal value, since in every authentic language, the term must in principle be considered to have the same meaning. **43**

2. Context

The process of treaty interpretation is, of course, not a pure grammatical exercise. The general rule of interpretation laid down in Art 31 para 1 does not allow establishing an abstract ordinary meaning of a phrase, divorced from the place which that phrase occupies in the text to be interpreted. Instead, the terms of a treaty have to be interpreted "in their context", which means that the interpreter of any phrase in a treaty has to look at the treaty as a whole and, as Art 31 paras 2 and 3 demonstrate, even beyond that. The systematic structure of a treaty is thus **of equal importance** to the ordinary linguistic meaning of the words used, in order to determine its true meaning, since, as the PCIJ had already pointed out, words obtain their meaning from the context in which they are used.[135] **44**

The entire text of the treaty is **to be taken into account** as "context", including title, preamble and annexes (*cf* the chapeau of para 2) and any protocol to it, and the systematic position of the phrase in question within that ensemble. Interpretative value can be found in the position of a particular word in a group of words or in a sentence, of a particular phrase or sentence within a paragraph, of a paragraph within an article or within a whole set of provisions, of an article within or in relation to the whole structure or scheme of the treaty. **45**

The relevance of the **title of a treaty** is demonstrated, for example, by the ICJ's reasoning in the *Oil Platforms* case: **46**

> "For the meaning of the word 'commerce' in a bilateral treaty concluded by Iran and the US, the Court turned, *inter alia*, to the actual title of treaty which referred rather broadly to 'economic relations' and thereby suggested a wider reading of the term."[136]

The importance of **punctuation and syntax** can be seen in the *Aegean Sea Continental Shelf* case, where the ICJ had to deal with the French phrase "et, notamment," and explicitly pointed to the commas used.[137] The **structure of the sentence** was also relevant in *Land, Island and Maritime Frontier Dispute* **47**

[135] *Cf* PCIJ *Competence of the ILO* (n 28) 23. Adopted by the ICJ in *Constitution of the Maritime Safety Committee* (n 110) 158.

[136] ICJ *Oil Platforms* (Preliminary Objection) (n 131) para 47; also used as an example by *Gardiner* (n 6) 180–181.

[137] *Cf* ICJ *Aegean Sea* (n 81) para 53.

(El Salvador v Honduras), when an ICJ Chamber had to decide on its authority to delimit disputed maritime boundaries and, for that purpose, to interpret the phrase "to determine the legal situation". The Chamber held:

> "No doubt the word 'determine' in English (and, as the Chamber is informed, the verb 'determinar' in Spanish) can be used to convey the idea of setting limits, so that, if applied directly to the 'maritime spaces' its 'ordinary meaning' might be taken to include delimitation of those spaces. But the word must be read in its context; the object of the verb 'determine' is not the maritime spaces themselves but the legal situation of these spaces. No indication of a common intention to obtain a delimitation by the Chamber can therefore be derived from this text as it stands."[138]

48 The treaty as a whole is considered when the interpreter compares the **use of the same term elsewhere in the treaty** or **different phrases of the same treaty** dealing with the same issue in different wordings. The latter is what the Chamber did in the said decision when it pointed out:

> "The question must be why, if delimitation of the maritime spaces was intended, the Special Agreement used the wording 'to delimit the boundary line [. . .]' ('Que delimite la linea fronteriza [. . .]') regarding the land frontier, while confining the task of the Chamber as it relates to the islands and maritime spaces to 'determine [their] legal situation [. . .]' ('Que determine la situacion juridica [. . .]')."[139]

49 The treaty as a whole is also taken account of when it is established that other provisions of the same treaty have as a **necessary consequence or implication** a certain reading of the disputed term. The ICJ chose that line of argument recently in *Dispute Regarding Navigational and Related Rights* when it held that Costa Rica's right to the navigational use of the river included a minimal right of navigation in the villages along the river, including the use by official vessels, and concluded that from other provisions of the treaty than those on navigational rights.[140]

50 The **preamble** to a treaty, usually consisting of a set of recitals, may assist in determining the object and purpose of the treaty, for it is the normal place where the parties would embody an explicit statement to that effect. By stating the aims and objectives of a treaty, a preamble can thus be of both contextual and teleological significance. There are many examples in international jurisprudence of reference being made to the preamble of a treaty in order to elucidate the meaning of a particular provision.[141]

51 To take account of the position of a term or phrase in a treaty provisions means also that **considerations of textual logic** apply in establishing the ordinary meaning: thus, the ICJ recently considered it decisive in this regard if only one of several

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[138]ICJ *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras, Nicaragua intervening)* [1992] ICJ Rep 351, para 373.

[139]*Ibid* para 374.

[140]ICJ *Navigational Rights* (n 11) paras 77–79 and 84.

[141]*Cf eg* ICJ *Asylum Case* (n 39) 282*; Rights of US Nationals in Morocco* (n 42) 196; *Sovereignty over Pulau* (n 12) para 51; ECtHR *Golder* (n 16) para 34; WTO Appellate Body *US – Shrimp* (n 82) para 129; *Chile – Price Band System* (n 133) paras 196–197.

proposed readings allows the entire sentence in a treaty provision to be given a coherent meaning.[142]

Also, comparing the term in question with the **analogous wording of a related treaty** may assist in the contextual interpretation. The latter is aptly illustrated by the Chamber decision referred to above: 52

> "The same contrast of wording can be observed in Article 18 of the General Treaty of Peace, which, in paragraph 2, asks the Joint Frontier Commission to 'delimit the frontier line in the areas not described in Article 16 of this Treaty', while providing in paragraph 4, that 'it shall determine the legal situation of the islands and maritime spaces'. Honduras itself recognizes that the islands dispute is not a conflict of delimitation but of attribution of sovereignty over a detached territory. It is difficult to accept that the same wording 'to determine the legal situation', used for both the islands and the maritime spaces, would have a completely different meaning regarding the islands and regarding maritime spaces."[143]

By thus extending systematic considerations beyond the frame of the specific treaty in question, the role of extrinsic material in the process of interpretation comes into play, which is effectively governed by Art 31 paras 2 and 3 (→ MN 62 and 70).

3. Object and Purpose

The final words of Art 31 para 1 introduce the **teleological or functional element** into the general rule of interpretation and, by doing so, bring the principle of effectiveness into that rule: the terms of a treaty are to be interpreted in a way that advances the latter's aims. Any interpretation that would render parts of the treaty superfluous or diminish their practical effects is to be avoided (→ MN 35).[144] 53

The introduction of the **composite "object and purpose"** into the work of the ILC drafts was apparently influenced by the French version of the ICJ opinion on *Reservations to the Genocide Convention*. There, the Court ruled on the admissibility of reservations to treaties according to "l'objet et le but" of the latter, which appeared in the English version as "object and purpose".[145] 54

> This incidentally leads to the conclusion that the object and purpose test laid down in Art 19 VCLT for the purpose of determining the compatibility of a reservation and closely modelled after the *Reservations* opinion, is in fact just an application of the teleological approach to interpretation: that compatibility can be decided on only after the object and purpose of the treaty has been determined through interpretation (→ Art 19 MN 74).

[142] *Cf* ICJ *Navigational Rights* (n 11) para 52.

[143] ICJ *Land, Island and Maritime Frontier Dispute* (n 137) para 374.

[144] *Cf eg* ICJ *Constitution of the Maritime Safety Committee* (n 110) 160–161 and 166.

[145] ICJ *Genocide* (n 40) 24. On the previous page of the opinion, however, the English "objects" is used to translate the French "fins", which could imply that "object" was meant to have a purely teleological meaning.

Taken literally, "l'objet" would seem to describe the substantive content of a treaty, *ie* the rights and obligations created by it, while "le but" refers to the general result, which the parties want to achieve through the treaty.[146] However, in practice and doctrine, both elements are usually amalgamated into one single test[147] applying the *telos* of the treaty, or of one of its provisions, to a proposed interpretation of its terms.

55 Although many treaties have in fact a variety of different, and possibly conflicting, purposes, Art 31 para 1 uses **the singular form** "object and purpose", as do other provisions of the VCLT. Thus, the general rule of interpretation clearly means to refer as a single overarching notion to the *telos* of the treaty as a whole,[148] as does expressly Art 41 para 1 lit b cl ii. Since, however, in practice, the object of interpretation is always a specific provision, or a part of such, rather than the treaty as a whole, this global view is bound to diminish the value of teleological interpretation. Therefore, in the case of multi-purpose treaties all goals that are expressed in the terms of the treaty are to be taken into account, and in the end that which conforms best with the grammatical and systematic considerations on the term in question will prevail in the process of interpretation.

56 There are various ways of **determining the object and purpose** of a treaty. Some treaties contain general clauses specifically stating their purposes, Art 1 UN Charter being the obvious example.[149] Also, recourse to the title of the treaty may be helpful. Moreover, the preamble of a treaty is regularly a place where the parties list the purposes they want to pursue through their agreement (→ MN 50). In other cases the type of treaty may itself attract an assumption of a particular object and purpose, such as boundary treaties (final and stable fixing of frontiers).[150] Generally, however, a reading of the whole treaty, *ie* of all its substantive provisions, will be required to establish the object and purpose with some certainty. Also, contrasting the treaty in question with relevant treaties of the same kind can assist in establishing the *telos* of the former.

> That is what the ICJ did, for example, in the *Oil Platform* case, when it compared the Treaty of Friendship between Iran and the United States with other types of treaties of friendship and thereby determined the objective of the treaty before it.[151]

In general, intuition and common sense may provide useful indicators in identifying the object and purpose,[152] with the rule of good faith preventing that aims and objectives are introduced through the back door, which the drafters of the treaty rejected to insert into its terms.

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[146] *I Buffard/K Zemanek* (1998) 3 ARIEL 311, 326.

[147] *Cf J Klabbers* (1997) 8 FinnYIL 138, 144–148.

[148] *J Klabbers* Treaties, Object and Purpose in MPEPIL (2008) MN 6–7; *id* (n 140) 151–155.

[149] For more examples *cf* n 100.

[150] *Gardiner* (n 6) 192.

[151] ICJ *Oil Platforms* (Preliminary Objection) (n 131) para 27.

[152] *Klabbers* (n 148) 155.

Considerations of **effectiveness** play a predominant role in interpreting treaties that set up international organs or organizations and empower them with certain functions and powers. Here, the teleological element of interpretation could lead to **unwritten ('implied') powers** being read into the text in order to enable the organ concerned to fulfil its task under the treaty. The ICJ's case-law contains examples for different versions of that approach: while in its *Reparation for Injuries* opinion the Court referred for implied competences of the UN to the powers explicitly laid down in the Charter: **57**

> "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication – as being essential for the performance of its duties,"[153]

in the *Certain Expenses* case, only a couple of years later, it derived unwritten powers simply from the purposes of the UN:

> "But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization."[154]

Over the years, the concept of implied powers seems to have been very attractive, even seductive to those who wanted to see founding treaties of international bodies to be interpreted according to the principle of *effet utile*. However, it may be that the doctrine has in the meantime lost quite a bit of its appeal and interpretation in practice now favours a stricter approach to the attribution of powers to international organs.[155]

The consideration of object and purpose finds its **limits in the ordinary meaning of the text** of the treaty. It may only be used to bring one of the possible ordinary meanings of the terms to prevail and cannot establish a reading that clearly cannot be expressed with the words used in the text.[156] As the Iran-US Claims Tribunal once pointed out: **58**

> "Even when one is dealing with the object and purpose of a treaty, which is the most important part of the treaty's context, the object and purpose does not constitute an element independent of that context. The object and purpose is not to be considered in isolation from the terms of the treaty; it is intrinsic to its text. It follows that, under Article 31 of the Vienna Convention, a treaty's object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text."[157]

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[153]ICJ *Reparation for Injuries* (n 39) 182. See also the dissenting opinion of *Judge Hackworth* [1949] ICJ Rep 196, 198 who found the Court's approach too wide and wanted to have implied powers limited to "those that are 'necessary' to the exercise of powers expressly granted."

[154]ICJ *Certain Expenses* (n 44) 168.

[155]See *J Klabbers* An Introduction to International Institutional Law (2009) 59–73. A telling example seems to be ICJ *Use of Nuclear Weapons* (n 103) para 25, where the Court upheld the "principle of speciality" *vis-à-vis* alleged implied powers of the Organization.

[156]Concurring *Villiger* Art 31 MN 14.

[157]Iran-United States Claims Tribunal *Federal Reserve Bank of New York v Bank Markazi* (n 19) para 58.

59 Furthermore, determining the object and purpose of a treaty, or of one of its provisions, must, for practical as well as theoretical reasons, **be distinguished from** having recourse to the "**circumstances of the conclusion**" of the treaty. The latter may only be taken into account under the conditions of Art 32, *ie* as a supplementary means of interpretation. As the decision in *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* demonstrates, to point to certain behaviour of a State Party in order to develop views on the treaty's purpose from it may end up as being taken merely as part of those "circumstances", and thus being given a much lesser importance in the process of interpretation.[158] The result is, again, that object and purpose of a treaty must primarily be established by reading the latter as a whole, and not so much by recurring to external factors.

4. In Good Faith

60 Art 31 para 1 requires every treaty to be interpreted "in good faith" and thereby establishes the general idea embodied in that well-known phrase as some kind of umbrella covering the whole process of interpretation. Embodied in the opening words of the general rule of interpretation, that idea sets the tone and directs the undertaking as a whole. According to the most fundamental rule of the law of treaties, every treaty must be performed "in good faith" (Art 26). Since interpreting a treaty is a necessary element of its performance, logic requires that good faith be applied to the interpretation of treaties. Good faith must be used **during the entire process of interpretation**, *ie* when examining the ordinary meaning of the text, the context, object and purpose, the subsequent practice of the parties, etc In addition, the result of the interpretative operation must be appreciated in good faith as well.[159]

61 Although it is difficult to give precise content to the concept in general, the bottom line of it appears to be a **fundamental requirement of reasonableness** qualifying the dogmatism that can result from purely verbal or, for that purpose, excessively teleological analysis.[160] This is also the understanding in which the concept of good faith is at least hinted at in the rules of interpretation themselves, albeit only as an obligation of result: what is to be avoided by applying the principle of good faith is set out in Art 32 lit b, *ie* that interpretation of a treaty should not lead to a result, which is manifestly absurd or unreasonable. Thus, the ordinary meaning, if established in its context, must always be submitted to the test of reasonableness. If applying the words of a treaty in their ordinary meaning would seem to lead to a result, which would be manifestly absurd or unreasonable, another interpretation must be sought.

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[158] *Cf* ICJ *Land, Island and Maritime Frontier* (n 137) para 376.

[159] *Sinclair* 120.

[160] *Cf Gardiner* (n 6) 151 and 157. See also *R Jennings/A Watts* (eds) Oppenheim's International Law Vol I (1992) 1272.

Thus, to adopt the example given by *Aust*, the reference in Art 23 para 1 of the UN Charter to the "Republic of China" and the "Union of Soviet Socialist Republics" must today reasonably be taken to refer to the People's Republic of China and to the Russian Federation, respectively.[161] Any other approach, which might be in accordance with the ordinary meaning of those names, would be contrary to good faith.

II. Certain Elements of 'Context' (para 2)

Art 31 para 2 designates two types of documents that are regarded as forming part of the "context" within the meaning of para 1 and, thus, to be used for the purpose of arriving at the ordinary meaning of the terms of the treaty. The provision is based on the principle that a unilateral document cannot as such be regarded as part of the "context" but has, in order to attain that status, to receive some kind of acceptance by the other parties.[162] **62**

The documents referred to in para 2 are **extrinsic to the treaty**, they are not integral parts of it. Whether a document set up with regard to the conclusion of a treaty constitutes an actual part of that treaty depends on the intention of the parties in each individual case.[163] **63**

If the parties adopt certain 'understandings' and annex them formally to their treaty, they obviously want them to form part of their treaty consensus, and not material external to it. *Cf* the "Understandings with respect to certain provisions of the Convention" annexed to the UN Convention on the Jurisdictional Immunities of States and Their Property (2004).[164]

This also applies to treaties which contain explicit clauses with regard to their own interpretation or which refer to attached documents on their interpretation, such as, *eg*, Art 9 of the Rome Statute on the ICC introducing "Elements of Crimes" that "shall assist the Court in the interpretation and application" of articles 6 to 8*bis* of the Statute. Those "elements", which can be, and indeed are, amended by decisions of the States Parties, may not be an integral part of the original document of the Statute, but they are certainly part of the treaty consensus of the parties and not extrinsic material within the meaning of para 2.

If a document is part of the actual treaty consensus, it is an object and not, as part of the treaty "context", an instrument of interpretation. The provision in para 2 makes documents outside the treaty consensus, but related to its development, fully-fledged interpretative instruments.

On the other hand, documents within the meaning of para 2 are to be **distinguished from mere *travaux préparatoires***, since they form part of the "context" and are thus to be treated as an element of the general rule of interpretation, and not as supplementary means according to Art 32. However, it is left unclear in **64**

[161] *Aust* 234.

[162] Final Draft, Commentary to Art 27, 221 para 13.

[163] *Cf* ICJ *Ambatielos Case (Greece v United Kingdom)* (Preliminary Objection) [1952] ICJ Rep 28, 42–43; taken up by the ILC in Final Draft Commentary to Art 27, 221 para 13.

[164] Text annexed to UNGA Res 59/38, 16 December 2004, UN Doc A/RES/59/38.

both norms, how the distinction between extrinsic context (Art 31 para 2) and the preparatory works of a treaty (Art 32) can be drawn in a given case. It is submitted that the distinction hangs in the phrase "in connexion with the conclusion of the treaty" contained in both alternatives of para 2. Documents that are connected with the act of concluding the treaty, not so much with the treaty itself, leave the preparatory stage behind them and refer to the actual existence of the treaty consensus. The distinction between "preparation" and "connexion" can be best drawn by taking objective factors (*eg* the time taken in making the document) and the intention of the actors into account. Treaty-related material that does not fulfill the conditions for being "context" according to Art 31 para 2 may still be considered as *travaux* within the meaning of Art 32.

> A good example for material within the meaning of Art 31 para 2 is to be found in the declarations adopted by the EU Member States as part of the final act which is drawn up at Member State conferences amending the basic treaties of the EU, *cf eg* the Final Act attached to the Treaty of Lisbon[165]

65 Since the extrinsic context recognized in para 2 is an expression of the consensus of the parties and since the latter, acting in consensus, are the 'masters' of their treaty, para 2 provides **a method of authentic interpretation** (→ MN 20) of the treaty. In this case, all parties to a treaty agree on interpretative instruments relating to the treaty and thereby on its interpretation by means extrinsic to the treaty itself. The material accepted as relating to the conclusion of the treaty may help to determine which of the various ordinary meanings of its terms shall prevail.

66 Art 31 para 2 sets out **four conditions** for related material to become extrinsic context of a treaty:

- The document in question must be drawn up either by all parties together or, if drawn up only by one or several parties, must be accepted by the other parties. In order to be considered extrinsic context, it must be the object of a **general consensus** of all parties.
- That consensus must be born by all "**parties**", which are, in accordance with Art 1 para 1 lit g, only those States that have consented to be bound by the treaty and for which the treaty is in force. Taken literally, this would mean (a) that there can be no extrinsic context in this sense before the treaty has actually entered into force, and (b) that acts, views and instruments of States that may have participated in the negotiations but in the end are not party to the treaty must not be considered.
- The material must **"relate**" to the substance of the treaty, *eg* by specifying or clarifying certain concepts used therein or limiting its field of application. That relation must be one of substance, but it must also be encompassed by the parties' consensus.
- The provision does not say **at what moment in time** the consensus, either in the form of "agreement" or of "acceptance", must have been established. In

[165] [2007] OJ C 306/231, 249 *et seq*.

alternative (a), Art 31 para 2 requires that the agreement was made "in connexion with" the conclusion of the treaty, which does not necessarily require a temporal coincidence, since "connexion" implies a nexus in purpose and substance, not necessarily in time. Alternative (b) does not give any hint as to a temporal requirement. However, the general design of Art 31, which deals with acts and agreements subsequent to the conclusion of the treaty in para 3, would seem to imply that "agreement" and "acceptance" within the meaning of para 2 refer to a consensus established **in a certain temporal proximity** to the process of conclusion. Usually, agreements of this sort are made at the occasion of adopting the text of the treaty, while unilateral documents may very well be presented by individual parties when signing or ratifying a treaty and, therefore, require a reaction by the other parties at that later date.

67 Art 31 para 2 lit a defines "**agreements relating to the treaty**" as "context", provided they were made between all parties in connexion with the conclusion of the treaty. Since the term "agreement" is obviously wider than the notion of "treaty", as defined in Art 2 para 1 lit a, it also covers an unwritten consensus.[166] However, in common treaty practice, those "agreements" regularly take on the form of final acts, protocols of signature, understandings, commentaries or explanatory reports, which are agreed upon by the governmental experts drawing up the text of the treaty and adopted simultaneously with that text.

Eg the "Understandings" agreed upon together with the text of the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)[167]; the "Commentaries" on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997;[168] or the Explanatory Report adopted by the Committee of Ministers of the Council of Europe when it agreed on the text of the Criminal Law Convention on Corruption.[169]

The latter example demonstrates that "agreements" between the parties to the treaty may also come in the form of resolutions of an international organization, if the treaty has been drafted under the auspices of that organization. Rather unusual, but, of course, also relevant for lit a are agreements **explicitly** setting out guidance on the interpretation of the treaty.

See *eg* the 1973 Protocol on the Interpretation of Article 69 of the European Patent Convention (revised in 2000), adopted simultaneously with the Convention itself.[170]

[166] *Villiger* Art 31 MN 18.

[167] Understandings not printed in 1108 UNTS 151, but included in the Report of the Conference of the Committee on Disarmament Vol I, Official Records of the General Assembly, 31st Session, Supp No 27, UN Doc A/31/27 (1976), 91–92.

[168] See *OECD* (ed) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents (2010) 13–18.

[169] ETS 173.

[170] 1065 UNTS 199, 509.

Probably the most prominent example in this respect is the 1994 Agreement Relating to the Implementation of Part XI of UNCLOS[171] which in its Art 2 para 1 expressly sets out that its provisions and Part XI of the Convention "shall be interpreted and applied together as a single instrument".

In case of bilateral treaties the parties often include details on interpretation or application of the treaty in agreed minutes or an exchange of letters.

See *eg* the exchange of interpretative letters accompanying the 1977 UK-US Air Services Agreement.[172]

68 Art 31 para 2 lit b refers to unilateral or plurilateral "**instruments related to the treaty**" that are accepted as such by all the other parties. These can be statements made by individual parties before the conclusion of the treaty or accompanying their expression of consent to be bound, but also encompassed are unilateral interpretative declarations which a State presents at the time of agreeing to the treaty and which regularly share the outer characteristics of reservations to the treaty.[173] Unlike a reservation, an interpretative declaration simply states that the declarant considers or understands provision X to mean Y. By making such a declaration a State is taking the opportunity to influence in advance the subsequent interpretation of the treaty, the extent of that influence being dependent on the reaction of the other parties to the declaration.[174]

It is, for example, common practice in the European Union, as it was in the European Community, to add declarations of one or more Member States to the final acts drawn up at Member States conferences amending the basic treaties of the EU, the texts of those declarations having been taken note of by the other Member States at the end of the negotiations.[175]

69 As Art 31 para 2 lit b does not stipulate any formal requirement, the "**acceptance**" by the other parties can also be given informally or tacitly. Because, however, there is no provision in Art 31 para 2, as there is for objections to reservations in Art 20 para 5, to the effect that non-objection amounts to acceptance, a party advocating a certain interpretation on the basis of extrinsic context under lit b will always have to show that the other parties actually accepted the interpretation advanced.

III. Interpretative Means Additional to the Context (para 3)

70 Art 31 para 3 introduces two rather different things as means of interpretation, the common feature of which seems to be that they relate to **the practice of the parties**

[171] 1836 UNTS 41; 33 ILM 1309.

[172] 1079 UNTS 21, cited by *Aust* 237 in n 28.

[173] *Cf DM McRae* Legal Effect of Interpretative Declarations (1978) 49 BYIL 155 *et seq*; *I Cameron* Treaties, Declarations of Interpretation in MPEPIL (2008). See also → Art 19 MN 3.

[174] *McRae ibid* 170.

[175] *Cf eg* the declarations contained in the Final Act attached to the Treaty of Lisbon (2007), [2007] OJ C 306, 231, 267 *et seq*.

to the treaty in question, either with regard to the specific treaty or in their international legal relations in general: lit a and b allow material to be used that relates to the implementation of the treaty by its parties, while lit c directs the view of the interpreter to other rules of international law, independent of the specific treaty, and thereby introduces the systemic approach into treaty interpretation.

Despite an obvious difference in the wording, the material mentioned in para 3 is meant to have the same interpretative value as that listed in para 2 (→ MN 5), the essential difference being that para 2 refers to the process of conclusion of the treaty, while para 3 deals with evidence that arises independently from that process. However, both kinds of material are supposed to be used in order to establish the true meaning of the relevant terms of the treaty by applying the general rule of interpretation. **71**

1. Subsequent Agreements (lit a)

The "subsequent agreements" referred to in para 3 lit a bear a **close resemblance to the agreements mentioned in para 2 lit a**, the only two apparent differences being that the agreements here are made "subsequently", *ie* with a certain time lag after the conclusion of the treaty, and that they relate specifically to "the interpretation of the treaty or the application of its provisions", and not simply to the treaty. However, there does not seem to be any practical difference between both types of agreement: if they are sufficiently clear, they will have a comparable effect on establishing the meaning of the terms of the treaty; as *Gardiner* points out, whether elucidation of the treaty provisions is provided by the parties at the time of conclusion of the treaty or later seems of little importance.[176] What has been said with regard to "agreements" under para 2 (→ MN 67) is, thus, equally applicable here. **72**

However, it appears from judicial practice in the WTO that one important qualification has to be made: a subsequent agreement cannot be one "regarding the interpretation or application" of the treaty, if the agreement itself is, in the case of a conflict with the treaty, supposed to follow the latter or to adjust to it, thus if the agreement is considered by its parties to be **of lower rank than the treaty** under interpretation. The external means of interpretation must therefore be of equal rank as the object of interpretation. **73**

> Thus, in *Chile – Price Band System* the WTO Panel, which had to interpret the WTO Agreement on Agriculture, did not accept an Economic Complementarity Agreement between Chile and MERCOSUR as a "subsequent agreement" within the meaning of Art 31 para 2 lit a, because in its preamble it explicitly stated that its provisions "shall adjust" to the WTO Agreements.[177]

Since authors of the agreements referred to in para 3 lit a can only be the "parties" to the treaty, acting in consensus, these agreements are also a means **74**

[176] *Gardiner* (n 6) 206.

[177] *Chile – Price Band System* (n 112) paras 7.83–84.

of an **authentic interpretation** of the treaty concerned (→ MN 20) and must therefore be read into the latter for purposes of its interpretation.[178] Being the masters of their treaty, the parties are, in principle, not limited in making subsequent understandings or agreements. If the latter's content would not come within the bounds of an ordinary meaning of the terms, they would amount to an amendment of the treaty by implicit agreement.

> This is why in the *Territorial Dispute (Libya v Chad)* the ICJ considered it irrelevant to categorize an Anglo-French Convention of 1919, which was supposedly concluded to interpret a declaration between the two States of 1899, either as a confirmation or modification of the declaration. In any case, because the parties dealt with their own treaty consensus, the later agreement constituted the correct and binding interpretation of the earlier declaration.[179]

75 Again, since para 3 lit a does not contain any formal requirement, it would seem that the "agreements" can very well be made informally. They **do not have to be in treaty form** but must be such as to show that the parties intended their understanding to be the basis for an agreed interpretation.[180] The proven fact, not the form, of an agreement is what counts under lit a.

> This also seems to be the position of the ICJ in the *Kasikili/Sedudu Island* case, when the Court reviewed the various dealings between the local authorities involved in the border dispute and concluded that there had been no agreement between them, so that para 3 lit a could not apply.[181]

If informal agreements or understandings fall under lit a, this would also mean that there is a potential overlap with the concept of "subsequent practice establishing agreement of the parties" within the meaning of lit b. One might also even say that the less formal the subsequent agreement, the greater is the significance of subsequent practice confirming it for the purpose of establishing the meaning of a treaty provision.

2. Subsequent Practice (lit b)

76 The subsequent practice of the parties in implementing the treaty constitutes objective evidence of their understanding as to the meaning of the latter and is, therefore, of utmost importance for its interpretation. This particular value of subsequent practice had already been pointed out by the arbitral tribunal in the *Russian Indemnity* case of 1912 when it held that:

> "l'exécution des engagements est, entre Etats comme entre particuliers, le plus sûr commentaire du sens de ces engagements."[182]

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[178] Final Draft, Commentary to Art 27, 221 para 14.

[179] *Cf* ICJ *Territorial Dispute* (n 5) para 60.

[180] *Gardiner* (n 6) 218.

[181] ICJ *Kasikili/Sedudu Island* (n 11) para 63.

[182] 11 RIAA 421, 433.

From there, it is only a small step to recognize that, because the parties are the masters of their treaty, a meaning derived from subsequent practice, which is consistent and embraces all parties of a treaty, constitutes an **authentic interpretation** established by agreement, not only overlapping with agreements under lit a (→ MN 74), but also blurring the line between interpretation and amendment of a treaty.[183] Since the parties, acting collectively through their concordant practice, are the masters of their treaty, they cannot only take interpretation further than could a body charged with the role of independent interpretation, but also bring about an implicit treaty amendment by practice.[184]

77 Subsequent practice as an element of treaty interpretation is nowadays **well-established in the practice** of international courts and tribunals,[185] and it was an important element of it even in the early days of international jurisprudence: Already in 1922, the PCIJ pointed out in its second advisory opinion:

> "If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the treaty."[186]

The limits of referring to subsequent practice were also fairly clearly set by the Court when it held in *Land, Island and Maritime Frontier Dispute* that consideration of that element cannot make it read into the text of a treaty a competence that is not specifically mentioned there.[187]

78 Which **elements of practice** are to be taken into account under lit b will vary according to the subject matter of the treaty concerned. In principle, any action, or even inaction, of parties with a view to implementing the treaty will have to be considered. Just as in the process of developing customary law (Art 38 para 1 lit b ICJ Statute), the notion of "practice" comprises any external behaviour of a subject of international law, here insofar as it is potentially revealing of what the party accepts as the meaning of a particular treaty provision. **No particular form** is required, so that official statements or manuals, diplomatic correspondence, press releases, transactions, votes on resolutions in international organizations are just as relevant as national acts of legislation or judicial decisions. In fact, "practice" in this respect is not limited to the central government authorities of States, rather any

[183]This was already pointed out by *Waldock* III 60, para 25.

[184]*Gardiner* (n 6) 242–245. This was also the view of the ILC which in Art 38 of its Final Draft had explicitly provided for the possibility that a treaty "may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions" (Final Draft 236). The fact that this article was the only one that was not adopted, but discarded altogether at the Vienna Conference, was mostly based on its specific drafting or on grounds of legal policy and cannot be taken to mean that the concept of implicit modification of a treaty by its parties, acting in agreement, was rejected by the States, *cf W Karl* Vertrag und spätere Praxis im Völkerrecht (1983) 288–295.

[185]For the jurisprudence of the ICJ, *cf* the references given by the Court itself in *Kasikili/Sedudu* (n 11) para 50.

[186]PCIJ *Competence of the ILO* (n 28) 39. *Cf* also *Brazilian Loans* (n 122) 93, 119; ICJ *Corfu Channel Case* (n 40) 25: "The subsequent attitude of the Parties shows [. . .]."

[187]ICJ *Land, Island and Maritime Frontier Dispute* (n 137) para 380.

public body acting in an official capacity can contribute to demonstrating the state's position towards its treaty commitments.

The **relevance of national legislation** in this respect is, *eg*, emphasized in the jurisprudence of the ECtHR on the question if capital punishment was as such compatible with Art 3 of the ECHR. In its *Soering* judgment of 1989, the Court pointed out that Art 3 must be construed in harmony with Art 2 and could not, therefore, be taken to include a general prohibition of the death penalty, but continued: "Subsequent practice in national penal policy, in the form of a generalized abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Art 2 § 1 and hence to remove a textual limit on the scope for evolutive interpretation of Art 3."[188] Many years later, in its first *Öcalan* judgment of 2003, the ECtHR reiterated that in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Art 3 "it cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field", and it observed that "the legal position as regards the death penalty has undergone a considerable evolution since the *Soering* case was decided", in that forty-three contracting States had by then *de jure* abolished that penalty.[189] The Court concluded that though their practice the States had agreed to modify Art 2 § 1 of the Convention and that against this background it could be argued "that the implementation of the death penalty can be regarded as inhuman and degrading treatment contrary to Art 3."[190] Again some years later, this interpretation of Art 3 of the Convention has become generally accepted case-law of the ECtHR, as the Court recently confirmed in *Al-Saadoon and Mufdhi*.[191]

The ECtHR adopted recently a similar approach with regard to the applicability of Art 9 ECHR (freedom of conscience and religion) to conscientious objectors in the *Bayatyan* case: While the ECommHR still had denied that the conscientious objection to military service was covered by the Convention, the Court discovered "an obvious trend among European countries to recognize the right to conscientious objection" and established that "the domestic law of the overwhelming majority of Council of Europe Member States, along with relevant international instruments, has evolved to the effect that at the material time there was already a virtually general consensus on the question in Europe and beyond". Consequently it held, that the matter today falls under Art 9 ECHR.[192]

79 In order to become relevant under lit b, State conduct must constitute **a sequence of acts or pronouncements**, since "practice" cannot be established by one isolated incident. The interpretative value of that practice will always depend on the extent to which it is concordant, common and consistent and thus sufficient to establish a discernable pattern of behaviour.[193]

80 That practice of the parties is only relevant under lit b if it occurs "**in the application**" of the treaty, which plainly indicates that, just as for the development of international customary law, a subjective link is required under lit b: the parties whose practice is under consideration must regard their conduct to fall within the

[188]ECtHR *Soering v United Kingdom* App No 14038/88, Ser A 161, para 103 (1989).

[189]ECtHR *Öcalan* (n 86) paras 194–195.

[190]*Ibid* para 198.

[191]ECtHR *Al-Saadoon and Mufhdi* (GC) (n 16), para 120.

[192]ECtHR *Bayatyan v Armenia (GC)* App No 23459/03, 7 July 2011, paras 101–109.

[193]*Sinclair* 137. Adopted by the WTO Appellate Body in *Japan – Taxes on Alcoholic Beverages II* (n 18) 13; and the Panel in *Chile – Price Band System* (n 112) para 7.78–79.

scope of application of the treaty concerned and in principle to be required under that treaty. They must act the way they do for the purpose of fulfilling their treaty obligations. On the other hand, their actions do not have to bear a special reference to a particular provision of the treaty, but can relate to the treaty as a whole or to different parts of it than the one under scrutiny.

81 Subsequent practice may also serve as a means to determine the scope of application of a treaty, and then even to establish that the latter does not apply. Thus, under lit b, the interpreter may just as well consider the practice of parties in the "**non-application of the treaty**", *ie* draw conclusions from the fact that the parties did not apply their treaty when treaty provisions might have been thought to be applicable.[194] This was the approach, for example, of the ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, when the Court referred to State practice in order to determine whether various treaties applied to the use of nuclear weapons:

> "The Court will observe that the Regulations annexed to the Hague Convention IV do not define what is to be understood by 'poison or poisoned weapons' and that different interpretations exist on the issue. Nor does the 1925 Protocol specify the meaning to be given to the term 'analogous materials or devices'. The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons. In view of this, it does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of the above-mentioned provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Protocol [. . .]."[195]

82 Although the wording of lit b does not say so explicitly, the subsequent practice considered relevant for the purpose of interpretation must be **practice of the parties**, *ie* attributable to parties to the treaty concerned.[196] Thus, acts or pronouncements of non-parties or of private individuals, that are not attributable to the States Parties according to the general rules of attribution, can in principle not be taken into account. Again, "parties" refers, in accordance with Art 1 para 1 lit g, only to those States that have consented to be bound by the treaty and for which the treaty is in force.

83 Even though lit b requires the practice to establish the agreement of "the parties", meaning all the parties, that does **not mean that every party** must have individually engaged in practice. The ILC omitted the word "all", which had been contained in an earlier draft, from this phrase precisely in order to avoid the misconception that the practice must be actively performed by all the parties.[197] It suffices, therefore, that inactive parties should have accepted the practice set by other parties. Although it is, thus, possible that only some of the parties participate in the

[194] *Gardiner* (n 6) 232–233.

[195] ICJ *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, paras 55–56.

[196] *Gardiner* (n 6) 235.

[197] *Cf* Final Draft, Commentary to Art 27, 222 para 15.

subsequent practice, lit b does not allow a certain interpretation to be established only among those participating States with binding force '*inter se*', as opposed to the other parties to the treaty: if some of the parties wanted to modify the treaty only between themselves, they would have to pursue the means provided for in Art 41 VCLT, *ie* to conclude an agreement to that effect and notify the other parties of it.[198]

84 As lit b does not explicitly say whose practice is to be considered, there is room for other actors that have been given a role in the implementation of a treaty to set relevant practice. Thus, where States by treaty entrust performance of activities under that treaty to an **international organ or organization**, the fulfillment of those functions is not only attributable to the parties (→ MN 82), but can also in itself constitute "subsequent practice" under the treaty. This is of particular relevance with regard to constituent treaties of international organizations, and here especially for interpreting the provisions dealing with the competences and procedures of the organs created. While the ILC Special Rapporteur has explicitly declined to deal with the practice of organs,[199] the ICJ underlined its importance with great emphasis:

> "the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, *as well as its own practice*, are all elements which may deserve special attention when the time comes to interpret these constituent treaties."[200]

85 That "subsequent practice" can also be **practice of the organization** concerned has for a long time been a permanent feature of international jurisprudence. Above all, the ICJ refers to practice of the UN organs in almost every case where it has to interpret one of its constituent treaties.

> Thus, in its *Namibia* opinion the Court acknowledged that in view of the longstanding practice in the UN Security Council the phrase "concurring votes" in Art 27 para 3 UN Charter does not actually require, as the wording might suggest, that all permanent members must vote in favour of a resolution, but that the requirement is also fulfilled by abstention or absence. To reach that conclusion, it referred to "the proceedings of the Security Council extending over a long period", especially presidential rulings and the positions taken by members of the Council, and it held that this procedure "has been generally accepted by Members of the United Nations and evidences a general practice of that Organization".[201]
>
> In its opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ pointed to a change in the practice of the General Assembly for the purpose of interpreting Art 12 UN Charter to the effect that it precludes recommendations of the Assembly only when the Security Council is actually exercising its functions at that moment.[202]

[198] Concurring *Gardiner* (n 6) 236–237.

[199] *Waldock* III 52, 59–60 para 24a.

[200] ICJ *Use of Nuclear Weapons* (n 103) para 19 (emphasis added).

[201] ICJ *Namibia* opinion (n 75) para 22.

[202] ICJ *Construction of a Wall* (n 11) paras 27–28.

> In *Constitution of the Maritime Safety Committee of the IMCO* the Court, in order to interpret Art 28 lit a IMCO Convention, took into account the actual practice followed by the organization's Assembly in giving effect to the provision, such as the electoral practice and the apportionment of the expenses of the Organization, as well as a working paper prepared by the Secretary-General. Moreover, the interpretation was chosen which was "most consonant with international practice and with maritime usage".[203]
>
> In its *Nuclear Weapons (WHO)* opinion the ICJ considered "the practice of the WHO", in order to establish whether the legality of the use of nuclear weapons belongs to the scope of activities of that Organization. In particular, the Court referred to reports and resolutions adopted by the WHO organs and held that a single resolution, "adopted not without opposition, could not be taken to [...] amount on its own to a practice establishing an agreement between the members of the Organization" which would be relevant for the interpretation of its constituent treaty.[204]

For the purpose of interpretation, the Court considered as relevant practice, *inter alia*, the rules of procedure of UN organs[205] and the Organization's budgetary practice.[206]

Subsequent practice of parties is only relevant for treaty interpretation if it "**establishes the agreement of the parties**". In setting up this second subjective requirement, lit b underlines the value of subsequent practice as an instrument of authentic interpretation: the practice, even if only some parties participated in it, must be accepted by all the parties, *ie* the parties as a whole.[207] Again, if not every party has participated in the practice, there must be at least good evidence that the other, inactive parties have endorsed it. If the subsequent practice consists of the conduct of organs of an international organization, it is only relevant if it is not counteracted by acts or representations of the parties to the treaty in question. **86**

What exactly "**agreement**" within the meaning of lit b means is not clear. In the *Kasikili/Sedudu Island* case, the ICJ seems to have considered the concept to mean less than "agreement" in lit a, since it concluded *a fortiori* from the latter when it held: **87**

> "From all of the foregoing, the Court concludes that the abovementioned events [...] demonstrate the absence of agreement between South Africa and Bechuanaland with regard to the location of the boundary around Kasikili/Sedudu Island and the status of the Island. Those events cannot therefore constitute 'subsequent practice in the application of the treaty [of 1890] which establishes the agreement of the parties regarding its interpretation' (1969 Vienna Convention on the Law of Treaties, Art 31, para 3 (b)). *A fortiori*, they cannot have given rise to an 'agreement between the parties regarding the interpretation of the treaty or the application of its provisions' (*ibid*, Art 31, para 3 (a))."[208]

[203] ICJ *Constitution of the Maritime Safety Committee* (n 110) 168–170.

[204] ICJ *Use of Nuclear Weapons* (n 103) para 27.

[205] ICJ *Competence for Admission* (n 38) 9.

[206] ICJ *Certain Expenses* (n 44) 160.

[207] *Cf* Final Draft, Commentary to Art 27, 222 para 15.

[208] ICJ *Kasikili/Sedudu Island* (n 11) para 63.

Thus, agreement in lit b would in essence seem to mean **acceptance**, even tacit, and is at the very minimum evidenced by the absence of any disagreement.[209] Such acceptance cannot be taken to exist if the parties concluded a separate treaty whose provisions take up the problem that was supposed to be addressed by the meaning established by way of interpretation under para 3 lit b.

> Thus, in its *Soering* judgment (→ MN 78) the ECtHR refused to interpret Art 3 ECHR, because of the development in national policies, in a way as to prohibit the death penalty *per se*, because the contracting States to the Convention had concluded Protocol No 6 to the Convention which provided for the abolition of the death penalty in time of peace. According to the Court "Protocol 6, as a subsequent written agreement, shows that the intention of the Contracting Parties [. . .] was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions [. . .] Art 3 cannot be interpreted as generally prohibiting the death penalty."[210]

88 What is more, "agreement" presupposes, as the ICJ has also pointed out, the **knowledge or awareness** of other parties of a certain practice: internal documents or acts that have never been made known to the other parties cannot qualify under lit b.[211] Rather, the subjective element contained in that provision requires that a party acts under a treaty in the belief of a certain meaning of its terms and that the other parties were aware of that understanding and accepted it as what the treaty stipulates.[212]

3. Relevant Rules of International Law: The Systemic Approach (lit c)

89 Art 31 para 3 lit c includes yet other material extrinsic to the treaty in question into the process of its interpretation. It refers to **the international legal system as a whole as part of the context** of every treaty concluded under international law and thereby lays the foundation for the systemic approach to treaty interpretation: whatever their subject matter, treaties are a creation of the international legal system and their operation is based upon that fact. In a much more restricted form the rule had already been applied in early international jurisprudence, for example when the PCIJ looked at treaties and other documents having the same object as the treaty under consideration.[213] Later the ICJ formulated it in its *Namibia* opinion, under the impression of the debate in the ILC and the adoption of the VCLT, in a rather broad and general manner:

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[209] Concurring *Villiger* Art 31 MN 22.

[210] ECtHR *Soering* (n 188) para 103.

[211] ICJ *Kasikili/Sedudu Island* (n 11) para 55.

[212] *Ibid* para 74.

[213] PCIJ '*Wimbledon*' (n 28) 25–28.

> "An international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[214]

Moreover, the rule laid down in lit c has a firm **basis in the principle of good faith**, since according to that principle, every party to a treaty must in principle be presumed to intend to keep its treaty obligation in conformity with its other obligations under international law. As the ICJ pointed out in the *Right of Passage* case: **90**

> "It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."[215]

The French-Mexican Claims Commission, through Professor *Verzijl*, had produced the same thought much earlier in its *Georges Pinson* decision of 1928:

> "Toute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente."[216]

The interpretative approach laid down in lit c views the international legal order as one single system and allows drawing conclusions from that perspective. It has, therefore, great potential to be one of the means to mitigate the effects of the much-described **fragmentation of international law**, since treaty interpretation can on the basis of this rule transgress the borders of specialized subregimes of international law, such as environmental law, trade law, law of the sea, international criminal or human rights law, and try to find a meaning for the terms in question that reflects the common basis of legal rules in an integrated system of international law. Thus, lit c highlights systemic integration as a function of treaty interpretation.[217] **91**

The provision refers to "**relevant rules of international law**" as a means to interpret treaty provisions. Since no restrictions are contained in that phrase,[218] and its meaning is even widened by the word "any", it must be taken to refer to all recognized sources of international law the emanations of which can in principle be of assistance in the process of interpretation. The implicit reference is, of course, to Art 38 para 1 ICJ Statute. **92**

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[214] ICJ *Namibia* (n 75) para 53.

[215] ICJ *Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125, 142.

[216] *Georges Pinson (France) v Mexico* 5 RIAA 327, para 50 subpara 4 (1928).

[217] *Cf* the report of the ILC Study Group on "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (2006), UN Doc A/CN.4/L.702, in its conclusions 17–21. In the same context also *C Thiele* Fragmentierung des Völkerrechts als Herausforderung für die Staatengemeinschaft (2008) 46 AVR 1, 24–28.

[218] In an earlier draft the word "general" had been included as qualifying "international law", but it was deleted during the discussion in the ILC, in order to allow specific and regional rules to be used, *cf Gardiner* (n 6) 262.

93 Thus, the terms of a treaty can, first, be interpreted in the light of those of **another treaty**, especially where the latter deals with a similar object or addresses the same legal situation.

For example, the **ECtHR** uses, for the purpose of interpreting provisions of the ECHR, to take into account other human rights treaties, such as the International Covenant on Civil and Political Rights, the UN Convention Against Torture, the UN Convention on the Rights of the Child, the European Social Charter or conventions concluded under the auspices of ILO,[219] as well as the interpretation of those instruments by competent organs.

In the *Rantsev* case the Court, after explicitly referring to Art 31 para 3 VCLT, turned to a UN Protocol and to the Anti-Trafficking Convention of the Council of Europe, in order to establish that trafficking in persons falls within the scope of Art 4 ECHR.[220]

Also the **Inter-American Court of Human Rights** refers to other human rights treaties, in order to establish the meaning of provisions of the American Convention on Human Rights. Thus, in the *Street Children* case the Court pointed out that "[b]oth the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the child that should help this Court establish the content and scope of the general provision established in Art 19 of the American Convention".[221]

94 Since they are derived from the provisions of the UN Charter, basically a multilateral treaty, binding **resolutions of the UN Security Council** may also play an important role in the process of treaty interpretation.

Thus, the ECtHR in its *Loizidou* case referred to Security Council resolutions relating to the situation in Northern Cyprus when it interpreted the ECHR with regard to the taking of property there.[222]

95 Secondly, the general rules of **customary international law** may serve to set the background of a treaty provision and, thus, contain important guidance as to its interpretation.

This is, for example, what the **ICJ** did in the *Oil Platforms* case when it interpreted a clause contained in the bilateral treaty of friendship between Iran and the United States, which allowed for measures "necessary to protect the essential security interests" of either party, in the light of the general rules of international law on the use of force and the right to self-defence. The Court underlined that "the application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court [. . .]."[223]

Also the **ECtHR** referred to international customary law in its well-known *Al-Adsani* case: "The Convention should so far as possible be interpreted in harmony with other

[219] *Eg,* ECtHR *Al-Adsani v United Kingdom* (GC) (n 16), para 60; *Pini et al v Romania* ECHR 2004-V, para 139; *Siliadin v France* App No 73316/01, ECHR 2005-VII, paras 85–87; *Sørensen and Rasmussen v Denmark* (GC) App Nos 52562/99 and 52620/99, ECHR 2006-I, para 72; *Emonet et al* (n 88) para 65; *Demir and Baykara* (GC) (n 16) paras 69–73.

[220] ECtHR *Rantsev v Cyprus and Russia* App No 25965/04, 7 January 2010, paras 273–282.

[221] IACtHR *'Street Children' (Villagran-Morales et al) v Guatemala*, 19 November 1999, para 194.

[222] ECtHR *Loizidou* (GC) (Merits) (n 16) paras 42–47.

[223] ICJ *Oil Platforms* (Merits) (n 13) paras 40–41.

rules of international law of which it forms part, including those relating to the grant of State immunity." The Court interpreted the right of access to court granted in Art 6 para 1 ECHR in the light of the inherent restrictions arising from the customary rules of State immunity.[224]

In the *Banković* case, when the ECtHR had to interpret the phrase "within its jurisdiction" in Art 1 ECHR, the Court found that that "must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law",[225] but in the end did not derive any assistance from external material.

The **ECJ** in the *Brita* case, where it was to interpret the EC-Israel Association Agreement, applied "the general international law principle of the relative effect of treaties [. . .] ('*pacta tertiis nec nocent nec prosunt*')" and referred in that respect explicitly to the 'relevant rules'-clause of Art 31 VCLT.[226] In *Axel Walz* the Court, for the purpose of interpreting the Montreal Convention on the International Carriage in Air, referred to the ILC Articles on State Responsibility[227] as endorsing "a concept of damage which [. . .] is common to all the international law sub-systems".[228]

The **Iran-US Claims Tribunal**, when it had to interpret the word "national" contained in the bilateral Claims Settlement Declaration, considered relevant the customary rule of effective nationality which it saw as having been developed in precedents and legal doctrine.[229]

Similarly, in the *Iron Rhine* arbitration the tribunal took into consideration the general rules of international environmental law, in order to interpret the treaty before it.[230]

Although of minor practical relevance, para 3 lit c would even allow reference to **general principles of law** within the meaning of Art 38 para 1 lit c ICJ Statute in the context of interpreting a treaty provision. **96**

A famous example is the decision of the ECtHR in the *Golder* case where the Court held: "The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para 1 must be read in the light of these principles."[231]

In its decision *US – Shrimp* the WTO Appellate Body referred to the principle of good faith as being, at once, a general principle of law and a general principle of international law and, under explicit reference to Art 31 para 3 lit c, sought guidance from it for the interpretation of Art XX GATT.[232] In the *EC – Biotech* case the WTO Panel was prepared to take into account the precautionary principle of international environmental law, if it

[224]ECtHR *Al-Adsani v United Kingdom* (GC) (n 16) paras 55–56. To the same effect ECtHR *Cudak v Lithuania* App No 15869/02, 23 March 2010, para 56; *Sabeh El Leil v France* App No 34869/05, 29 June 2011, para 48.

[225]ECtHR *Banković et al v Belgium et al* (GC) App No 52207/99, ECHR 2001-XII, para 57.

[226]ECJ (CJ) *Brita* (n 17) paras 43–44.

[227]Articles on Responsibility of States for Internationally Wrongful Acts, Annex to UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83.

[228]ECJ (CJ) *Axel Walz* (n 17) para 27.

[229]Iran-United States Claims Tribunal *Iran v United States* Case A/18 (1984), 75 ILR 175, 188–194.

[230]*Iron Rhine* Arbitration (n 19) paras 58–59.

[231]ECtHR *Golder* (n 16) para 35.

[232]WTO Appellate Body *US – Shrimp* (n 82) para 158 and n 157.

were established that it had achieved the status of a general principle of law (which, it found, it had not).[233] In *EC – Large Civil Aircraft* the WTO Appellate Body considered the principle of non-retroactivity reflected in Art 28 VCLT a general principle of law, which is relevant to the interpretation of the WTO covered agreements.[234]

97 Notwithstanding the fact that "rules" would imply that only legally binding instruments can play a role under lit c, parts of international judicial practice seem to apply this condition somewhat less restrictively and also consider **non-binding documents** as material relevant for interpretation.

For example, the **ECtHR** turns, for the purpose of interpreting the ECHR, to non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly or reports by various independent commissions,[235] the UN General Assembly's Universal Declaration on Human Rights,[236] Guidelines and "Conclusions" published by the UN High Commissioner on Refugees,[237] and even the (then) non-binding EU Charter of Fundamental Rights.[238] The ECJ referred in the context of interpreting the Montreal Convention to the ILC Articles on State Responsibility.[239]

Even broader is apparently the approach taken by the **Inter-American Commission on Human Rights** which considers that "in interpreting and applying the American Declaration [on Human Rights], it is necessary to consider its provisions in the context of the international and inter-American human rights systems more broadly, in the light of developments in the field of international human rights law since the instrument was first adopted and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the American Declaration are properly lodged."[240]

98 In cases where the provision to be interpreted relates to the competences or procedures of international organs, the interpretation might seek guidance in similar provisions in other treaty regimes and, above all, in their **application by competent organs**. In such cases, it is not so much the external (parallel) "rules", but the practice under them which is being used as a means of interpretation.

This can be aptly shown in the *Mamatkulov and Askarov* case of the ECtHR where the Court had to decide on the binding character of interim measures adopted under Art 34 ECHR. In the process of interpreting the Convention norm and after explicitly referring to

[233] WTO Panel *EC – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291-3/R, paras 7.76–7.89 (2006).

[234] WTO Appellate Body *EC – Large Civil Aircraft* (n 131) para 672.

[235] *Cf* ECtHR *Demir and Baykara* (GC) (n 16) paras 74–75; *Bayatyan* (GC) (n 192) para 107

[236] *Eg* ECtHR *Al-Adsani v United Kingdom* (GC) (n 16) para 60.

[237] ECtHR *Saadi* (GC) (n 16) para 65.

[238] ECtHR *Christine Goodwin v United Kingdom* (GC) App No 28957/95, ECHR 2002-VI, para 100; *Sørensen and Rasmussen* (GC) (n 219); *Eskelinen et al v Finland* (GC) App No 63235/00, 19 April 2007, para 60 *in fine*.

[239] ECJ (CJ) *Axel Walz* (n 17) para 27.

[240] IACHR *Mossville Environmental Action Now v United States*, Report No 43/10, 17 March 2010, para 43.

Art 31 para 3 lit c it basically reviewed the practice under other individual petition procedures, *eg* in the UN and the Inter-American system, and concluded from that: "The Court observes that the International Court of Justice, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations, although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law."[241]

In the recent *Bayatyan* case, the ECtHR interpreted Art 9 ECHR to cover conscientious objection to military service and, as one of the reasons beside a trend in national legislation of European States, referred to "the equally important developments concerning recognition of the right to conscientious objection in various international fora", the most notable being the interpretation by the UN Human Rights Committee of the corresponding provisions of the ICCPR.[242]

The ICJ in its *CERD case* (*Georgia v Russia*) referred, for the purpose of interpreting the compromissory clause in the Convention, to its own jurisprudence concerning comparable clauses in other treaties.[243]

99 Art 31 para 3 lit c requires the rules of international law, which are supposed to be looked at for the purpose of interpretation, to be "**relevant**". This, of course, is a rather vague condition, which leaves the interpreter much room in the selection of extrinsic material to be taken into account. It seems that the "relevance" of other treaties or customary rules can be seen to follow from various grounds: it is fairly obvious when those rules relate to the same subject matter as the treaty provision under interpretation.[244]

For example, the exact scope of privileges of family members of diplomatic agents, which is described in Art 37 para 1 of the Vienna Convention on Diplomatic Relations with the words "forming part of his household", may be determined by looking at the provision addressing the same issue in the Vienna Convention on Consular Relations (Art 49 para 1). Even if in this case the English texts of both provisions do not reveal any significant differences in wording that would assist in the interpretation, the other authentic language versions in fact do.

Moreover, external rules, regardless of their subject matter, can be relevant when they are created to solve the same or similar factual, legal or technical problems. Again, another treaty cannot be "relevant" in this sense, if it is intended by its parties to be **of lower rank** than the treaty under interpretation (→ MN 73). An agreement that "shall adjust" to the latter or shall leave its provisions unaffected (*etc*) does not, therefore, qualify as a means of interpretation under para 3 lit c.[245]

[241]ECtHR *Mamatkulov and Askarov* (GC) (n 16) para 124.

[242]ECtHR *Bayatyan (GC)* (n 192) para 105.

[243]ICJ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections), 1 April 2011, paras 136–140.

[244]The WTO Appellate Body confined the concept of "relevant" to this meaning in *EC – Large Civil Aircraft* (n 131) para 846.

[245]Thus, the WTO Panel in *Chile – Price Band System* (n 112) para 7.85.

100 Finally, para 3 lit c only allows those rules to be used for the purpose of interpretation that are "**applicable in the relations between the parties**". Since the word "parties" is defined in Art 2 para 1 lit g, its meaning seems, on the face of it, clear, *ie* States for whom the treaty under interpretation is in force. However, this does not settle the question, of whether the norm requires *all* the parties of that treaty to be bound by the "rules" in question, or whether it suffices that the latter apply only to some of the parties, *eg* those having an immediate interest in the interpretation or being involved in a dispute over it. While the comparison with para 2 lit a, where "all" is included before "the parties", might point to the latter, less restrictive reading, the definite wording "the" parties strongly suggests the former, restrictive reading.[246] This is confirmed by the immediate context of the norm, that is by para 3 lit b: it would be incongruous to allow the interpretation of a treaty to be affected by rules of international law that are not applicable between all parties to the treaty, but not by a subsequent practice, which does not establish the agreement of all parties regarding the meaning of that treaty (→ MN 86).[247] It is admitted that this restrictive approach severely limits the relevance of para 3 lit c for the interpretation of multilateral treaties with a wide, even universal participation.[248] However, on proper construction, it may allow for an exception, and that is if the treaty obligation in question, even if contained in a multilateral treaty, is in fact owed in a synallagmatic way between pairs of parties, rather than *erga omnes partes*: in those **cases of a bilateral implementation structure,** the treaty obligation may very well be considered in the light of other obligations applying bilaterally between those two parties only.[249]

The restrictive approach was applied by the WTO Panel in the *EC – Biotech* case when it held that other rules of international law, in that case the Convention on Biological Diversity and the Biosafety Protocol, cannot be taken into account for the interpretation of the WTO agreements, unless all WTO Members are bound by them.[250] The fact that the United States had signed, but not ratified the former Convention meant that it was not "applicable" to them and that Art 31 para 3 lit c did not apply.[251] The WTO Appellate Body was confronted with the issue in a recent case, but avoided to give an opinion on it.[252]

The less restrictive approach, which allows external rules to be used even if they are not binding on all the parties to the treaty, receives considerable support from the **practice of the ECtHR**: while in some cases it emphasized the fact that the other treaties referred to for the purpose of interpretation were at least binding upon the respondent State, the Court admitted itself in *Demir and Baykara v Turkey* that in searching for common ground among

[246] In favour of the restrictive reading, also *Villiger* Art 31 MN 25; *C Thiele* (n 217) (2008) 46 AVR 26–27.

[247] This was held by the WTO Panel in *EC – Biotech* (n 233) para 7.68, n 243 *in fine*.

[248] Favouring a less restrictive reading for practical reasons *D French* Treaty Interpretation and the Incorporation of Extraneous Legal Rules (2006) 55 ICLQ 281, 307.

[249] *C McLachlan* The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention (2005) 54 ICLQ 279, 315.

[250] WTO Panel *EC – Biotech* (n 233) paras 7.68–7.71.

[251] *Ibid* para 7.74.

[252] *Cf* WTO Appellate Body *EC – Large Civil Aircraft* (n 131) paras 844–46.

the European Convention and other norms of international law it had not always distinguished between sources of law according to whether or not they had been ratified by all States Parties to the Convention, or even by the respondent State.[253]

That the external rules are "**applicable**" in the relations between the parties presupposes that the latter are legally bound by those rules, either because they have given their consent to them as treaty rules, or because they are addressed by them as binding customary rules or general principles, or because they are bound for other reasons, such as acquiescence or unilateral declaration. Secondly, even if the external rules may have in principle binding effect on "the parties", their applicability between them must not be excluded for reasons of estoppel or through admissible reservations to a treaty. **101**

In practice, it is sometimes considered possible that rules extrinsic to the treaty under interpretation which do not qualify for consideration under lit c, either because they are not binding on all parties to the treaty, or because they face restrictions of application, may under certain circumstances nevertheless become relevant for the interpretation of the same treaty. **102**

For example, the WTO Panel in the *EC – Biotech* case, after having followed the restrictive approach mentioned above (→ MN 100), thought it possible to consider the external rules, excluded under that approach, "because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do. They would be considered for their informative character."[254] The Appellate Body skirted the issue in EC Large Civil Aircraft, but was in the further course of its reasoning apparently prepared to consider the external agreement referred to as "part of the facts".[255]

Although the difference is, of course, that a treaty interpreter would this way be free to rely on the external rules, while under para 3 lit c he is bound to take them into account, the argument appears very much like a sleight-of-hand, since it reintroduces interpretative material through the backdoor that has been excluded following a strict reading of the rule of interpretation. It seems hardly compatible with the overall structure of Art 31. Maybe, the fact that this 'backdoor approach' has been thought necessary in practice, serves as a practical argument against the restrictive approach to the phrase "applicable in the relations between the parties".

Even though it is not recognizable in the text of para 3 lit c, the provision has an important **temporal element**: in relation to the state of the law **at what moment in time** does the rule relate, the time of the conclusion of the treaty or that of interpretation? The (inter)temporal aspect was contained in earlier drafts of the provision, it had even been the reason for designing it in the first place, but was later omitted[256]: the provisional ILC draft of 1964 had referred to the general rules of international law "in force at the time of its conclusion"; after re-considering the **103**

[253]ECtHR *Demir and Baykara* (GC) (n 16) para 78, with examples given in paras 79–84.

[254]WTO Panel *EC – Biotech* (n 233) para 7.92. Similarly, *McLachlan* (n 246) 315; leaning towards this approach also *Gardiner* (n 6) 274.

[255]WTO Appellate Body *EC – Large Civil Aircraft* (n 131) paras 852–53.

[256]*Cf Sinclair* 138–139; *Gardiner* (n 6) 256–259.

article, the ILC deleted the time element because it thought it was "unsatisfactory". The Commission considered that "the correct application of the temporal element would normally be indicated by interpretation of the term in good faith",[257] thus, it left the issue decidedly undecided.

104 Since the consideration of external rules for the purpose of interpretation is not *per se* either static or dynamic, *ie* it can be used both ways, it is submitted that the correct use of the rule contained in para 3 lit c **depends on whether the static or the dynamic approach applies** to the term in question. As has been shown earlier (→ MN 23–28), this depends upon the intentions of the parties, but if they have used generic terms in their treaty, the meaning of which necessarily evolves over time, they usually must be presumed to have intended a dynamic interpretation. In that case, the "relevant rules" to be considered under para 3 lit c must be those applicable at the time of interpretation.

This is also how the ICJ applied the rule in its *Namibia* opinion, when it introduced the dynamic approach of treaty interpretation and added: "an international instrument has to be interpreted and applied within the framework of the entire legal system *prevailing at the time of the interpretation*".[258]

Similarly, in the *Iron Rhine Railway* arbitration the tribunal considered modern principles of international environmental law relevant for the interpretation of bilateral treaties concluded by Belgium and the Netherlands in 1839 and 1873.[259]

IV. Special Instead of Ordinary Meaning (para 4)

105 Art 31 para 4 contains an **exception to para 1** for cases where the parties have agreed, even implicitly, to replace the ordinary meaning of a term contained in a treaty provision by a special meaning. However, the notion of "special meaning" refers to two different kinds of cases, which are both covered by para 4.

First, it may be that the terms of a treaty have a technical or "special meaning" due to the particular field the treaty covers. In this case, the particular meaning may already appear from the context and object and purpose of the treaty, it is essentially the **ordinary meaning in the particular context**.[260] It is this reading of the concept of "special meaning" which lends itself to explaining the practice of autonomous interpretation applied in particular legal regimes, such as the ECHR or the European Union: the autonomous meaning given by the European Courts to the European Convention and the EU treaties, respectively, represents their ordinary meaning in the particular setting of their legal regime.[261]

[257] Final Draft, Commentary to Art 27, 222 para 16.

[258] ICJ *Namibia* (n 75) para 53 (emphasis added).

[259] *Iron Rhine* Arbitration (n 19) paras 57–60.

[260] *Gardiner* (n 6) 291.

[261] Art 31 para 4 is applied to both regimes by *M Sorel* in *Corten/Klein* Art 31 MN 50.

In the second case, the meaning of terms of a treaty is "special" because the parties are using it in a way **different from the more common meaning**. It is this category which para 4 is especially aiming at, and in this understanding, the provision entails the only element in the process of treaty interpretation which explicitly looks to the intention of the parties, rather than to its emanation in the text, in order to establish their very own understanding of a term which they used.

106 The main reason why the ILC decided to include an express provision on the point into its draft was to emphasize that the **burden of proof** lies on the party invoking the special meaning of the term, and the strictness of the proof required.[262] That point had already been made by the PCIJ in the *Eastern Greenland* case, when it held:

> "The geographical meaning of the word 'Greenland', *ie* the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention."[263]

Also, in *Conditions of Admission,* the ICJ pointed out that "a decisive reason would be required" in order to displace the natural meaning of the terms used,[264] and the arbitral tribunal in the *Rhine Chlorides* arbitration of 2004 applied a very similar standard when it required the party invoking a particular meaning "to make a convincing case for it".[265] In view of the general design of Art 31, the **standard of proof** required to establish a "special meaning" is, thus, fairly high: it is not enough that one party simply uses the particular term in a particular way, but it must show that such a usage reflects the common intention of the parties.

107 However, Art 31 para 4 does not say **what kind of evidence** may be used to establish that intention. Since Art 31 contains no restriction in this respect, it seems plausible that all the evidence available to the proponent of a "special meaning" may play a role in showing that a "special meaning" was intended and what that meaning is. The most common way in which the parties could indicate a particular meaning would be, of course, to include an explicit definition article in the treaty. If a definition is lacking, the *travaux préparatoires* and the actual, and consented, practice of the parties may in most cases be useful. Moreover, para 4 does not exclude that the parties could agree on special interpretative principles, which differ from the general rule laid down in Art 31, or which place a different weight on some of the elements of interpretation.[266]

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[262] *Cf* Final Draft, Commentary to Art 27, 222 para 17.

[263] PCIJ *Legal Status of Eastern Greenland* (n 27) 49. Confirmed by the ICJ in *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, para 116.

[264] *Conditions of Admission of a State to Membership in the United Nations* (Advisory Opinion) [1948] ICJ Rep 57, 63.

[265] *Convention on the Protection of the Rhine* (n 19) para 67.

[266] *Gardiner* (n 6) 298.

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Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Contents

A. Purpose and Function

Art 32 deals with the use of supplementary means in the process of treaty interpretation and with the relationship of that use to the general rule of interpretation laid down in Art 31. The provision therefore basically determines the circumstances under which such means may be invoked in treaty interpretation, what weight is to be given to them and how they relate to the other rules of interpretation. The core issue is what **information and material outside the text of a treaty** can be brought into the process of interpreting it, and how this is done *lege artis*.[1] In this respect, Art 32 corresponds to Art 31 paras 2 and 3, which also refers to extrinsic material in order to include them into the context of the treaty, whereas here the identified material is given a lesser value as being merely supplementary. **1**

The most commonly used and most controversial of those means is, of course, the **preparatory work** of a treaty, which is commonly referred to in its French version as "*travaux préparatoires*". The restrictive purpose of Art 32 relates above all to that interpretative *topos*, it is labelled a supplementary means of interpretation in order to ensure that recourse to preparatory work is not used as an alternative, **2**

[1] *R Gardiner* Treaty Interpretation (2008) 302.

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autonomous method of interpretation, distinct from the general rule.[2] The main reason for this general scepticism as to the interpretative value of *travaux* seems to be that they are usually seen as being often incomplete and misleading, thus by their nature less authentic than the other elements of interpretation.[3]

3 The foremost purpose of Art 32 is, therefore, to make clear that preparatory work in principle has nothing but **a supporting role** in treaty interpretation. It is supposed to assume its interpretative function only after the application of the general rule, *ie* after the application of the whole of Art 31. Since the role which preparatory material can play in the process of interpretation marks the essential difference between the textual and the "intentions" approaches to treaty interpretation, the restrictive design of Art 32 characterize the provision as a further confirmation of the fact that the Vienna rules of interpretation are clearly based on the textual approach (→ Art 31 MN 3 and 38). This supplementary value of preparatory work is usually taken to be **part of the customary law character** of the Vienna rules of interpretation (→ Art 31 MN 6).[4]

4 As part of treaty and customary law, the rule laid down in Art 32 is a **dispositive norm**, so that the parties to a given treaty, acting in consent, may opt to decide otherwise and agree that for the interpretation of their treaty the use of preparatory work is, for example, to play a more important role. Such can also be stipulated in a multilateral convention, as is done, for example, in Art 14 para 1 lit d VCLT, which binds the valid treaty consent of a State to an intention "expressed during the negotiation".

B. Historical Background and Negotiating History

5 The restrictive use of *travaux préparatoires* in treaty interpretation has a long history in the practice of international law. One of the most prominent *dicta* in this respect can be found in the *Lotus* judgment of the PCIJ where the Court **established the merely subsidiary value** of the preparatory work by holding that "there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself."[5] The ICJ in its early case law explicitly referred to that restrictive approach and adopted it.[6] The early international jurisprudence further

[2] *Sinclair* 116.

[3] *Aust* 244; various reasons are given by *Y Le Bouthillier* in *Corten/Klein* Art 32 MN 32–38. The traditional doctrinal controversy on the use of *travaux préparatoires* is described *eg* by *Mehrish* (1971) 11 IJIL 39, 39–57.

[4] *Y Le Bouthillier* in *Corten/Klein* Art 32 MN para 7.

[5] PCIJ *SS 'Lotus'* PCIJ Ser A No 10, 16 (1927). To the same effect *cf Payment of Certain Serbian Loans Issued in France* PCIJ Ser A No 20, 30 (1929).

[6] *Cf eg* ICJ *Conditions of Admission of a State to the United Nations* (Advisory Opinion) [1948] ICJ Rep 57, 63; *Ambatielos Case (Greece v United Kingdom)* (Preliminary Objections) [1952] ICJ Rep 28, 45; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 159–160.

described the threshold which must be reached before preparatory work can be taken into account. In its opinion on the *Polish Postal Service in Danzig*, the PCIJ held that

> "It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, *unless such interpretation would lead to something unreasonable or absurd*."[7]

Again, that view was adopted by the ICJ, which applied it at a very early stage of its practice to the interpretative use of *travaux préparatoires*.[8] Nevertheless, the state of the law seemed very unclear in those days, which led an important voice in legal doctrine opining that:

> "[i]t is not possible to state any rules of law governing the question whether, and, if so, to what extent international courts and tribunals [. . .] are entitled to look at 'preparatory work' [. . .]."[9]

6 The restrictive approach to preparatory work was also very much present in the **work of the ILC** on the law of treaties. Thus, SR *Waldock* pointed out that some caution is needed in the use of *travaux*, because they are simply evidence of the intentions of some of the parties, and their cogency depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning of the terms of the treaty.[10] The provision on preparatory work exposed some difference in approach to treaty interpretation among members of the ILC, especially regarding the precise way in which recourse to *travaux préparatoires* should be related to the textual approach to interpretation.[11] In view of those differences and despite critical comments on the part of some governments indicating a preference for allowing a larger role to preparatory work, SR *Waldock* thought the rule he had formulated was carefully balanced in reconciling the principle of the primacy of the text with the frequent and quite normal recourse to *travaux préparatoires* in practice.[12]

7 In its commentary on the **Final Draft,** the ILC itself basically gave two distinct explanations on why the preparatory work should play a less prominent role in treaty interpretation: first, the elements of interpretation contained in the general rule of interpretation (today Art 31) all related to the agreement between the parties at the time when or after it received authentic expression in the text, while this is not the case with preparatory work, which could not therefore, in the view of the Commission's majority, have the same authentic character as an element of interpretation. Second, the Commission pointed out that the records of treaty

[7]PCIJ *Polish Postal Service in Danzig* PCIJ Ser B No 11, 39 (1925) (emphasis added).

[8]ICJ *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4, 8.

[9]*McNair* 411.

[10]*Waldock* III 58 para 21.

[11]*Cf Waldock* VI 99 para 20.

[12]*Cf Waldock* VI 99 para 20.

negotiations are in many cases incomplete or misleading, so that considerable discretion should be exercised in determining their value as an element of interpretation.[13]

8 The provision on preparatory work was the only part of the rules on interpretation on which there was a substantial debate at the **Vienna Conference** in the first session. The differences arising can in essence be described to have existed between those who asserted the primacy of the text of a treaty as revealing the parties' commitments and those who saw the interpretative quest as primarily investigating the intentions of the parties, with aid in that task being sought from wherever it could be found.[14] In the end, the attempts, especially undertaken by the US delegation, to have the rule on the use of preparatory work and the general rule on interpretation combined in one provision and, thus, put on the same footing[15], failed.

C. Elements of Art 32

I. Supplementary Means of Interpretation

9 Art 32 refers as supplementary means of treaty interpretation explicitly to the preparatory work of the treaty and to the circumstances of its conclusion, but at the same time indicates, by using the word "including", that these are meant to be examples, rather than an exclusive list.

1. Preparatory Work of the Treaty

10 There is no recognized definition in international law of *travaux préparatoires*, nor is there a clear rule on what kind of material can be taken into account in this respect or how far back in the history of the treaty the interpreter may go to look for guidance. As *Gardiner* puts it, courts and tribunals tend to seize on anything that looks helpful.[16] Since the purpose of the use of preparatory work in this context is to discover the true meaning of what the parties agreed to in their treaty, **several conditions** must be fulfilled before the material in question can be considered *travaux préparatoires*.

11 First, only material and processes **that can be objectively assessed** by an interpreter can qualify as preparatory work. They must be part of the outside world, so that people can take cognizance of them. Thus, individual thoughts, plans, recollections and memoirs in principle do not qualify; also, oral statements are difficult to

[13]Final Draft, Commentary to Arts 27 and 28, 220 para 10.

[14]*Gardiner* (n 1) 302; *Y Le Bouthillier* in *Corten/Klein* Art 32 MN 2.

[15]The debate on the US proposal is summarized *eg* by *Mehrish* (n 3) 58–60 and *Gardiner* (n 1) 303–04.

[16]*Gardiner* (n 1) 99–100.

evaluate, as long as they are not written down or cannot be corroborated by other evidence.[17]

Thus, preparatory work includes **all documents relevant** to the forthcoming treaty and generated by the negotiating states during the preparation of the treaty up to its conclusion, for example drafts, memoranda, commentaries and other statements and observations by governments transmitted to each other or to a drafting body, diplomatic exchanges between the negotiating parties, negotiation or conference records, minutes of commission and plenary proceedings. Beside the documents themselves, preparatory work includes the **processes** they underwent during the negotiations, *eg* changes in texts under negotiation, but also the refusal to change a text. The course of a discussion or of a diplomatic exchange may be important, as well as individual contributions by negotiators or delegations.[18] **12**

Second, the material considered must be apt to **illuminate a common understanding** of the negotiating parties as to the meaning of the treaty provisions.[19] Thus, the material in question can only qualify as preparatory work proper if it was, at one stage at least, present in the negotiating process and **available to the negotiators** collectively. **13**

This *caveat* applies, above all, to **documents from a unilateral source**, such as statements of individual governments or State representatives outside the treaty negotiations, national legislative documents, explanations given to a legislative body as part of a national ratification process. Those materials can only be taken into account if they were at some point introduced into the negotiation process, at least brought to the knowledge of other participants in the negotiations, and did not remain unilateral hopes, inclinations or opinions. **14**

In the *Oil Platforms* case, the ICJ did admit and consider unilateral documents of the US administration (a memorandum sent by the State Department to the US embassy in China, and a message of the Secretary of State transmitting several treaties to the US Senate for consent to ratification) in order to confirm an interpretation of the bilateral treaty of friendship with Iran which it had found before.[20] From the sequence of argument of the Court it can be deduced that it admitted the documents under Art 32,[21] although it did not explicitly characterize them as preparatory work (which they clearly were not).

[17] *Y Le Bouthillier* in *Corten/Klein* Art 32 MN 28 refers, *eg*, to videotaped sessions of a negotiating committee.

[18] For example, the ICJ considered in *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 Rep 16, para 69, the course of the debate in the UN Preparatory Commission. The bilateral exchange between the parties was considered inconclusive in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1995] ICJ Rep 6, para 41.

[19] *Cf Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands),* 27 RIAA 35, para 45 (2005).

[20] ICJ *Oil Platforms (Iran v United States)* (Preliminary Objection) [1996] ICJ Rep 803, para 29.

[21] *Gardiner* (n 1) 107.

15 The question arises then as to whether material can be banned from being considered if it was **not equally available to all parties** to the treaty. In this respect, the PCIJ in the *River Oder* case had followed a very restrictive approach, when it refused to take the record of the conference which prepared the Treaty of Versailles into account as *travaux*, simply because some of the parties to the dispute before the Court had not participated in that conference.[22] It is doubtful, however, if that ruling represents the actual practice in regard to multilateral treaties open to accession by States that did not attend the conference at which they were drawn up.[23] A state acceding to a treaty in the drafting of which it did not participate may usually ask to see the *travaux* before acceding. Moreover, the restriction applied by the PCIJ would be practically inconvenient, having regard to the great number of multilateral treaties open generally to accession: accession to and interpretation of those treaties would be made much more difficult, if the preparatory work could only be used as between parties that took part in their drafting. Therefore, the ICJ in its early jurisprudence tacitly rescinded the *River Oder* approach of the PCIJ,[24] and the ILC explicitly refused to adopt it.[25]

16 Thus, preparatory work of multilateral treaties may also be considered in disputes on interpretation in which non-negotiating states are involved, as long as the *travaux* are published or unpublished, but accessible.[26] This last *caveat*, made by the ILC, **excludes confidential documents** from being used for the purpose of treaty interpretation, which were not accessible to other participants in the negotiations, let alone to acceding states. The questions remains, however, if in a given case the test for reliance on the *travaux* tends to be a more formal one, referring to the publication of the material in question, or a substantive one of genuine accessibility, or a combination of both – all three approaches, it is submitted, can be found in practice.[27]

17 The principle that material can only qualify as preparatory work if it was present in the negotiating process, also applies to drafting material and discussion processes in **independent bodies**, such as expert committees or even the ILC itself. In practice, ILC records are on occasion referred to as preparatory work of multilateral conventions that had their origins in the Commission's work.

> Thus, in its *Continental Shelf Case* the ICJ referred explicitly to "the records of the International Law Commission *and other travaux préparatoires* of the 1958 Geneva Convention on the Continental Shelf".[28] In later decisions, the Court used ILC material to describe "the genesis of the text" of a provision of the 1958 Convention on the Territorial

[22] PCIJ *Territorial Jurisdiction of the International Commission of the River Oder* (Order of 20 August 1929) Ser A No 23, 41, 42.

[23] *Waldock* III 58 para 21.

[24] *Cf S Rosenne* 'Travaux Préparatoires' (1963) 12 ICLQ 1378, 1380–1381.

[25] Final Draft, Commentary to Art 27, 223 para 20.

[26] *Ibid*. Concurring *Sinclair* 144.

[27] *Cf Merkouris* 'Third Party' Considerations, in Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On (2010), 75, 81–82.

[28] ICJ *Continental Shelf (Tunisia v Libya)* [1982] ICJ Rep 18, para 41(emphasis added).

Sea and the Contiguous Zone[29] and quoted comments of the ILC and its Special Rapporteur as part of the *travaux* of that Convention.[30] Similarly, when the Court interprets the rules of the VCLT itself, it refers to ILC documents and to the views expressed in them.[31]

While the liberal use that is made of the ILC material may seem justified by the fact that in essence its work is usually the main substantive source, or at least the predominant inspiration, of the later convention, this can, in a formal sense, only be correct under the head of *travaux préparatoires* insofar as the material had been introduced into the negotiations by the parties or their representatives. Other than that, it would seem that the relevant ILC records, or fact records of equivalent organs, may be taken into account as other "supplementary means" under Art 32.[32]

18 Third, in order to be relevant as *travaux*, the material must directly **relate to the treaty under consideration**, it must be part of its negotiation process and purport to shed light on its substance. In practice, however, interpreters sometimes refer to material leading up to an identical predecessor treaty and even to similar treaties and apply that material as if it were preparatory work to the treaty under consideration.

That is what the ICJ did in the *La Grand* case, when it interpreted Art 41 of its Statute in the light of the drafting history of the identical provision in the PCIJ Statute, which included an earlier bilateral treaty between the United States and Sweden.[33] Also in the various *Legality of Force* cases the Court found it necessary, in order to interpret Art 35 para 2 of its Statute, to examine the drafting history of both the PCIJ and the present Statute.[34]

It is submitted that material relating to earlier or similar treaties is not *stricto sensu* preparatory work, but may, again, belong to the other supplementary means under Art 32.

19 The collected material qualifying as preparatory work will necessarily be quite heterogeneous, and its **interpretative value will depend** on its cogency, its accessibility, its direct relevance for the treaty terms at issue, the consistency with other the means of interpretation, but also on the number of parties involved in the evolution of the particular material. Moreover, the more the material actually reflects a growing agreement, even a common intention of the negotiating parties, the higher its interpretative value will be. This may, among others, depend on the moment in time the material comes into existence: documents from the negotiations that were drawn up immediately before the text of the treaty was adopted will

[29]ICJ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Carribean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 659, para 280.

[30]ICJ *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, 3 February 2009, para 134.

[31]*Eg*, in ICJ *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections) [1998] ICJ Rep 275, para 31; *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] Rep 1045, para 49.

[32]Concurring *Y Le Bouthillier* in *Corten/Klein* Art 32 MN 25.

[33]ICJ *LaGrand (Germany v United States)* [2001] ICJ Rep 466, paras 105–107.

[34]*Eg*, ICJ *Legality of the Use of Force (Serbia and Montenegro v Germany)* (Preliminary Objections) [2004] ICJ Rep 720, paras 101–111.

probably deserve particular attention as being very "close" to the agreement of the parties,[35] unless, however, they form part of the latter and are, therefore, to be considered as extrinsic context under Art 31 para 2.

20 It becomes evident from the structure of Arts 31 and 32 that preparatory work must be **distinguished from extrinsic context,** which is covered by Art 31 para 2. As pointed out earlier (→ Art 31 MN 64), this distinction is far from easy to draw and probably best made according to whether the material in question was relevant in preparing the text of the treaty (*travaux*) or in underlining the treaty consensus present at the time of conclusion (context). Naturally, only material set out before the adoption or conclusion of the treaty can become part of its preparatory work, but if the time-lag between the material in question receiving the agreement of the parties and the adoption of the text of the treaty itself becomes too small, the material might qualify as extrinsic context under para 2 lit b or c, rather than as *travaux*.

2. Circumstances of Conclusion

21 Along with the preparatory work, Art 32 allows the circumstances of the conclusion of a treaty to be taken into account as a supplementary means of interpretation. According to SR *Waldock*, this formula is meant to cover both the contemporary circumstances and the historical context in which the treaty was concluded.[36] Thus, reference is made to **factual circumstances** present at the time of conclusion and the historical background of the treaty, which is supposed to have been present in the minds of those who concluded it. Above all, the knowledge of those facts may help to identify the motives of the parties and, thus, the object and purpose of the treaty,[37] but the factual background may be relevant beyond that.

> In its *Danube* opinion of 1927 the **PCIJ**, being asked to interpret the rules on the competences of the European Commission of the Danube, referred for that purpose to the powers which the Commission has possessed since 1865 and to the fact that before 1921, date of the treaty to be interpreted, the fluvial Danube was not effectively internationalized.[38]
>
> In the *Asylum* case the **ICJ** referred, when interpreting the Havana Convention of 1928, to "one of the most firmly established traditions of Latin America, namely, non-intervention", and rejected a certain interpretation put forward because it would come into conflict with that tradition.[39]
>
> In *Aegean Sea Continental Shelf* the Court had to interpret the Brussels Communiqué concluded between Greece and Turkey and for that purpose considered "what light is thrown on its meaning by the context in which the meeting of 31 May 1975 took place and

[35] *Y Le Bouthillier* in *Corten/Klein* Art 32 MN 27.

[36] *Waldock* III 59 para 22.

[37] This was apparently the reason why the ICJ in *Barcelona Traction* referred to the historical background of Art 37 ICJ Statute, before actually going about to interpret that provision, *cf Barcelona Traction, Light and Power Company, Limited* (Preliminary Objections) [1964] ICJ Rep 6, 31–32.

[38] PCIJ *Jurisdiction of the European Commission of the Danube* PCIJ Ser B No 14, 57 (1927).

[39] ICJ *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, 285–286.

the Communiqué was drawn up." The Court took note in this regard of an exchange of notes between the two governments and a declaration made before the Turkish parliament.[40]

In *Land, Island and Maritime Frontier Dispute* the ICJ Chamber held that Honduras' contention that the parties of the Special Agreement under consideration intended to have the legal situation of the maritime area in question settled comprehensively, thus including a maritime delimitation, simply referred to the "circumstances of the conclusion" and was therefore not to be considered.[41] Thus, the Chamber apparently drew a distinction between the intentions of the parties, which may be taken into account as object and purpose of the treaty if they have found adequate expression in the text of the treaty, and the factual situation the parties intended to change through their treaty, which merely falls under the "circumstances" in Art 32.

In its recent *CERD case (Georgia v Russia)* the ICJ seems to have introduced a slightly different category of supplementary material into the process of interpretation: Under the heading of "Travaux préparatoires", the Court considered the "circumstances in which CERD was elaborated" (rather than concluded) and referred in this respect to the fact that at that time "the idea of submitting to the compulsory settlement of disputes by the Court was not readily acceptable to a number of States" (which, it is submitted is clearly a factual circumstance, rather than a part of the preparatory work).[42]

The **WTO Appellate Body** referred on several occasions to "circumstances" within the meaning of Art 32. In *EC – Computer Equipment* it considered the classification practice in the European Communities during the Uruguay Round part of "the circumstances of [the] conclusion" of the WTO Agreement and used it in the interpretation.[43]

In *EC – Chicken Cuts* it offered a much more expanded treatment of the matter and held that "an event, act or instrument may be relevant [. . .] not only if it has actually influenced a specific aspect of the treaty text in the sense of a relationship of cause and effect; it may also qualify as a 'circumstance of the conclusion' when it helps to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or specific provision." The relevance of a circumstance for interpretation should, in the view of the Appellate Body, be determined on the basis of objective factors, such as the temporal relation to the conclusion of the treaty, actual knowledge of the parties or mere access to it, its subject matter in relation to the treaty provision and whether or how it influenced the negotiations of the treaty.[44]

Also, the economic, political and social **conditions of the parties**, their adherence to certain groupings or their status, for example, as importing or exporting countries may be taken into account, in order to determine the reality of the situation which the parties wished to regulate through their treaty.[45] Nature and substance of the treaty will usually determine what circumstances might be **22**

[40]ICJ *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 3, paras 100–105.

[41]ICJ *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* [1992] ICJ Rep 351, para 376.

[42]*Application of CERD (Georgia v Russian Federation)* (Preliminary Objections), 1 April 2011, para 147. In sum, this case appears to underline the wide discretion which the interpreter enjoys in using material outside the general rule of interpretation.

[43]WTO Appellate Body *EC – Customs Classification of Certain Computer Equipment* WT/DS62/AB/R (1998), para 92.

[44]WTO Appellate Body *EC – Customs Classification of Frozen Boneless Chicken Cuts* WT/DS269/AB/R (2005), paras 282–309.

[45]*Sinclair* 141; *MK Yasseen* L'interprétation des traités d'après la convention de Vienne (1976) 151 RdC 1, 90.

considered relevant. Also, legislative acts and court judgments of some of the negotiating States can be part of the historical background of a treaty, thus of the "circumstances" of its conclusion.[46] As *Villiger* puts it, the "circumstances" in Art 32 include the political, social and cultural factors – the *milieu* – surrounding the conclusion of the treaty.[47]

23 Another distinction must be drawn between "circumstances of the conclusion" and agreements or instruments **"made in connexion with the conclusion"** of the treaty, which fall under Art 31 para 2 as extrinsic context. The latter refer to documents that reflect a consensus of the parties on their substance, present at the time of conclusion, and may, therefore, be considered as context of the treaty itself. "Circumstances" on the other hand simply means the factual situation at the time of the conclusion, irrespective of any consensus or substance. However the simple fact that extrinsic agreements or instruments have been made relating to the conclusion of the treaty may be part of that situation and, thus, count as such among the "circumstances".

3. Other Supplementary Means

24 The supplementary means of treaty interpretation are not listed exhaustively in Art 32, as the plain wording of the norm reveals ("including"), even if those most commonly used are expressly mentioned in the text. What supplementary "means" may be considered along with those mentioned in the text has not yet been established conclusively in practice or doctrine. However, in the context of the Vienna rules, "means of interpretation" appears to refer to **material or substantive matters** to be taken into consideration, rather than to general interpretative principles or techniques.[48] Therefore, when Art 32 allows further "means of interpretation" to be taken in account and confines them *ab initio* to a supplementary role, it cannot be assumed to refer to principles outside the general rule of interpretation. Since the latter is not exclusive in a way that would prohibit those unwritten principles, they may, where the preconditions are fulfilled, be applied as customary rules alongside Art 31 (→ Art 31 MN 33).

25 Any material that was not *stricto sensu* part of the negotiating process, but played a role because it covers the substance of the treaty and the negotiators were able to refer to it, can thus be introduced into the process of interpretation as other "supplementary means". Documents or facts may be considered that are sufficiently closely connected to the preparation of the treaty and have, therefore, in the eyes of the interpreter, a direct bearing on the interpretation. This includes, as pointed out earlier (→ MN 17), documents originating from independent bodies, such as the ILC, and preparatory work on treaties that are identical or similar to the

[46] *Cf* WTO Appellate Body *EC – Chicken Cuts* (n 44) paras 308–309.

[47] *Villiger* Art 32 MN 4.

[48] *Gardiner* (n 1) 311. Contra *Aust* 248–249; *Villiger* Art 32 MN 5, who also count the "rational techniques of interpretation" not included in the Vienna rules among the "supplementary means".

one under consideration. Similarly, documents of state or interstate bodies dealing with matters covered by the present treaty may be given a role by the interpreter.

> For example, a WTO panel took into account reports of various agriculture committees established over the years by parties to the GATT 1947 and used them as an aid in interpreting provisions of the GATT 1994.[49]

Also, **subsequent practice** which either was not that of parties (but, for example, of international organs), or which does not relate to the application of the treaty or does not establish an agreement of the parties, and therefore does not fall under Art 31 para 3 lit c, may still at times shed some light on the meaning of the treaty and, therefore, also be considered a "supplementary means" of interpretation.[50]

> Thus, in *EC – Chicken Cuts,* the WTO Appellate Body explicitly confirmed a panel ruling to the effect that EC customs classifications practice subsequent to the conclusion of the WTO Agreement may be taken into account for interpreting the latter. It continued: "In our view, it is possible that documents published, events occurring, or practice followed *subsequent to* the conclusion of the treaty may give an indication of what were, and what were not, the 'common intentions of the parties' *at the time* of the conclusion. The relevance of such documents, events or practice would have to be determined on a case-by-case basis".[51]

In the end, it seems that it basically **depends on the assessment of the interpreter** whether the material in question can reasonably be thought to assist in establishing the meaning of the treaty under consideration, and if it does, there are scarcely any clear limits to taking it into account under Art 32. **26**

II. Admissible Use of the Supplementary Means

Art 32 allows reference to supplementary means of interpretation, that is, above all, to *travaux préparatoires*, **in a much more liberal manner than it is usually perceived**. Nothing in the rules on interpretation precludes a treaty interpreter *from looking at* the preparatory work in the process of interpretation. What is restricted by the Vienna rules, however, is to actually base a finding on such material at the outset of the process of interpretation, and they do so in order to prevent the agreement of the parties from being replaced by the content of unconsummated exchanges of proposals and arguments that preceded the finalization of the treaty.[52] Thus, preparatory work is designed to determine the meaning of a treaty provision only when certain qualifying conditions are met. And Art 32 contains a procedural restriction in that the interpretative means which are only "supplementary" may not be employed first, but **only after the general rule laid** **27**

[49] WTO Panel *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R (2002), paras 7.35–37.

[50] *Y Le Bouthillier* in *Corten/Klein* Art 32 MN 43–44.

[51] WTO Appellate Body *EC – Chicken Cuts* (n 44) para 305.

[52] *Gardiner* (n 1) 307.

down in Art 31 has been applied. Other than that, the rule gives the interpreter considerable freedom to make use of supplementary means.

28 First, Art 32 stipulates that recourse to those means **"may be had"**, thus in contrast to the mandatory character of the general rule in Art 31, the use of supplementary means is basically left to the discretion of the interpreter.

> This discretion was underlined, apparently for reasons of procedural comity, by the ICJ in its recent *CERD case (Georgia v Russia)*, when the Court found that in the light of its conclusion so far it need not resort to supplementary means of interpretation … to determine the meaning of Article 22 (CERD). However, the Court notes that both Parties have made extensive arguments relating to the *travaux préparatoires*, citing them in support of their respective interpretations … Given this and the further fact that in other cases, the Court had resorted to the *travaux préparatoires* in order to confirm its reading of the relevant texts … , the Court considers that in this case a presentation of the Parties' positions and an examination of the *travaux préparatoires* is warranted.[53]

However, if the latter decides to use supplementary means, the discretion is limited in two ways: the application of supplementary means must follow that of the general rule of interpretation, and, according to Art 32, it must fall into one of two specific *modi applicandi*, namely a confirmative and a determinative one.

> The difference between those *modi*, however, is smaller than one might think. As the WTO Appellate Body pointed out, the elements to be examined under Article 32 are distinct from those to be analyzed under Article 31, but it is the same elements that are examined under Article 32 irrespective of the outcome of the Article 31 analysis. Instead, what may differ, depending on the result of the application of Article 31, is **the weight that will be attributed to the elements** analyzed under Article 32.[54]

1. Confirm the Meaning

29 The confirmative mode of applying *travaux préparatoires* in the process of treaty interpretation has a long tradition in international judicial practice[55] and is well recognized in that practice today.[56] This tradition carries with it the assumption,

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[53] *Application of CERD* (n 40) para 142.

[54] WTO Appellate Body *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R para 403 (2009).

[55] See *eg* PCIJ *Payment of Certain Serbian Loans Issued in France* PCIJ Ser A No 20, 30 (1929); *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* PCIJ Ser A/B No 50, 380 (1932); ICJ *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 161.

[56] Examples in recent case law can be found, *eg*, in ICJ *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, para 55; *Kasikili/Sedudu Island* (n 29) para 46; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)* [2002] ICJ Rep 625, para 53; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 95 and 109; ECtHR *Banković et al v Belgium et al* (GC) App No 52207/99, ECHR 2001-XII, paras 63 and 65.

just as widely accepted, that preparatory work, when it is used as a confirmative means of interpretation, is bound to play a minor role in the process of interpretation and is limited to that role by Art 32 itself, which prescribes the confirmative function.[57]

However, as *Gardiner* rightly points out, investigating preparatory work to see if it does in fact "confirm" a particular meaning arrived at by applying the general rule carries with it the implicit possibility that it does not do so. In that case, the interpreter will have to reconsider its position. Thus, **"confirm" entails the option of not confirming** and the possibility of transforming the exercise into one where the preparatory work leads to a revisiting of the application of the general rule to find a permissible interpretation, which is then confirmed. The investigation may also lead to the conclusion that there is an ambiguity that has hitherto gone unnoticed, such that the exploration of the preparatory work is transformed from a potential confirming role to one of determining the meaning.[58] **30**

In this view, it is difficult to imagine situations where preparatory work, or indeed all means covered by Art 32, may not be employed in the process of interpretation.[59] And it also becomes clear that the confirmative mode of using supplementary means of interpretation possesses in the system of the Vienna rules ***de facto* a relevance similar to that of the general rule** of interpretation. **31**

Judicial practice knows of **several variants of the confirmative mode** of applying supplementary means of interpretation. Only a small linguistic variation occurs when a court sees an interpretation arrived at as being "reinforced" by an examination of the *travaux préparatoires*.[60] Another variant is that the court would hold that the preparatory work "does not preclude the conclusion" reached by applying the general rule of interpretation.[61] Similarly, preparatory work is used in practice in order to dismiss the position presented by one party to the dispute.[62] **32**

2. Determine the Meaning

The determinative mode of applying supplementary means is restricted in Art 32 by **qualifying conditions described by two special scenarios**: the meaning of a treaty **33**

[57] *Cf Sinclair* 141–142: "there can be little doubt that such recourse is permissible in carefully controlled circumstances".

[58] *Gardiner* (n 1) 309; *Y Le Bouthillier* in *Corten/Klein* Art 32 MN 11–12.

[59] *Villiger* Art 32 MN 11.

[60] For example, ICJ *Legality of the Use of Force* (n 34) para 101.

[61] ICJ *LaGrand* (n 33) para 104; very similar ICJ *Application of CERD* (n 40) para 147 *in fine* (possible nevertheless to conclude that the *travaux préparatoires* do not suggest a different conclusion from that at which the Court has arrived through the main method of ordinary meaning interpretation"). A similar approach was taken by the Iran-US Claims Tribunal in *United States, Federal Reserve Bank of New York v Iran, Bank Markazi* Case A 28 (2000) 36 Iran-US Claims Tribunal Reports 5, para 70.

[62] *Cf* ICJ *Sovereignty over Pulau Litigan* (n 56) para 58; *Avena and Other Mexican* Nationals *(Mexico v United States)* [2004] ICJ Rep 12, para 86.

clause remaining ambiguous or obscure, or the result hitherto achieved being absurd or unreasonable. The general perception of this provision, again, suggests that it is therefore only in limited cases that supplementary means can play a decisive role in treaty interpretation.

> An apt example for the exercise required by Art 32 is the decision in the *United States – Measures Affecting Gambling* case where the WTO Appellate Body, after investigating the ordinary meaning, context and subsequent developments, concluded that the meaning of the commitments made by the United States are still ambiguous and felt, thus, that it was "required, in this case, to turn to the supplementary means of interpretation provided for in Art 32 of the Vienna Convention."[63]

34 However, as SR *Waldock* had already pointed out, the rule on the use of *travaux préparatoires* is "inherently flexible, since the question whether the text can be said to be 'clear' is in some degree subjective."[64] It is regularly in the eye of the interpreter, *ie* subjective, whether, after applying the general rule of interpretation, the meaning of the treaty is clear or ambiguous. Thus, it will **normally be a matter of discretion** to have recourse to the supplementary means and to give them the decisive role in determining the meaning of the treaty clause under consideration. The only requirement, which the interpreter will have to fulfil is to explain that step with the unsatisfactory results of applying the general rule.

> A very telling example of that interpretative discretion can be found in the *Chile – Price Band System* case, where the WTO panel simply "considered that the text and context of 'variable import levy' and 'minimum import price' alone do not enable us to determine the meaning of those terms without ambiguity", and, without any further explanation, decided to take recourse to supplementary means of interpretation pursuant to Art 32 of the Vienna Convention.[65]

In essence, the **elastic concept of ambiguity** (or, for that purpose, of obscurity) clearly outweighs the – alleged – supplementary character of the interpretative means identified in Art 32, before all of the *travaux préparatoires*.

35 Opposed to that, the second limb of the determinative mode provided for in Art 32 plays a far less significant role in practice, because it is activated only where the application of the general rule leads to a "**manifestly absurd or unreasonable**" result. Not only is the threshold set extremely high, especially since the absurdity has to be "manifest", but the principal criterion to determine that an interpretation is unreasonable will regularly be the object and purpose of the treaty in question, which in turn must have been taken into account in order to reach that interpretation.[66] A possible case of an unreasonable result is said to be where by applying the general rule an interpretation of a treaty provision is reached that

[63] WTO Appellate Body *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, para 195 (2005).

[64] *Waldock* VI 99–100, para 20.

[65] WTO Panel *Chile – Price Band System* (note 49), para 7.35.

[66] *Y Le Bouthillier* in *Corten/Klein* Art 32 MN 19 referring to *Corten*.

contradicts another rule contained in the same treaty or otherwise agreed upon by the same parties.[67]

3. Recourse

Art 32 describes the use of supplementary means of interpretation, before all of preparatory work, as the interpreter having "recourse" to them. The wording and structure of the norm would seem to demand that the interpreter makes clear **which of the two modes** contained in lit a and b is being applied. However, judicial practice does not always live up to that expectation.[68] **36**

How exactly that material may be introduced into the process of interpretation and what conclusions may be drawn from it in a given case is not at all clear, and at least the latter point is itself a question of interpretation. There are **no fixed rules on interpreting *travaux préparatoires***, but there is some practice. For example, the question quite often arises as to the consequences that may be drawn from the fact that in the process of negotiating an authoritative text, certain passages have been deleted or amendments rejected. **37**

> In its *Namibia* opinion the ICJ held on that point that "[t]he fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed. There can be many reasons determining rejection or non-approval."[69]
> In *Maritime Delimitation and Territorial Questions* the Court adopted a very similar approach by refusing to adopt a certain reading of an agreed document only because the opposite reading had been abandoned in the negotiations.[70]

A straightforward use of *travaux* would also be to **interpret the scope of application** of a treaty as encompassing an individual case that had explicitly been mentioned in the preparatory phase of that treaty as an example of what the treaty is meant to address. Similarly, any specific interpretation of terms of the treaty recorded during the negotiations will usually lend considerable force to a corresponding interpretation of the treaty.[71] Moreover, the **silence of the preparatory work** may prove to be a significant element in showing that a conclusion at odds with a literal reading of a treaty provision was within a permissible range of interpretations.[72] In its decision on the *Oil Platform* case, the ICJ referred to the silence of the *travaux*, *ie* to the fact that a certain view had never been expressed **38**

[67] *Reuter* [1966-I] YbILC 195 para 22; *Y Le Bouthillier* in *Corten/Klein* Art 32 MN 19.

[68] Leaving this point open *eg* ICJ *Avena* (n 62) para 86.

[69] ICJ *Namibia* (n 18) para 69.

[70] ICJ *Maritime Delimitation and Territorial Questions (Quatar v Bahrain)* (n 18) para 41; see also the strong dissent by Judge *Schwebel* [1995] ICJ Reports 27, 34–39.

[71] *Gardiner* (n 1) 341.

[72] *Ibid* 335–336.

during the negotiations, and based its rejection of the interpretation put forward by Iran on that.[73]

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See also the references given in respect of Art 31 *supra*.

[73] ICJ *Oil Platforms* (n 20) para 29.

Article 33

Interpretation of treaties authenticated in two or more languages

1. **When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.**
2. **A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.**
3. **The terms of the treaty are presumed to have the same meaning in each authentic text.**
4. **Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.**

Contents

A. Purpose and Function

Most international treaties, bilateral as well as multilateral, are **concluded in more than one language**, the obvious reason being that the contracting parties have different official languages. This can cause serious problems of interpretation if there are material differences between the language texts, which may arise only some time after the treaty was concluded. Art 33 addresses the problem of multilingual treaties by determining which language versions 'count' for interpretation purposes and by laying down rules for solving differences between language versions. 1

Thus, the four paragraphs of Art 33 do in fact contain rules relating to two different issues: Art 33 paras 1 and 2 determine **which versions of a treaty are the object of interpretation** in case of multilingual treaties: It is the texts that are authenticated by the parties or those versions that they agreed upon as being authentic. Each of those authentic texts carries the same authority, but the parties, 2

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
DOI 10.1007/978-3-642-19291-3_36,

being the masters of their own treaties, are free to agree otherwise. These provisions are in fact closely related to the technical problems of the conclusion of treaties.

3 Secondly, Art 33 paras 3 and 4 determine **how to proceed in cases of divergent meanings**, *ie* if the relevant language versions of a treaty provision do not, at least not on the face of it, coincide. Art 33 para 3 contains the presumption of identical meaning, which requires the interpreter, as a first step, to search for a common meaning of all texts, while para 4 applies in case that presumption fails, because a difference of meaning between several language versions persists. In that case, para 4 authorizes to adopt a meaning of the text that could not be reached by means of interpretation, provided that meaning is the one that "best reconciles the texts" and has due regard to the object and purpose of the treaty.

4 The existence of more than one authentic text **introduces an additional element into the interpretation** of the treaty, the comparison of texts or versions, but it remains a single treaty with a single set of terms, the interpretation of which is governed by the general rule of interpretation laid down in Art 31 VCLT (→ Art 31 MN 39).[1] The equality of all authentic languages and the presumption of an identical meaning is in case of a plurilingual treaty an integral **part of the application of the general rule**, with paras 1–3 of Art 33 coming into play when at the grammatical stage of interpretation the ordinary meaning of a – multilingual – treaty phrase is being established. Art 33 para 4, if applicable, extends the process of interpretation beyond the search for the ordinary meaning by directing the interpreter towards reconciling different meanings in the light of the treaty's object and purpose.

5 Art 33 is generally recognized as participating in the **customary international law character** of the Vienna rules of treaty interpretation (→ Art 31 MN 6) and can, therefore, be applied to treaties outside the scope of the Convention.[2] The interpretative rule to adopt a common meaning of different language versions is in principle also being followed by the ECJ with regard to provisions of EU law,[3] if rarely for the founding treaties themselves.[4]

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[1] Final Draft, Commentary to Art 29, 225 para 7.

[2] *Cf eg* ICJ *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep 1045, para 25; *LaGrand (Germany v United States)* [2001] ICJ Rep 466, para 101; ECtHR *Golder v United Kingdom* App No 4451/70, Ser A 18, para 29 (1975); WTO Appellate Body *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* WT/DS257/AB/R (2004), para 59.

[3] *Cf eg* ECJ (CJ) *Marija Omejc* C-536/09, 16. June 2011, paras 23-24; *Berliner Verkehrsbetriebe (BVG)* C-144/10, 12 May 2011, para 28; *M et al* C-340/08, 29 April 2010, para 44; *Plato Plastik* C-341/01 [2004] ECR I-4883, para 64; *Hässle* C-127/00 [2003] ECR I-14781, para 70. See the recent study *M Derlén* Multilingual Interpretation of European Union Law (2009); on earlier case-law *cf* already *S Rosenne* The Meaning of "Authentic Text" in Modern Treaty Law, in *R Bernhardt et al (eds)* Festschrift Mosler 759, 769–772.

[4] But see ECJ (CJ) *Spain v Council* C-36/98 [2001] ECR I-779, paras 47–55.

B. Historical Background and Negotiating History

While until the end of nineteenth century, international instruments had mainly been drafted in French, and in times before that mostly in Latin, the international legal practice knows of treaties concluded in more than one language and the resulting problems with regard to their interpretation basically **since the end of World War I**. In 1922, the PCIJ was for the first time confronted with the task of interpreting the bilingual Peace Treaty of Versailles with regard to the competences of the ILO; in that case, the Court was still able to somewhat circumvent the problem by finding that both the English and the French text had the same meaning and, thus, avoiding the need to reconcile them.[5] **6**

Two years later in the ***Mavrommatis* case**, the PCIJ had to address the problem explicitly when it was confronted with a wider French and a more restrictive English text of the Mandate for Palestine. It held: **7**

> "The Court is of the opinion that, where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties. In the present case this conclusion is indicated with especial force [. . .] because the original draft of this instrument was probably made in English."[6]

Thus, it appears, first, that the Court in case of a textual divergence gave **precedence to the narrower interpretation** or, as *Villiger* puts it, to the lowest common denominator.[7] Here, the traditional rule of *in dubio mitius,* which in those days still had some support in international practice (→ Art 31 MN 34), might have served as a suitable legal background. In the late 1960s, that concept was explicitly rejected by the ECtHR,[8] and in 1989, when the Italian government argued the precedence of the narrower language text in the *ELSI* case, the ICJ left the question explicitly unresolved.[9] Second, it seems that the Court in *Mavrommatis* was prepared to give **greater weight to the drafting language** of a treaty than to other authentic language versions. The PCIJ affirmed this latter point in much clearer terms in the *Exchange of Greek and Turkish Populations* case.[10]

The well-known **Harvard Draft** Convention on the Law of Treaties of 1935 (→ Art 31 MN 10) anticipated the gist of what now is Art 33 VCLT, when it stipulated in its Art 19 lit b that a treaty embodied in different language versions was **8**

[5]PCIJ *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* PCIJ Ser B No 2, 33–39 (1922).

[6]PCIJ *The Mavrommatis Palestine Concessions* PCIJ Ser A No 2, 19 (1924).

[7]*Villiger* Art 33 MN 1.

[8]ECtHR *Wemhoff v Germany* App No 2122/64, Ser A 7, para 8 (1968).

[9]ICJ *Elettronica Sicula (ELSI) (United States v Italy)* [1989] ICJ Rep 15, paras 118–119.

[10]PCIJ *Exchange of Greek and Turkish Populations* PCIJ Ser B No 10, 18 (1925).

> "to be interpreted with a view to giving to corresponding provisions in the different versions a common meaning which will effect the general purpose which the treaty is intended to serve."[11]

9 In the **UN system,** the problem became much more acute, since multilateral conventions were, as from 1945, usually concluded in five languages (as in Art 111 UN Charter and Art 85 VCLT), and as from 1974[12] in six authentic language versions. The ECtHR took up the rules developed in international practice in its *Wemhoff* case of 1968 when it held:

> "Thus confronted with two versions of a treaty which are equally authentic but not exactly the same, the Court must, following established international law precedents, interpret them in a way that will reconcile them as far as possible. Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties."[13]

Since the approach chosen by the Court is very similar to what very shortly thereafter became Art 33 VCLT, it seems likely that it was already influenced by the debates within the ILC and its Final Draft of 1966.

10 In the **ILC,** the problem of multilingual treaties received relatively little attention. SR *Waldock* had presented in his third report 1964 two provisions on the subject (draft Arts 74, 75), which contained the equal authority rule, as well as the presumption of equal meaning, gave ample room to reconciling differing authentic texts, but made no mention yet of the object and purpose test in this respect.[14] After *Waldock* in his sixth report (1966) had combined the provisions into one single article (draft Art 72),[15] the ILC adopted it as Art 29 of its Draft Articles. The draft provision was divided into three paragraphs, the third of which combining the presumption of the same meaning and the duty to reconcile as far as possible.[16] The Commission explicitly declined to adopt the *Mavrommatis* rules, that is, the priority of the restrictive interpretation and of the drafting language, as rules of interpretation.[17]

11 The **Vienna Conference** adopted the ILC's proposals on treaty interpretation with only one change of substance, and that was the inclusion of the reference to the treaty's object and purpose as an element to be used in reconciling divergencies between different language texts. For that purpose, draft Art 29 para 3 of the ILC Draft was divided into the present paras 3 and 4.

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[11] Harvard Draft 661; comments *ibid*, 971 *et seq*.

[12] In the wake of UNGA Res 3191, 18 December 1973, UN Doc A/RES/3191.

[13] ECtHR *Wemhoff v Germany* (n 8) para 8.

[14] *Cf Waldock* III 62–65.

[15] *Waldock* VI 101–103.

[16] Final Draft, Text of Art 29, 224.

[17] Final Draft, Commentary to Art 29, 225–226 paras 8 and 9.

C. Elements of Art 33

I. Equal Authority of Different Languages (para 1)

Art 33 para 1 lays down the equal authority of each language version of a treaty, which has been authenticated by the parties. This rule of equality **corresponds to the sovereign equality of States** and is thus an expression of the fact that every sovereign State is in principle entitled to conclude its treaties in its own official language, or rather in the language of its choice, and that every official language is in this respect of the same value. **12**

1. Authentic Languages

The equality rule of para 1 can only apply when the parties authenticated the treaty in more than one language, and it merely applies to those language versions that are **authenticated by the parties**. Authentication is described in Art 10 VCLT as a distinct procedural step in the conclusion of a treaty, that is, finalizing the text and establishing it as definitive. With regard to language versions, it describes the agreement of the parties on the authentic character of a certain text of the treaty. The authentic languages are commonly designated in the final clauses or the testimonium of a treaty. **13**

Some treaties, however, explicitly provide for other language versions to be adopted and **authenticated subsequently** to the conclusion of the treaty. **14**

> *Eg* the 1975 Convention for the Establishment of a European Space Agency was concluded in seven equally authentic languages, but provided in its testimonium for texts to be drawn up in other official languages of the Member states and to be "authenticated by a unanimous decision of all Member States".[18]
> The 1994 International Tropical Timber Agreement was concluded in Arabic, English, French, Russian, and Spanish, all being equally authentic; its testimonium provides that the authentic Chinese text "shall be established by the depository (in that case the UN Secretary-General) and submitted for adoption to all signatories and States and Intergovernmental organizations which have acceded to this Agreement".[19]

Another situation where new authentic languages are added to a treaty is the accession of new States Parties with new official languages, an obvious example being the European Union:

> The founding Treaties of Rome (1957) were originally concluded in four authentic languages, while after the 2007 Treaty of Lisbon TEU and TFEU, including those provisions that are part of them from the beginning, are now authentic in 23 languages (Art 55 para 1 TEU, Art 358 TFEU).

[18] 1297 UNTS 187, 347.

[19] *Cf* 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, para 45; Text in 1955 UNTS 81.

15 Beside the official languages of all the parties, which, of course, is only reasonable when their number is limited, **the choice is** normally one or some of their languages, or a third language (today often English).

> *Eg* 1998 Double Taxation Agreement between Republic of Korea and Japan: English text authentic.[20]

Multilateral conventions concluded under the auspices of the UN usually determine the six **official UN languages** as authentic versions, whereas until 1973, the number of the UN languages was five.

> Thus the five authentic languages *eg* in Art 111 UN Charter, Art X Genocide Convention,[21] Art 53 VCDR, Art 53 para 1 CCPR, Art 85 VCLT. Six languages (including Arabic) in Art 30 CEDAW,[22] Art 320 UNCLOS; Art 11 para 1 of the 1989 Second Optional Protocol to the CCPR[23]; Art 128 of the 1998 Rome Statute of the ICC[24]; Art 50 of the 2006 UN Convention on the Rights of Persons with Disabilities.[25]

If an agreement adopted by the UN General Assembly contains no provision on the authentic languages, practice would turn to the resolution approving the agreement, and if the latter is also silent on the point, the practice followed by the Secretary-General has been to consider as authentic the official languages of the UN.[26]

16 Many important multilateral treaties concluded in the course of the twentieth century are authenticated **in English and French only**

> Beside the League of Nations treaties *eg* the 1948 Brussels Treaty on the WEU,[27] the four 1949 Geneva Conventions on the Laws of War,[28] the ECHR and its Protocols, the 1951 Convention on the Status of Refugees,[29]

while the WTO agreements have as their authentic languages **English, French and Spanish,**[30] and treaties sponsored by the OAS are concluded in its four official languages English, French, Portuguese and Spanish.

17 Multilateral treaties which are concluded with the view to a close integration of the legal orders of their parties, and aim, therefore, at their direct implementation by national authorities and courts, tend to determine **all official languages of the participating States** as authentic text of the relevant treaties.

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[20] 2394 UNTS 75.

[21] 78 UNTS 277.

[22] 1249 UNTS 13.

[23] 1642 UNTS 85.

[24] 2187 UNTS 90.

[25] UNGA Res 61/106, 13 December 2006, UN Doc A/RES/61/106.

[26] Summary of Practice (n 19) para 40.

[27] 19 UNTS 51.

[28] 75 UNTS, 31, 85, 135, and 287.

[29] 189 UNTS 150.

[30] *Cf* the testimonium of the WTO Agreement itself and of the Final Act of the Marrakesh Conference 1994, to be found at www.wto.org (last visited 30 December 2010).

The major example being, of course, the European Union where Art 55 TEU and Art 358 TFEU now list 23 authentic languages. Whereas the 1951 ECSC Treaty[31] had a single authentic text in French, the Treaties of Rome,[32] establishing the two other Communities in 1957, were concluded in the four languages of the parties. The subsequent treaties of accession (1972, 1979, 1985, 2003 and 2005) each contained provisions adding the official languages of the new members to the authentic texts of the basic Treaties as a whole. Through the 2007 Treaty of Lisbon, that development was codified in the two languages provisions of the EU treaties.

18 Authenticated texts within the meaning of para 1 must be **distinguished from** '**official texts**', which are texts that have been signed by the negotiating States but not accepted as authoritative.[33] Also, **official translations**, that is, translations prepared by the parties, an individual government or by an organ of an international organization, might benefit from an official approval, but do not carry with them the presumption of equal authority and identical meaning set out in paras 1 and 3.

Eg the 1990 Convention on Temporary Admission, concluded under the auspices of the World Customs Organization,[34] has two authentic texts (English and French), but provides in its Art 34 for authoritative translations in Arabic, Chinese, Russian and Spanish to be prepared and circulated by the depositary.

Eg the 1978 Protocol to the International Convention for the Safety of Life at Sea declares in Art VIII that the Protocol is established in five authentic languages, with official translations in Arabic, German and Italian to be prepared and deposited with the signed original.[35]

Even less authenticity is envisaged when the treaty sets out that translations may be made, and consequently be circulated and used in practice, but does not provide for any official notice to be taken or approval to be given to the translated version.

This is the case with Art 55 (2) TEU, which according to Art 358 TFEU also applies to that treaty and provides that the Treaty "may also be translated into any other languages as determined by Member States among those which, in accordance with their constitutional order, enjoy official status in all or part of their territory". It does not seem that those regional languages are meant to acquire any official status under the law of treaties.

2. The General Rule of Equal Authority

19 If there is more than one authentic language version of a treaty, the general rule laid down in para 1 confers upon everyone of them the same authority. Equality of the texts also means that in the interpretation of the treaty, every reasonable effort should first be made to reconcile the texts and to ascertain the intention of the

[31] 261 UNTS 140.

[32] 298 UNTS 3 and 167.

[33] Final Draft, Commentary to Art 29, 224 paras 1 and 3, which refers in this respect to the 1947 Peace Treaties with Italy, Bulgaria, Hungary, Romania and Finland.

[34] Texts to be found under www.wcoomd.org (last visited 30 December 2010).

[35] 1226 UNTS 237, 239.

parties by recourse to the general means of interpretation.[36] A **formal precedence** of the drafting or negotiating language, which was applied then by the PCIJ (→ MN 7), is from the outset **incompatible** with Art 33. Thus, the arbitral tribunal in the *Young Loan Arbitration* held

> "that the habit occasionally found in earlier international practice of referring to the basic or original text as an aid to interpretation is now, as a general rule, incompatible with the principle, incorporated in Article 33 (1) of the VCLT, of the equal status of all authentic texts in plurilingual treaties [. . .]. The interpretational maxim of the special importance or precedence – whatever form it may take – of the original text would relegate the other authentic texts again to the status of subordinated translations."[37]

20 The equality of languages and the equal authority of the texts is **the general rule** and applies in the absence of any provisions to the contrary.[38] Explicit provisions in treaties to the same effect are therefore only important as a confirmation of the fact that the parties did not agree otherwise.

21 That every authentic text is in a formal sense equally authoritative does not, however, mean that **in practice,** all of them would be attributed the same weight. For example, if the treaty was negotiated and drafted in only one of the authentic languages, it would seem natural, as a feature of practical usage, to place more reliance on that text, at least if it is unambiguous.[39]

> *Eg* the 1995 Dayton Agreement[40] was negotiated entirely in English, even though there are authentic texts in Bosnian, Croatian and Serbian; in the daily practice of applying and interpreting the Agreement, the English version is supposedly being seen to be more reliable in giving expression to the intention of the parties.

Similarly, in the interpretation of the UN Charter greater significance seems to be attached, also by the ICJ, to the French and English texts than to the other authentic texts, possibly because those two were the working languages at the San Francisco Conference.[41] The same might be said about official language versions, which are added after the treaty has been concluded (→ MN 14): they may in a formal sense be equally authentic, but in practice not carry the same weight as the original language texts.[42] Art 33 gives room for those practical considerations by referring in para 4 to Art 32, thus allowing to **consider the *travaux préparatoires*** of the treaty and, in this context, to take due account of the fact that the treaty was drafted or negotiated in one of the authentic languages (→ MN 32).

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[36] Final Draft, Commentary to Art 29, 225 para 7.

[37] *Young Loan Arbitration on German External Debts (Belgium, France, Switzerland, United Kingdom and United States v Germany)* 59 ILR 494, para 17 (1980).

[38] Final Draft, Commentary to Art 29, 224 para 2.

[39] *Aust* 254.

[40] 35 (1996) ILM 75 *et seq*.

[41] Thus *Sinclair* 147–148; to the same effect *Rosenne* (n 3) 763–765.

[42] *Aust* 255; *M Tabory* Multilingualism in International Law and Institutions (1980) 194.

3. Different Agreement of the Parties

The rule of equal authority is **dispositive** and may therefore, according to para 1, be set aside by agreement of the parties. Quite naturally, their sovereign will does not only extend to the number and choice of authentic languages of the treaty, but also to creating an unequal authority of those languages. If such an agreement has been made, the authentic texts which are not determined to prevail can still be taken into consideration for the interpretation of the treaty, as they are still authentic, but in case a difference of meaning ("divergence") arises between some of them, the "prevailing text" overrules the others and determines the meaning to be adopted. **22**

Indeed, it is not uncommon **in bilateral treaties** to agree upon a text in a third language and designate it as prevailing in case of divergencies, *eg* because the language of one States Parties is not well understood by the other or because neither State wishes to recognize the supremacy of the other's language.[43] **23**

> *Eg* 1957 Treaty of Friendship between Japan and Ethiopia: French text to prevail[44]; 1958 Treaty of Friendship between Japan and Indonesia: English text to prevail[45]; 1985 Air Services Agreement between the Netherlands and Saudi-Arabia: English to prevail[46]; 1993 Fundamental Agreement between the Holy See and Israel: English to prevail[47]; 1998 Air Services Agreement between the Republic of Korea and Iran: English to prevail[48]; 1999 Treaty between the Republic of Korea and Mongolia on Mutual Legal Assistance in Criminal Matters: English to prevail[49]; 2000 Agreement between the Republic of Korea and Nicaragua for the Promotion and Protection of Investments: English to prevail.[50]

In the practice of **multilateral treaties**, provision is made in different forms and terms for one authentic language to prevail over others in case of divergencies.

> *Eg* the 1955 Protocol amending the Warsaw Convention, which itself is concluded only in French: French prevailing[51]; the 1960 International Convention Relating to Co-operation for the Safety of Air Navigation 'Eurocontrol', concluded in the languages of all founding States: French prevailing.[52]
>
> The 1978 Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, was concluded in Arabic, Persian, and English as equally

[43] Final Draft, Commentary to Art 29, 224 para 3.
[44] 325 UNTS 99.
[45] 324 UNTS 235.
[46] 1480 UNTS 143.
[47] 1775 UNTS 182.
[48] 2394 UNTS 3.
[49] 2394 UNTS 129.
[50] 2394 UNTS 325.
[51] 478 UNTS 371.
[52] 523 UNTS 117.

authentic languages; in case of a dispute as to the interpretation of the treaty, however, the English text shall be "dispositively authoritative" (final clause).[53]

24 The agreement provided for in para 1 can be either set out explicitly in the text of the treaty concerned or outside the latter. **No particular form** is required, thus unwritten agreements between the parties are also encompassed by this phrase,[54] as long as all parties to the treaty are taking part in them.

25 Art 33 para 1 seems to confine such agreement to only one possible content, *ie* that in case of divergent meanings a particular language version shall prevail. It is submitted, however, that the rule contained in para 1, second part, **is merely residuary** and the agreement mentioned therein simply declaratory of the sovereign will of the parties, which is not effectively restricted by this provision. Thus, if acting in consent, the **parties remain free to determine and differentiate the authoritative character** of different language versions. They may, *eg*, agree that certain language texts are authoritative between some parties, and other texts between others.[55] Also, the parties could designate a prevailing language version without there having arisen any substantial divergence between different texts. Furthermore, they could determine a language to prevail for the purposes of interpretation which is not among the authentic texts.

26 Art 33 para 1 does not answer the question **at what stage in the interpretation process** the language version designated as prevailing should in fact prevail: Should the prevailing text be applied automatically, thus without considering the other authentic versions, or should recourse first be had to the general means of interpretation, thus to the general rule laid down in Art 31 VCLT, in order to establish that there actually is a case of "divergence" and that it is a case for the prevailing text to be applied exclusively. The ILC considered the international practice to be ambivalent in this respect and left the issue, therefore, explicitly undecided.[56] It is submitted that the second alternative is much more in line with the concept of Art 33, since it treats multilingual treaties as a particular case of treaty interpretation, which, in spite of all the different means, principles and instruments, remains a single combined operation (→ Art 31 MN 5 and 39) following a common set of rules, that laid down in Arts 31 and 32 VCLT. If a **divergence** must be identified for a prevailing language to prevail, this **presupposes an interpretation** of the treaty in question, which means that the agreed precedence of one language can only have effect as part of the process of interpretation.

[53] 1140 UNTS 155, 165.

[54] *Villiger* Art 33 MN 6.

[55] As *eg* the 1918 Treaty of Brest-Litowsk, mentioned in Final Draft, Commentary to Art 29, 224 para 3.

[56] *Ibid* 224 para 4.

II. Other Authentic Versions (para 2)

Art 33 para 2 **complements para 1** by addressing the other side of the principle stipulated therein, and at the same time opens the possibility of extending the scope of application of para 1. Incidentally, it appears from the use of the word "version" in para 2 that the Convention reserves this term to languages other than those in which the text was authenticated by the parties. Usage in international practice, however, appears to be quite diverse on this point. **27**

First, the language versions of a treaty other than those in which it was authenticated are, as a matter of principle, not authoritative, and will not, therefore, be taken into consideration for the interpretation of a multilingual treaty. It is thus unnecessary to try to reconcile authentic and non-authentic texts.[57] Those non-authentic texts may be designated "official" or "official translations" (→ MN 18), which does not, however, give them any formal relevance within the meaning of Art 33. **28**

Second, para 2 envisages the usual exception referring to the will of the parties also in respect of the authoritative character of non-authenticated texts. The provision stipulates that there can in practice be **authentic texts of a treaty other than those authenticated by the parties** at the time of conclusion. The intention of the parties to that effect must either have found an expression in the text of the treaty or be clearly established to exist apart from that text. **29**

> *Eg* the 1994 Investment Promotion and Protection Agreement between the United Kingdom und the Kyrgyz Republic provides in Art 15 that the English language text be authentic and that a Russian version be prepared which, being duly certified by both governments, then be "equally authoritative"; the Russian text was agreed upon in 1996, the Agreement entered into force in 1998.[58]

It is submitted that also the possibility, explicitly provided for in the treaty, to **subsequently authenticate** other language versions (→ MN 14) is in fact a case of para 2.

III. Presumption of Identical Meaning (para 3)

The presumption of identical meaning set out in para 3 relates to the principle of equality of texts in para 1 and gives practical effect to that principle. It reflects the concept of the treaty constituting a single treaty with a single set of terms and reflecting a single intention of the parties (→ MN 4), and it requires that every effort should be made to find a common meaning for the authentic texts before preferring one to another.[59] **30**

Thus, the comparison of authentic texts is made **an element of the grammatical interpretation** of the treaty. When aiming to establish the ordinary meaning of the **31**

[57] *Villiger* Art 33 MN 7.

[58] UKTS No 7, also to be found under www.fco.gov.uk (last visited 30 December 2010).

[59] Final Draft, Commentary to Art 29, 225 para 7.

words of the treaty, as required by Art 31 para 1, the interpreter must consider the words in all authentic language versions, and, as para 4 reveals, it must actually compare them. As the WTO Appellate Body stated in the *Softwood Lumber IV* case:

> "It follows that the treaty interpreter should seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language."[60]

Since to have to consider *all* authentic languages is bound to meet with practical difficulties in the case of treaties concluded in more than two languages, the ILC refrained from including such a requirement into Art 33 and inserted the presumption of equal meaning instead.[61] This usually allows the interpreter to work with one or two authentic languages only for the purpose of 'routine interpretation', as long as no difference of meaning in different languages has come up.

> In *Kasikili/Sedudu Island* the ICJ considered, with reference to para 3, that the terms "centre of the main channel" and "Thalweg des Hauptlaufes" had the same meaning, particularly since the parties "did not themselves express any real difference of opinion on this subject."[62]
>
> In its recent *CERD case (Georgia v Russia)* the ICJ adopted the meaning of the treaty phrase under consideration by using the grammatical form of the French version, which in the Court's view was much closer to its preferred interpretation than the English version. It added: "The other three authentic texts of CERD, namely the Chinese, the Russian and the Spanish texts, do not contradict this interpretation".[63]

32 If, however, comparison reveals a divergence in meaning, the first attempt at resolving the matter should use all other **means of interpretation provided for in Arts 31 and 32** VCLT. This order of events is clearly envisaged by para 4, which mentions the applications of both articles explicitly as a stage preceding the reconciliation of different meanings.

> The ECJ held in *France v Commission* (1994) that the word "reconnu" in the French version of the EC Treaty (then: Art 228 para 1 EEC Treaty) must be interpreted as referring to the attribution of competences to the Commission in the Treaty itself, and not in some other sources, since that was in conformity with other authentic versions of the provision and with the general principle of attributed powers, then laid down in Art 4 para 1 EEC Treaty.[64]

In this context then, the **fact that the treaty was drafted in one of the languages,** which later became the authentic texts, may play a role as part of the *travaux préparatoires*, thus in turning to Art 32 VCLT in an effort to bridge differences between the languages. The precedence of the drafting or negotiating

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[60] WTO Appellate Body *United States – Softwood Lumber* (n 2) para 59. *Cf* also ITLOS (Seabed Disputes Chamber) *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion), 1 February 2011, para 63.

[61] *Gardiner* Treaty Interpretation 358.

[62] ICJ *Kasikili/Sedudu* (n 2) para 25.

[63] *Application of CERD (Georgia v Russian Federation)* (Preliminary Objections), 1 April 2011, para 135.

[64] ECJ (CJ) *France v Commission* C-327/91 [1994] ECR I-3641, paras 33–35.

language, which is no longer admissible as a formal principle (→ MN 19), may, therefore, indirectly still have a bearing on the practice of treaty interpretation (→ also MN 21).[65]

> When in 2004 the precedence of the negotiating language was argued by the European Commission in the *Simutenkov* case before the ECJ,[66] the Court did not address that argument in its decision.[67]

Occasionally, this *de facto* priority of one of the authentic languages as the negotiating language is at least indicated in the text of the treaty.

> Thus the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, signed on 12 May 2011, declares in its testimonium the English, French and Russian texts to be equally authentic, which then continues: "The working language of this Agreement shall be English, the language in which this Agreement was negotiated".[68]

33 The presumption stipulated in para 3 is **rebutted, as soon as,** by comparing different authentic texts, a difference of meaning between them has been established,[69] in which case, para 4 applies. It is submitted that divergent meanings between any two of the authentic languages displace the presumption of para 3 and bring para 4 into play, without there being need to analyze the words in all authentic languages.[70]

IV. Reconciling Different Meanings (para 4)

34 Para 4 provides for two additional steps in the process of interpreting multilingual treaties. First, it clarifies that the interpreter actually has the **possibility to establish, by applying Arts 31 and 32 VCLT, a difference of meaning**[71] between different authentic languages of the treaty and thereby to refute the presumption laid down in para 3. Thus, the result of the interpretative effort is not predetermined by that presumption, even if the latter points the interpreter in a certain direction: the interpretation is meant to confirm the identical meaning of all authentic texts, but Art 33 does not prohibit the opposite result, *ie* a difference of meaning. By referring to Arts 31 and 32 in this respect, the provision confirms that the comparison of

[65] Concurring *Sinclair* 152; *Gardiner* (n 62) 367; *Villiger* Art 33 MN 11 in n 39.

[66] See *F Hoffmeister* The Contribution of EU Practice to International Law in *Cremona* (ed) Developments in EU External Relations Law (2008) 37, 61–62.

[67] *Cf* ECJ (CJ) C-265/03 *Simutenkov* [2005] ECR I-2579, para 22.

[68] Text to be found in all three languages at www.arctic-council.org (last visited 27 July 2011).

[69] In contrast, the prevalence of one authentic text in accordance with para 1 does not refute the presumption of para 3, since the former does not refer to the meaning of the treaty; *contra Villiger* Art 33 MN 8.

[70] *Gardiner* (n 61) 365.

[71] Which, it is submitted, means the same as "divergence", the term used in para 1.

authentic texts is part and parcel of applying the general rule of treaty interpretation to multilingual treaties.

35 If the intended result, an identical meaning of all authentic texts, cannot be achieved, for example because this would be contrary to the ordinary meaning in one of the languages or to the context of the treaty, para 4 **authorizes as a second step the interpreter to reconcile** the different meanings in the light of the object and purpose of the treaty. The interpretation may, at this stage, not only depart from the equality of all authentic versions (para 1), but also from the general rule of interpretation (Art 31 para 1) according to which the *telos* of a treaty is one among a number of equally important means of interpretation (→ Art 31 MN 39). It is thus apparent from para 4 that, once this stage has been reached, the interpreter enjoys **much greater freedom** in finding a reasonable meaning of the treaty clause in question, simply by adopting a teleological approach. The interpretative effort is released from the strings of the general rules of interpretation, and the purpose of the treaty is singled out as the essential guiding element of interpretation.

36 But not only the means to be applied in the operation leaves to the interpreter a large margin of discretionl also, the **operation itself is scarcely determined**. The term '**reconciliation**' does not describe, not even roughly, how the meaning is to be found, and that non-determination is further softened by the term "best",[72] thus adding to the element of appreciation on part of the interpreter. It seems that all that is required from the interpreter is to present a reasonable solution within the scope and the wording of the treaty. Since the effort undertaken, however, still is one of interpretation, it is submitted that the general requirement of good faith applies to it (*cf* Art 31 para 1 VCLT).

In practice, examples for an explicit application of para 4 are rare, the best-known being the ***LaGrand* case** before the ICJ, where the Court was called upon to examine the binding character of provisional measures adopted under Art 41 of its Statute. It established a divergence between the equally authentic French and English versions of Art 41 and turned to Art 33 para 4 VCLT. The Court concluded from the object and purpose of the Statute, which is to enable it to fulfil its basic function of judicial settlement of international disputes, that the power to indicate provisional measures entails that such measures should be binding.[73]

When in *Spain v Council* the ECJ detected different meanings as to the scope of (then) Art 130 EC Treaty in the French and Dutch version of the Treaty on the one hand, and the German, Spanish, Italian, Finnish, Swedish, Danish, English, Irish, and Greek version on the other, the Court turned to "the purpose and general scheme" of the rules of which the provision forms part and, in the end, decided in favour of the narrower reading of the treaty provision (much along the lines of the French version).[74]

37 The concept embodied in para 4 clearly aims at an interpretative solution which respects the different languages but extracts from the treaty the best reconciliation

[72]Which was chosen at the Vienna Conference instead of "as far as possible" that had been contained in the Final Draft.

[73]ICJ *LaGrand* (n 2) paras 101–102.

[74]ECJ (CJ) *Spain v Council* (n 4) paras 47–55.

of the differences. In contrast, what also happens in practice seems to be the **selection of the meaning from one of the different languages**.[75]

> Thus in the *Young Loan Arbitration* the Tribunal held: "The repeated reference by Article 33 (4) of the VCLT to the 'object and purpose' of the treaty means in effect nothing else than that any person having to interpret a plurilingual international treaty has the opportunity of resolving any divergence in the texts which persists [. . .] by opting, for a final interpretation, for one or the other text which in his opinion most closely approaches the 'object and purpose' of the treaty."[76]

In spite of the large discretion given to the interpreter in para 4, the task is still one of interpretation, and not of progressive development, of the treaty, so that the freedom is **limited, beside the requirement of good faith, by the wording** of the various authentic texts[77]: the meaning adopted under para 4 must be encompassed by at least one of them. **38**

Finally, since the "reconciliation" according to para 4 is meant to be based on a comparison of equally authentic texts, it seems natural that it does not apply when the equality rule does neither *ie* when one authentic text prevails over the others because the parties agreed so. The **exception** contained in the first part of para 1 stipulates just that. **39**

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[75] *Gardiner* (n 61) 380.
[76] *Young Loan Arbitration* (n 37) para 39.
[77] *Villiger* Art 33 MN 12.

Section 4
Treaties and Third States

Article 34

General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Contents

A. Purpose and Function

Art 34 contains the Convention's general rule regarding the effects of treaties in respect of third States. For States who have not expressed their consent to be bound by its terms, a treaty constitutes *res inter alios acta*. The underlying notion, embodied in the maxim *pacta tertiis nec nocent nec prosunt* (agreements neither harm nor benefit third parties), may appropriately be described as the negative facet of the principle of *pacta sunt servanda* (→ Art 26) and is founded on the principles of sovereignty and independence of States.[1] While the *pacta tertiis* rule is not of absolute character, this does not alter the fact that a treaty generally has only a relative effect, *ie* is **valid *inter partes***.[2] Thus, the conclusion drawn by the ILC's third SR *Fitzmaurice* whereby the principles *pacta tertiis nec nocent nec prosunt* and *res inter alios acta* "are so fundamental, self-evident and well-known, that they do not really require the citation of much authority in their support"[3] is, as regards the validity of the general rule, essentially correct. Contrary to that which has been **1**

[1] Final Draft, Commentary to Art 30, 226 para 1; see also *Fitzmaurice* V 75 *et seq* (Draft Art 3); *Waldock* III 18; *Reuter* VI 120; PCIJ *Status of Eastern Carelia* (Advisory Opinion) PCIJ Ser B No 5, 27 (1923).

[2] *C Rousseau* Droit international public Vol 1 (1970) 184.

[3] *Fitzmaurice* V 84.

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stated by one source, however, it cannot be deduced from the foregoing that Arts 34–38 VCLT "do not call for extensive comment".[4] On the contrary, little attempt has been made to deal with the subject matter systematically to date.[5] Therefore, attention must in particular be turned to the **scope of the respective provisions** as well as to **possible exceptions** to the general rule, the latter aspect being an issue which at the time of drafting of the VCLT was so controversial that it divided the ILC.[6] Its lasting relevance has prompted one source to state that "the classic exposition does not provide the full story today."[7]

2 As regards the structure of Part III Section 4 of the Convention, Arts 35–38 prescribe the conditions under which a treaty **may** provide for obligations or rights of third States. For obvious reasons, these conditions are stricter in the case of obligations ("in writing") than in the context of rights. Therefore, Art 34, by explicitly distinguishing between obligations and rights, paraphrases the content of the following provisions, which then address the relevant conditions in detail, and, irrespective of its fundamental character, may best be understood as establishing a **presumption against any third-State treaty effect**.[8] It follows from this that "it is necessary to keep in mind the contents of the five articles as a whole."[9]

B. Historical Background and Negotiating History

3 The *pacta tertiis* principle may be traced back to an analogy to the Roman law of contract.[10] While under the various systems of municipal law, unanimity only exists as to the inadmissibility of incurring obligations under a contract on a third party,[11] the validity of the rule contained in Art 34, which encompasses obligations as well as rights, has **never been called into question generally**.[12] Notwithstanding several attempts to create objective law undertaken by the great powers on several occasions following the Congress of Vienna in 1815 (→ MN 50–59), that conclusion is reflected in the findings of all relevant international tribunals. In this respect, the judgment of the PCIJ in the *Free Zones of Upper Savoy and District of Gex* case is particularly noteworthy. The Court had to decide whether Art 435 para 2 **Treaty of Versailles** (which, due to the objective approach on which several of its

[4] *Sinclair* 98. *Aust* 256–261 deals with the subject matter on six pages only.

[5] See *Fitzmaurice* V 72.

[6] *Cf* Final Draft, Commentary to Art 30, 226 para 4.

[7] *AE Boyle/C Chinkin* The Making of International Law (2007) 239.

[8] *Sinclair* 101.

[9] *Waldock* VI 67; see also *Villiger* Art 34 MN 4.

[10] *Cf RF Roxburgh* International Conventions and Third States (1917) 6. For a critical appraisal of the role of Roman law in relation to international law, see *CH Winkler* Verträge zu Gunsten und zu Lasten Dritter (1932) 2–6.

[11] See *Roxburgh* (n 10) 6–18.

[12] The critique raised by *G Scelle* Précis de droit des gens Vol 2 (1934) 367–379 is based on a general refusal of any relative approach to public international law.

provisions were based, served as a litmus test concerning possible effects of treaties on third States in general), had abrogated or was intended to lead to the abrogation of provisions, which had brought into existence the customs and economic regimes of the free zones of Upper Savoy and the Pays de Gex. These provisions were incorporated in certain declarations made in favour of Switzerland by the powers participating in the Vienna Congress.[13] In its judgment, the PCIJ held that "Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it."[14]

Similarly, the very same court stated in the *Certain German Interests in Polish Upper Silesia* case that "[a] treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States."[15] In the *Island of Palmas* case before the Permanent Court of Arbitration, it was affirmed that "whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third powers."[16] When considering the effect of Art 338 Treaty of Versailles in the *Jurisdiction of the International Commission of the River Oder* case, the PCIJ, again, concluded that the rule under which "conventions, save in certain exceptional cases, are binding only by virtue of their ratification" is to be considered as constituting an ordinary rule of international law.[17] The ICJ upheld the jurisprudence of its predecessor in the *Anglo-Iranian Oil Co* case by determining that "[a] third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*."[18] Thus, against the background of this well-established jurisprudence, it is beyond doubt that the rule contained in Art 34 of the Convention **reflects customary international law**.[19] **4**

Within the ILC, the issue of the effects of treaties in relation to third States was comprehensively dealt with for the first time by SR *Fitzmaurice* in his fifth report.[20] Art 1 of the second chapter of the draft code on the law of treaties contained a lengthy definition of 'third State', whose main substance (para 1: "any State not actually a party to that treaty, irrespective of whether or not such a State is entitled to become a party, by signature, ratification, accession or other means") was **5**

[13]For an overview on the historical background, see PCIJ *Free Zones of Upper Savoy and the District of Gex* PCIJ Ser A/B No 46, 115 *et seq* (1932).

[14]*Ibid* 141.

[15]PCIJ *Certain German Interests in Polish Upper Silesia* (Merits) PCIJ Ser A No 7, 29 (1926); see also *The Factory at Chorzów (Claim for Indemnity)* (Merits) PCIJ Ser A No 17, 45 (1928); *Customs Régime between Germany and Austria (Protocol of March 19th, 1931)* (Advisory Opinion) PCIJ Ser A/B No 41, 48 (1931).

[16]*Island of Palmas Case (Netherlands v United States)* 2 RIAA 829, 842 (1928).

[17]PCIJ *Territorial Jurisdiction of the International Commission of the River Oder* PCIJ Ser A No 23, 20 (1929).

[18]ICJ *Anglo-Iranian Oil Co Case* (Jurisdiction) [1952] ICJ Rep 93, 109 (original emphasis).

[19]*Waldock* III 18 *et seq* with further references; see also the decision of the ECJ (CJ) *Brita* C-386/08, 25 February 2010, paras 42, 44.

[20]*Fitzmaurice* V 69 *et seq*.

complemented in the following paragraphs by a classification of what kinds of States the respective term would encompass.[21] In his commentary thereto, *Fitzmaurice* pointed to the fact that the term 'third State' is indeed neither satisfactory nor precise, as it is "strictly appropriate only for the case of a bilateral treaty",[22] but referred to the **common usage** of the concept of a 'third party' within the contract laws of many States (which, again, build upon their Roman law origins).[23]

6 The scope of the term "**obligations**" was addressed in detail by SR *Fitzmaurice* in his fifth report, but not resumed in the course of the following sessions, possibly due to the fact that the ILC changed the scheme of its work from an expository statement of the law of treaties to the preparation of draft articles capable of serving as a basis for an international convention. *Fitzmaurice* proposed the inclusion of a provision dealing with **effects incidentally unfavourable to a third State** resulting from the operation of a treaty in the second chapter of his draft code on the law of treaties.[24] In his commentary based on previous works by *Rivier* and *Roxburgh*,[25] he gave the example of a treaty from which an adverse effect (but no obligation) results in the situation of commercial privileges being mutually granted to one another by two States, whereby the trade or commercial position of a third State is detrimentally affected.[26] Considering possible third State effects of treaties of guarantee and mutual assistance, *Rousseau* had identified already in 1944 that such treaties "did not operate *ipso facto*, their operation being necessarily subordinated to the illicit act (aggression) of the third State."[27] *Fitzmaurice* adopted this conclusion and complemented it by reference to Art 17 LoN Covenant.[28] He furthermore referred to *McNair* who cited extradition treaties as a case in which incidental effects are produced for a third State due to the presence of the individual concerned in the territory of one of the parties to the treaty.[29]

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[21] *Ibid* 75.

[22] *Ibid* 83; see also *Y Dinstein* The Interaction between Customary International Law and Treaties (2006) 322 RdC 243, 331.

[23] *Cf* §§ 328 *et seq* German Civil Code; Contracts (Rights of Third Parties) Act 1999 of the United Kingdom.

[24] *Fitzmaurice* V 81 (Draft Art 19).

[25] *Ibid* 100 *et seq*.

[26] *Ibid* 100.

[27] Translation by *Fitzmaurice* V 101 (original emphasis).

[28] *Ibid*. Art 17 LoN Covenant reads in its relevant parts: "(1) In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council. [. . .] (3) If a State so invited shall refuse to accept the obligations of membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article 16 shall be applicable as against the State taking such action."

[29] *McNair* 333–336.

A similar problem exists in respect of where to draw the line between a mere benefit to which the *pacta tertiis* rule is not applicable,[30] and a "**right**" in terms of Art 34. The question was dealt with in a rather indirect manner by SR *Fitzmaurice* and *Waldock*. While the main issue addressed in the relevant documents was whether the parties to a treaty may create an actual right in favour of a third State without any specific act of acceptance made by the latter State at all (→ Art 36 MN 4–5), *Fitzmaurice* as well as *Waldock* referred to the fact that the existence of a right in contrast to a mere benefit depends on whether the parties to the treaty had the **specific intention to confer a right** on a third State.[31] In doing so, they relied on a statement made by the PCIJ in the *Free Zones of Upper Savoy and District of Gex* case.[32] The relevance of the subjective element of intention was supported by several members of the ILC and has found expression in Art 36 para 1.[33] **7**

For the history of the concept of objective regimes, see → MN 35–38. **8**

C. Elements of Article 34

I. Treaty

→ Art 2 MN 3–45 **9**

II. Third State

Under current international law, the notion 'third State' is defined in Art 2 para 1 lit h VCLT as a "State not a party to the treaty", that provision being logically linked to Art 2 para 1 lit g stating that "'Party' means a State which has consented to be bound by the treaty and for which the treaty is in force" (→ Art 2 MN 46).[34] As the decisive element is thus to be seen in the **entry into force** of a treaty for a certain State, a 'third State' is not only a State which is wholly stranger to the treaty but also a State which participated in the drafting of the treaty but has not yet signed it.[35] While the issue of what constitutes a third State is not one exclusively affecting the scope of treaties but might also concern unilateral acts and decisions of **10**

[30]Consequently, a treaty may permissibly confer benefits on a third State. See *Ago* [1964-I] YbILC 90; *de Luna* [1964-I] YbILC 90; *cf* also *Waldock* III 21; Final Draft, Commentary to Art 32, 228 para 3.

[31]*Fitzmaurice* V 102; *Waldock* III 21, 25; see also *Waldock* VI 71.

[32]PCIJ *Free Zones of Upper Savoy and District of Gex* (n 13) 147 *et seq*.

[33]*Cf Rosenne* [1964-I] YbILC 89; *Pal* [1964-I] YbILC 89; *Jiménez de Aréchaga* [1966-I/2] YbILC 90.

[34]However, see the critique raised by *Reuter* VI 125 stating that the terms "third" and "non-party" are not wholly equivalent.

[35]*Fitzmaurice* V 83.

international tribunals,[36] it should be noted that both categories, while not representing treaties *stricto sensu*, cannot be precisely differentiated from the matter relevant here due to the central importance of the **principle of good faith** for the creation and performance of **all** legal obligations.[37]

> In this respect, the ICJ held in the *Nicaragua* case with regard to declarations of acceptance of its jurisdiction under Art 36 para 2 ICJ Statute that "[i]n fact, the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration."[38] With a view to possible third State effects of its decisions, the Court stated in the *Burkina Faso v Mali* case that "[t]he Parties could at any time have concluded an agreement for the delimitation of their frontier, according to whatever perception they might have had of it, and an agreement of this kind, although legally binding upon them by virtue of the principle *pacta sunt servanda,* would not be opposable to Niger. A judicial decision, which 'is simply an alternative to the direct and friendly settlement' of the dispute between the Parties [. . .], merely substitutes for the solution stemming directly from their shared intention, the solution arrived at by a court under the mandate which they have given it. In both instances, the solution only has legal and binding effect as between the States which have accepted it, either directly or as a consequence of having accepted court's jurisdiction to decide the case."[39]

11 The Convention distinguishes "third States" from "contracting States" (Art 2 para 1 lit f), "negotiating States" (Art 2 para 1 lit e) and "States entitled to become parties to the treaty" (*eg* Art 23 para 1). While strictly speaking, **only one category of third States** exists (*ie* States for which a treaty has not entered into force), the Convention nevertheless assigns certain rights and obligations to States belonging to one of the aforementioned categories (→ Art 2 MN 46–48).[40] An especially noteworthy example is Art 18. One source has questioned the compatibility of that provision with the *pacta tertiis* rule, as it obliges contracting States to refrain from acts which would defeat the object and purpose of a treaty after signature, *etc* Thus, Art 18 seems to prescribe an obligation for entities belonging to the category of third States.[41] However, one must not ignore that Art 34 only covers situations in

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[36] *Cf* Art 59 ICJ Statute: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

[37] See ICJ *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, para 46; *Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457, para 49.

[38] ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, paras 59 *et seq*; *cf* also *Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125, 146.

[39] *Cf* ICJ *Frontier Dispute (Burkina Faso v Mali)* [1986] ICJ Rep 554, para 46.

[40] See *eg* Art 12 para 1 lit b, Art 12 para 2 lit a, Art 20 para 2, Art 40 para 2, Art 47, Art 76, Art 77 para 1 VCLT; see also *Waldock* III 19. The concept of the 'witness State' (which is not mentioned in the VCLT) is not associated with the category of States mentioned above; see *E David* in *Corten/Klein* Art 34 MN 19. Its sole effect is that the respective State acts as witness of the conclusion of a treaty to which it is not a party; an example worth mentioning is the 1979 Peace Treaty between Israel and Egypt 17 ILM 1469 whose conclusion was witnessed by US President *Carter*. There is no need to further explain that the 'witness State' is a third State under the VCLT.

[41] *M Fitzmaurice* Third Parties and the Law of Treaties (2002) 6 Max Planck UNYB 37, 43 *et seq*.

which the respective third State has not given its consent to be bound to the rights and obligations deriving from a treaty. With regard to its substance specified in the Convention, the *pacta tertiis* rule is not of absolute character.[42] Therefore, every State which accedes to the VCLT accepts that, within the degree foreseen by the Convention, it might become subject to rights and obligations stemming from other treaties which have not (yet) entered into force for that State due to its status as a 'contracting' or 'negotiating' State. Viewed from that perspective, the third party effect is an indirect one, which results either from the procedural provisions of the treaty in conjunction with the relevant requirements of the VCLT,[43] or, as in the case of Art 18, primarily from the Convention itself.[44]

12 According to its clear wording, Art 34 does not cover the creation of rights and obligations for a **third party other than a State**. Whether or not the *pacta tertiis* principle is applicable in such a situation thus seems to be a matter of its scope under customary international law.

In the *Brita* case, the ECJ regarded the *pacta tertiis* principle as being opposed to the creation of an obligation imposed by the EU-Israel Association Agreement on the Palestinian Authority.[45] The Court based its reasoning on the validity of that principle under customary international law.[46] However, it did not clarify whether it regarded the *pacta tertiis* rule as being applicable due to the particularities of the case at hand (parallel existence of an EC-PLO association agreement), and whether it considered it as generally applicable with regard to third non-State actors or only applicable to State-like entities or entities exercising effective jurisdiction *vis-à-vis* a specific subject matter. Interestingly, the opinion of Advocate General *Bot* remained completely silent on the *pacta tertiis* rule.

Common Art 3 of the Geneva Conventions as well as the Second Protocol to the Geneva Conventions[47] are based on the assumption that, notwithstanding their lacking status as contracting parties, parties other than States to a non-international armed conflict are generally bound to the standards contained in these documents.[48] This fact seems to militate against the applicability of the *pacta tertiis* rule in situations in which the third party affected by a treaty is not a State. Having said that, an alternative line of argument would be either to refer to the usual existence

[42] *Lauterpacht* I 98.

[43] See *McNair* 203 *et seq*.

[44] *P Cahier* Le problème des effets des traités à l'égard des États tiers (1974) 143 RdC 589, 601; *Sinclair* 99.

[45] ECJ (CJ) *Brita* (n 19) para 52.

[46] *Ibid* paras 44, 52.

[47] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts 1125 UNTS 609.

[48] ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, para 219; see also *C Greenwood* Scope of Application of Humanitarian Law in *D Fleck* (ed) The Handbook of Humanitarian Law in Armed Conflict (2nd edn 2007) 45, 76.

of implicit consent declared by the Non-State Party to the conflict,[49] or to rely on an alleged customary law exception to the *pacta tertiis* principle in situations of non-international armed conflict.[50] In the light of existing State practice,[51] it is submitted that the latter option, which insists on the validity of the *pacta tertiis* rule also *vis-à-vis* non-State actors (other than international organizations), is essentially correct.

III. Obligations

13 As regards the element of obligation, it is interesting to note that the overwhelming majority of relevant sources focuses either on how a third State's consent must be understood from a doctrinal point of view (→ Art 35 MN 12–19), or whether any exceptions to the general rule contained in Art 34 of the Convention exist (→ MN 32–59). In contrast, the antecedent question, namely what constitutes an obligation under that provision, is rarely discussed at all.[52] The same is true with regard to the opposite situation, *ie* the creation of rights in favour of a third State. The lack of authority as to the scope of the terms "obligations" and "rights" is somewhat surprising, since the impact of a treaty on a third State may take various forms and manifest itself in different grades of intensity. In this respect, as a matter of logic, an obligation *stricto sensu* must be **distinguished** from a third State being subject to an **adverse effect** of (but not bound to) the provisions of a treaty. That not every negative impact of a treaty on a third State corresponds to an obligation in terms of Art 34 was already emphasized by *Roxburgh* who stated that States "have a general duty not to interfere with the due execution of the treaty, so long as it does not violate International Law, or their vested rights."[53] Similarly, a right is, as regards the normative substance of the relevant legal position, something other than a mere benefit. As evidenced by the *Lake Lanoux* arbitration, the issue at hand is not a purely academic one. The Tribunal held that "[o]n a theoretical basis the Spanish argument is unacceptable to the Tribunal, *for Spain tends to put rights and simple interests on the same plane*."[54] Thus, the decisive point is to determine the **degree of intensity** of the negative impact of a treaty provision on a third State in order to qualify as obligation.

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[49] *M Bothe* Friedenssicherung und Kriegsrecht in *W Graf Vitzthum* (ed) Völkerrecht (5th edn 2010) 649, 746.

[50] See *L Zegveld* The Accountability of Armed Opposition Groups in International Law (2002) 10 with further references.

[51] *Ibid*.

[52] Exceptions are *C Chinkin* Third Parties in International Law (1993) 18–22; *Cahier* (n 44) 597–605; *Roxburgh* (n 10) 31–33. The issue was neither addressed by the ILC in its Commentary to the Final Draft nor by SR *Waldock* in his third report.

[53] *Roxburgh* (n 10) 32; see also *T Schweisfurth* International Treaties and Third States (1985) 45 ZaöRV 653, 655 *et seq*; *Cahier* (n 44) 598 *et seq*.

[54] *Lake Lanoux (France v Spain)* 12 RIAA 281, 315 (1957) (emphasis added).

1. Obligations *stricto sensu*

At any rate, it is clear that Art 34 covers obligations *stricto sensu*, *ie* obligations which **directly address one or more third States** and impose on them the duty to behave in a certain way. An example would be a treaty provision under which States, irrespective of whether or not they have acceded to the treaty concerned, were bound to follow certain environmental protection standards contained therein, whose violation would be a legal wrong. It should be noted, though, that due to the fundamental nature of the *pacta tertiis* principle, it is highly unlikely that States Parties to a treaty will agree on such regulations. The present author is not aware of a single treaty containing a provision from which an obligation *stricto sensu* would arise. **14**

2. Incidentally Unfavourable Effects

On the other hand, it is impossible to speak of an obligation in terms of Art 34 in the event that the impact of a treaty provision on a third State is of a **purely factual nature**.[55] *Chinkin* gives the example of a treaty between States A and B making an agreement that A will buy wheat from B instead of from C, who has been the major supplier of wheat to A for many years before.[56] In such a situation, unless the newly concluded treaty constitutes a violation of a previous (bilateral or multilateral) agreement to which C is a party, C may under no means be considered as a third State subject to an obligation deriving from the treaty between A and B. Such negative factual consequences (which, arguably, largely correspond to the notion of "incidentally unfavourable effects" introduced by *Fitzmaurice* [→ MN 6]) differ from obligations in terms of Art 34 in that they do not affect the **legal position** of the third State. **15**

3. Indirect Obligations

In many instances, however, a clear-cut **dividing line** between obligations on the one hand and incidentally unfavourable effects on the other may turn out to be difficult, if not impossible, to determine. This is particularly true with regard to obligations, which do not directly address third States but rather **oblige the States Parties to a treaty** or an international organization established under its terms to apply some or all of its provisions to third States. Examples include Art 2 para 6 UN Charter[57] as well as the "no more favourable treatment" (NMFT) clauses contained in the 1973 International Convention for the Prevention of Pollution from Ships **16**

[55] See *K Doehring* Völkerrecht (2nd edn 2004) 154 *et seq* (MN 347).

[56] *Chinkin* (n 52) 20.

[57] Art 2 para 6 UN Charter reads: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

(MARPOL)[58] and the 1974 International Convention for the Safety of Life at Sea (SOLAS).[59] Under these clauses, States Parties "shall apply" the requirements of the Conventions as may be necessary to ensure that no more favourable treatment is given to ships of non-parties.[60] In this respect, the subjective element of intention referred to by Art 35 VCLT does not provide authority for any manageable differentiation, as it presupposes an understanding of the parties to the treaty in respect of the obligatory character of the intended conduct. It should be noted, though, that the need to distinguish between indirect obligations and mere incidentally unfavourable effects would only exist if the former would have to be considered as obligations in terms of Art 34 VCLT.

17 A group of – mainly German – authors has advanced the view that the term "obligations" under Art 34 VCLT only comprises situations in which a third State is **directly and intentionally** addressed by the provisions of a treaty.[61] If this view is correct, then Art 2 para 6 UN Charter as well as the NMFT clauses of MARPOL and SOLAS would not conflict with the *pacta tertiis* rule at all. It seems doubtful, however, whether the exclusion of any indirect legal third party effect from the scope of Art 34 VCLT is compatible with the **object and purpose** of that provision.[62] From a third State's perspective, it does not make any difference whether a legal rule directly obliges it to comply with the regulations of a treaty, or whether the parties to the treaty are under an obligation to apply and/or enforce its standards *vis-à-vis* the third State and act correspondingly. With a view to the latter situation, *Jennings* and *Watts* have stated that "[t]he obligation, it will be noted, is not a direct one. However, inasmuch as a legal rule is conceived as a precept of conduct enforced by external sanction, the difference is one of form rather than of substance."[63] Moreover, limiting the scope of Art 34 VCLT to obligations *stricto sensu*, which scarcely occur in international practice (→ MN 14), would render the *pacta tertiis* rule virtually superfluous.

18 The view taken by *Rousseau* and *Fitzmaurice*[64] does not contradict the line of argument advocated here according to which indirect legal effects generally contravene the *pacta tertiis* principle. The fact that a State has taken the decision not to

[58] 1340 UNTS 184.

[59] 1184 UNTS 2.

[60] *Cf* Art 5 para 4 MARPOL; Art II para 3 of the 1978 Protocol to SOLAS. For further examples, see *G Handl* Regional Arrangements and Third State Vessels: Is the *pacta tertiis* Principle Being Modified? in *H Ringbom* (ed) Competing Norms in the Law of Marine Environmental Protection (1997) 217, 222.

[61] *R Wolfrum* Recht der Flagge und billige Flaggen (1990) 31 BDGVR 121, 139 *et seq*; *D König* Durchsetzung internationaler Bestands- und Umweltschutzvorschriften auf hoher See im Interesse der Staatengemeinschaft (1990) 168 *et seq*; *M Núñez-Müller* Die Staatszugehörigkeit von Handelsschiffen im Völkerrecht (1994) 261; *RG Wetzel* Verträge zugunsten und zu Lasten Dritter nach der Wiener Vertragsrechtskonvention (1973) 13.

[62] See *A Proelss* Meeresschutz im Völker- und Europarecht (2004) 132–135.

[63] *R Jennings*/*A Watts* (eds) Oppenheim's International Law Vol I/2 (9th edn 1992) 1264 footnote 4.

[64] See *Fitzmaurice* V 100–101.

comply with the requirements of a treaty to which it is not a party is not tantamount to the **existence of an autonomous scope of manœuvre** of that State (which would, according to these authors, generally speak in favour of an incidental effect not covered by Art 34 VCLT).[65] If the contrary would be true, literally every treaty producing an indirect third party effect would have to be considered compatible with the *pacta tertiis* rule simply due to the fact that all third States have the choice to comply with the treaty. Such reasoning would ignore that subject to the requirements of public international law, a State is in principle free to act in the way it wishes. In this respect, it is meaningful that the examples of treaties given by *Rousseau* and *Fitzmaurice* (treaties of guarantee and mutual assistance) only cover situations in which a third State resorts to the use of force and thus acts **contrary to general international law**. It is difficult to see how that State may then be entitled to challenge the legality of the States Parties' conduct *vis-à-vis* itself by recourse to the principles of sovereignty and independence on which the *pacta tertiis* rule is based (→ MN 1). The situation is different in the case of the NMFT clauses, since a ship flying the flag of a third State which intends to enter the port of one of the parties to MARPOL and/or SOLAS does, if viewed individually, not violate international law. Thus, the special circumstances applying to the case of traditional alliance clauses[66] justify a different evaluation as to its compatibility with Art 34 VCLT.[67]

It is submitted that the same is true with regard to the NATO Treaty[68] as specified by the **new strategic concept** of 1999, under which the security interests of the alliance are not only affected by armed attacks on the territory of the States Parties, but also relate to other risks of a wider nature, including acts of terrorism, organized crime and gross violations of human rights.[69] Since the instruments available within the expanded mandate of the existing framework of collective self-defence (assuming that their operation can be justified under general international law) only come into play if and to the extent to which they are activated by a third State's illegal conduct, which, due to its grave character, corresponds in substance to resorting to the use of force, the situation may well be compared to that of the operation of traditional alliance clauses. Consequently, the underlying treaties do not affect third States in a manner incompatible with Art 34 VCLT. **19**

[65]However, see *Handl* (n 60) 223 who with a view to the NMFT clauses contained in MARPOL and SOLAS argues that the third State effect does not derive from the treaty clauses themselves but from the autonomous behaviour of the flag State.

[66]The same line of argument is applied to Art 2 para 6 by *W Graf Vitzthum* in *B Simma* (ed) UN Charter Vol I (2nd edn 2002) Art 2 para 6 MN 23.

[67]See also *Ago* [1966-I/2] YbILC 67: "[T]he Commission had henceforth established the principle of inequality as between the aggressor State and the others, and [. . .] in contemporary international law, an aggressor State was no longer to be regarded as being on an equal footing with other States."

[68]1949 North Atlantic Treaty 34 UNTS 243.

[69]See the Alliance's Strategic Concept of 1999, NATO Press Release NAC-S(99)65, *M Rutten* (comp) From St-Malo to Nice – European Defence: Core Documents (2001) 24.

20 In contrast, if the view advocated here is correct, then Art 2 para 6 UN Charter, which produces **indirect legal effects as to non-member States** of the United Nations, may only be justified by recourse to the general interest of the international community embodied in the UN Charter (→ MN 53),[70] or by reference to the status of the principles contained in Art 2 as customary international law.[71] The contrary majority view resolves the potential conflict with Art 34 VCLT by way of restrictive interpretation of its elements,[72] that view, however, being of somewhat circular nature as it rests on the assumption that Art 2 para 6 UN Charter cannot create any actual obligation for the third State simply due to the fact that it would otherwise violate the *pacta tertiis* rule.[73] It also seems to ignore the mandatory wording of the provision ("shall ensure").[74]

> The practice of the UN organs does not provide clear evidence for either of the two lines of argument. When intending to also address non-member States in its resolutions, the Security Council in the majority of cases simply "appealed", "urged" or "called" on "all States" to act in accordance with its resolutions.[75]

21 Having regard to the NMFT clauses contained in MARPOL and SOLAS (→ MN 16), the enforcement of the standards concerned by the coastal State with regard to ships flying the flag of non-parties does, in light of Art 34 VCLT, not cause any legal problems as long as it is restricted to violations committed

[70] *Jennings/Watts* (n 63) 1264; *JL Kunz* Revolutionary Creation of Norms of International Law (1947) 41 AJIL 119, 125; *H Kelsen* The Law of the United Nations (1950) 110. See also *Elias* [1964-I] YbILC 73 and *Lauterpacht* I 98 who states that "[t]he Article in question imposes no legal obligation upon non-member States" on the one hand but examines that "with the growing integration of international society, collective treaties may, by general consent, be held to produce not only actual compliance but also legal rights and obligations in relation to States which are not parties thereto" on the other.

[71] *MN Shaw* International Law (6th edn 2008) 929; *I Brownlie* Principles of Public International Law (7th edn 2008) 628. Note that reference to custom would be superfluous if Art 2 para 6 and Art 102 UN Charter would not *per se* conflict with the *pacta tertiis* rule.

[72] *Graf Vitzthum* (n 66) MN 19 with further references; see also the mediative position taken by *PH Jessup* A Modern Law of Nations (1947) 135; *Villiger* Art 34 MN 9.

[73] See *Fitzmaurice* V 88.

[74] This is admitted by *Fitzmaurice* V 88.

[75] See *eg* UNSC Res 232 (1966), 16 December 1966, UN Doc S/RES/232 (1966), para 7; UNSC Res 314 (1972), 28 February 1972, UN Doc S/RES/314 (1972), para 2 ("[u]rges all States to implement fully all Security Council resolutions establishing sanctions against Southern Rhodesia, in accordance with their obligations under Article 25 and Article 2, paragraph 6, of the Charter of the United Nations"); UNSC Res 388 (1976), 6 April 1976, UN Doc S/RES/388 (1976), para 3; UNSC Res 409 (1977), 27 May 1977, UN Doc S/RES/409 (1977), para 2; UNSC Res 1368 (2001), 12 September 2001, UN Doc S/RES/1368 (2001), para 3; UNSC Res 1455 (2003), 17 January 2003, UN Doc S/RES/1455 (2003), paras 5–7. However, see UNSC Res 661 (1990), 6 August 1990, UN Doc S/RES/661 (1990), para 5, UNSC Res 670 (1990), 25 September 1990, UN Doc S/RES/670 (1990), para 1, and UNSC Res 1373 (2001), 28 September 2001, UN Doc S/RES/1373 (2001), para 1 *et seq*, obliging all States to act accordingly.

within the area over which the coastal State is **entitled to exercise territorial jurisdiction**. This will generally apply to the internal waters and the territorial sea.[76]

For the same reason, the position of the United States, according to which the exercise of jurisdiction by the International Criminal Court (ICC) on the basis of Art 12 para 2 lit a **Rome Statute** would violate the *pacta tertiis* principle,[77] is not correct. The provision concerned provides jurisdiction when the territorial State, *ie* the State where the alleged offences are committed, is a party to the Statute, even if the State of nationality of the accused person is not. The right of a State to exercise **jurisdiction over its territory** is a well-established principle in public international law.[78] In this respect, it has rightly been stated that "[t]here is no rule of international law prohibiting the territorial State from voluntarily delegating to the ICC its sovereign ability to prosecute."[79] Against this background, the consequences deriving from the application of Art 12 para 2 have, arguably, little to do with an alleged third party effect of the Rome Statute.[80] **22**

The contrary is true, however, if the exercise of jurisdiction is connected with acts committed by the ship of a third State **on the high seas** where, as a matter of principle, only the flag State is entitled to exercise jurisdiction over ships flying its flag due to the well-established principle of freedom of the high seas.[81] In such a situation, it seems that the NMFT clauses contained in MARPOL and SOLAS are inconsistent with Art 34 VCLT. Against this background, the Higher Administrative Court of Hamburg has interpreted Art 5 para 4 MARPOL in a restrictive manner as only referring to the preceding paragraphs of the provision, since it would otherwise violate the *pacta tertiis* rule.[82] Other sources have argued that the scope of the relevant provisions must necessarily respect the **geographical limitations of coastal State jurisdiction**.[83] If this is correct, then Art 5 para 4 MARPOL is only applicable with regard to MARPOL violations committed within the territorial sea and internal waters of the States Parties. **23**

The wording of the NMFT clauses does, however, not support any of the two interpretations. Art 5 para 4 MARPOL as well as Art II para 3 of the 1978 Protocol to SOLAS speak of "requirements of the present Convention", not of "requirements of the preceding paragraphs". Similarly, it must be noted that the requirements of the Conventions also extend to areas beyond the limits of national jurisdiction. **24**

[76] See Art 2 para 1 UNCLOS.

[77] *Cf SA Williams/WA Schabas* in *O Triffterer* (ed) Commentary on the Rome Statute of the International Criminal Court (2nd edn 2008) Art 12 MN 10.

[78] See *Brownlie* (n 71) 301–303 with further references.

[79] *Williams/Schabas* (n 77) MN 15 (footnote omitted).

[80] However, see *Boyle/Chinkin* (n 7) 240 *et seq*.

[81] See Arts 87, 89, 92 para 1 UNCLOS.

[82] Higher Administrative Court of Hamburg (Germany) 13 Natur und Recht 388, 389 (1991).

[83] *J Willisch* State Responsibility for Technological Damage in International Law (1987) 114 *et seq*; *Fitzmaurice* (n 41) 119.

Neither of the two treaties contains any reference according to which their provisions were to be applied subject to their conformity with general international law.[84] These objections have prompted the present author to argue in favour of an alternative understanding whereby the notion of "ship of non-Parties to the Convention" is to be interpreted in conformity with Art 3 para 1 lit b MARPOL,[85] but admittedly, SOLAS does not contain any corresponding rule relevant to the scope of the Convention.

25 A third category of authors relies on Art 38 VCLT and justifies the application of the MARPOL and SOLAS standards to third States by assuming that the two Conventions have **entered into customary law**.[86] From a doctrinal point of view, this is a problematic conclusion since the issue of custom deriving out of treaty provisions is to be answered for each treaty provision individually and not for the total treaty. Whether third States were at all able to acquiesce to the application of MARPOL and SOLAS standards to their vessels[87] is, arguably, a matter of doubt due to the lacking "fundamentally norm-creating character"[88] (→ Art 38 MN 9) of many of these standards contained in the annexes to the conventions. While with a view to the coastal State's territorial jurisdiction in respect of its ports as well as the existence of a multitude of regional memoranda of understanding on port State control and, indeed, their comparatively effective implementation, one is forced to accept the customary content of the NMFT clauses with regard to violations occurring in the territorial waters of the coastal State,[89] no evidence is given that the same is true as to violations which take place beyond the areas of national jurisdiction. In this respect, it should be noted that Art 218 para 1 UN Convention on the Law of the Sea (UNCLOS)[90] is, due to its **extraterritorial effect**, generally

[84] *Cf* in contrast Art 22 para 2 of the 1992 Convention on Biological Diversity: "Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea."

[85] *Proelss* (n 62) 135 *et seq*. Art 3 para 1 lit b reads: "The present Convention shall apply to [. . .] ships not entitled to fly the flag of a Party but which operate under the authority of a Party."

[86] *P Birnie/AE Boyle/C Redgwell* International Law and the Environment (3rd edn 2009) 389, 406; *M Valenzuela* Enforcing Rules against Vessel-Source Degradation of the Marine Environment: Coastal, Flag and Port State Jurisdiction in *D Vidas/W Østreng* (eds) Order for the Oceans at the Turn of the Century (1999) 485, 491; *Fitzmaurice* (n 41) 120; see also *Proelss* (n 62) 129 *et seq*.

[87] This reasoning is advanced by *GC Kasoulides* Global and Regional Port State Regimes in *H Ringbom* (ed) Competing Norms in the Law of Marine Environmental Protection (1997) 121, 132 *et seq*; *Birnie/Boyle/Redgwell* (n 86) 406; *Valenzuela* (n 86) 491.

[88] ICJ *North Sea Continental Shelf (Germany v Denmark, Germany v Netherlands)* [1969] ICJ Rep 3, para 72.

[89] See also the report by *GP Shultz*, Secretary of State, reprinted in Cumulative Digest of United States Practice in International Law (1981–1988) 2080, 2081: "As with all other MARPOL 73/78 regulations in force for them, States bound by Annex V will be required to apply Annex V regulations to all ships, including those of non-party States, using their ports or otherwise under their jurisdiction."

[90] Art 218 para 1 UNCLOS reads: "When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters,

considered as a novelty in international law, which has not yet developed into customary law.[91] That conclusion strongly militates against any extraterritorial application of the MARPOL and SOLAS standards on grounds of the NMFT clauses.

26 While it has been demonstrated that as a matter of principle, the *pacta tertiis* rule is applicable to indirect treaty obligations and thus renders these in need of justification under Arts 35–38 VCLT, it remains to be examined how to distinguish between indirect obligations and incidentally unfavourable effects **in cases of doubt**. As the intention of the parties to a treaty will generally not be easy to determine, it seems that the **intensity of the negative impact** of a treaty rule on the third State must constitute the decisive factor. In order to substantiate the element of intensity, the present author has suggested that only in case a State is affected in its 'basic rights' by a treaty to which it is not a party, may one speak of an interference with Art 34. The UN Charter in Art 2, as well as the Friendly Relations Declaration of the General Assembly,[92] delivers some evidence as to what legal positions are comprehended by the notion of 'basic rights'.[93] Examples mentioned in legal literature are the right to political independence, the principle of sovereign equality of States, and the territorial jurisdiction of a State.[94] With regard to the central importance of the aforementioned legal positions within the system of public international law, it may be argued that the more closely a treaty rule approaches the domain of the basic rights of a State, the more likely it is that it will become subject to the requirements of Part III Section 4 VCLT. Against this background, it is submitted that any treaty provision indirectly affecting the territorial integrity of a State or the sovereign exercise of territorial, personal or flag State jurisdiction is to be qualified as an indirect legal obligation in terms of Art 34 VCLT and must accordingly either be interpreted in a restrictive manner or not be applied to the respective third State.

territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference."

[91]See *RR Churchill*/*VA Lowe* The Law of the Sea (3rd edn 1999) 350; *R Lagoni* Die Abwehr von Gefahren für die marine Umwelt (1991) 32 BDGVR, 87, 144; *Valenzuela* (n 86) 496 ("no evidence that port states have resorted to this extended method of enforcement"); *Kasoulides* (n 87) 138.

[92]Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV), 24 October 1970, UN Doc A/RES/2625 (XXV).

[93]*Proelss* (n 62) 134–135. The notion seems to originate, as far as its applicability to States is concerned, in continental legal thinking; see *eg I Seidl-Hohenveldern* in *id* (ed) Lexikon des Rechts: Völkerrecht (3rd edn 2001) 156; *H-U Scupin* in *K Strupp*/*H-J Schlochauer* (eds) Wörterbuch des Völkerrechts Vol 1 (2nd edn 1960) 723–733; *A Verdross*/*B Simma* Universelles Völkerrecht (3rd edn 1984) 272–321.

[94]See only *Seidl-Hohenveldern* (n 93) 156; *Scupin* (n 93) 723.

IV. Rights

27 While it is beyond doubt that the intention of the parties to a treaty to confer an actual right on a third State is an important element in determining the scope of the treaty (→ MN 7),[95] the existence of such a subjective element is by itself not sufficient to establish a solid criterion in order to distinguish a right from a benefit. Rather, as is the case with the scope of the term "obligation" (→ MN 13–26), the intention to confer a right on a third State, while a condition precedent for the third State to exercise the right upon its conferment, does not qualify for the purpose of defining what constitutes such a right.[96] In this respect, *Rosenne* has suggested in very conclusive terms that "the word 'right' [was] to mean a right that was legally enforceable by whatever means were available in international law or international relations."[97] The essence of this argument is that the intention of the parties to a treaty to confer a right on a third State could only be assumed if the beneficial position is **enforceable** by the third State.[98] Recent authorities have supported this conclusion by stating that "[t]he acid test of a genuine right, as distinct from a mere interest, is that the third State – on which the treaty right is conferred – has a *ius standi* to insist directly on its implementation".[99]

28 In the view of the present author, applying the enforceability test in order to establish whether a right in terms of Art 34 has been conferred on a third State is based on good reason. It should be noted that also the ICJ accepted the **link between a material right and a *ius standi*** in its decision in the *Barcelona Traction* case, where it held that "[c]reditors do not have any right to claim compensation from a person who, by wronging their debtor, causes them loss. In such cases, no doubt, the *interests* of the aggrieved are affected, but not their *rights*."[100] In the same decision, the Court pointed to the "legal interest" of all States in the protection of obligations *erga omnes*,[101] but refused to accept the idea of *actio popularis*.[102] It must be concluded from the foregoing that contrary to a right, a legal interest in the

[95] *Cf* also written reply of the Legal Adviser for the US Department of State *HJ Hansell* to a letter by *MJ Glennon*, Legal Counsel of the Senate Committee on Foreign Relations, reprinted in Digest of United States Practice in International Law (1978) 702.

[96] However, see *Villiger* Art 36 MN 2.

[97] *Rosenne* [1964-I] YbILC 84.

[98] See also *Pal* [1964-I] YbILC 89; *Waldock* III 31; PCIJ *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who Have Passed into the Polish Service, against the Polish Railways Administration)* PCIJ Ser B No 15, 17 *et seq* (1928).

[99] *Dinstein* (n 22) 334 (original emphasis); *Fitzmaurice* (n 41) 104 *et seq*.

[100] ICJ *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, para 44 (emphasis added).

[101] *Ibid* para 33.

[102] *Ibid* para 91; see also ICJ *South-West Africa (Ethiopia v South Africa, Liberia v South Africa)* (Second Phase) [1966] ICJ Rep 6, para 88.

protection of a certain object does not automatically give rise to legal standing.[103] Art 386 Treaty of Versailles, dealing with freedom of passage through the Kiel Canal, does not militate against the position advocated here. It has rightly been stated that irrespective of its ambiguous wording,[104] this provision, by establishing a *ius standi* of every State concerned, rather confirmed the existence of a real right of any State to freedom of passage through the waterway.[105]

V. Consent

29 The element of "consent" is substantiated in Arts 35 and 36 VCLT, depending on whether an obligation or a right has arisen from a treaty provision in respect of a third State, and is therefore discussed in the context of those provisions (→ Art 35 MN 12–19; → Art 36 MN 11–26).

D. Legal Consequences of Violations

30 The legal consequences of a violation of the *pacta tertiis* rule were addressed by SR *Lauterpacht* in his first report. Considering whether a treaty or any of its provisions would be void "on the mere ground that it purports to affect, without its consent, the right of a third State", he concluded that this would not be the case, but then went on to argue that such treaties "are also in themselves void on account of the fact that their object is illegal – such illegality consisting in the attempt to interfere with the rights of a third State in disregard of international law."[106] As authority, *Lauterpacht* relied on the 1938 edition of *McNair*'s work on treaties, but it seems that this author abandoned his former view in the second edition of the opus.[107] It should also be noted that Art 15 of the Draft Articles formulated by the SR was based on the assumption that **illegality** of a treaty provision would automatically lead to its **invalidity** – a view which was neither maintained in the subsequent

[103] *E Jiménez de Aréchaga* Treaty Stipulations in Favour of Third States (1956) 50 AJIL 339, 349. See also *M Ragazzi* The Concept of International Obligations erga omnes (1997) 212; *S Talmon* Kollektive Nichtanerkennung illegaler Staaten (2006) 293 *et seq*. The commentary to the ILC Articles on Responsibility of States for Internationally Wrongful Acts does, as far as Art 48 is concerned, also not refer to "legal standing" but only to "legal interest in invoking responsibility"; *cf* ILC Report 53rd Session [2001-II/2] YbILC 116.

[104] Art 386 reads in its relevant part: "In the event of violation of any of the conditions of Articles 380–386, or of disputes as to the interpretation of these Articles, any interested Power can appeal to the jurisdiction instituted for the purpose by the League of Nations."

[105] *Jiménez de Aréchaga* (n 103) 350.

[106] *Lauterpacht* I 154; see also the position of the Algerian delegation, reproduced in *Waldock* VI 67.

[107] *Cf McNair* 220.

reports[108] nor in the VCLT itself (*cf* Arts 52, 53, 64, 69, 71). In his second report, SR *Waldock* discussed at length whether a treaty which infringes the rights of third States under a prior treaty was to be considered invalid and, based on a detailed examination of the judgments of the PCIJ in the *Oscar Chinn* and *European Commission of the Danube* cases, ultimately rejected the doctrine of absolute invalidity advanced by *Lauterpacht*.[109]

31 As of today, the necessity to differentiate between illegality and invalidity of a treaty provision is generally accepted. One must conclude from the foregoing that a treaty violating the *pacta tertiis* rule is **illegal either under the terms of the Convention or corresponding customary international law**. In any event, irrespective of its character as "un des axiomes fondateurs de droit international",[110] Art 34, which contains a general procedural rule rather than a substantive prohibition or right from which no derogation is permitted, cannot be regarded as a peremptory norm of general international law under Art 53 VCLT.

E. Third States and Objective Regimes

32 With a view to the scope of Art 34, *Simma* has rightly examined that

> [i]n international legal doctrine, recognition of the general principle of *pacta tertiis* has always been accompanied by the search for exceptions in the form of treaties that do create certain legal effects, be it rights or obligations, for third States. Discussion concentrates on so-called 'status-creating', 'dispositive' or 'constitutive' treaties, or treaties providing for 'objective régimes'.[111]

Indeed, the search for exceptions referred to by *Simma* aims at enhancing the status of treaties as a source of public international law. It originates in the **absence of an international legislature** being capable of immediately solving conflicts arising on the international plane by way of majority decision.[112] While the aforementioned statement only points to exceptions which do not directly arise from the terms of the VCLT, it should be noted that the rule contained in **Art 75**, which had originally been drafted as an independent paragraph to the article which later became Art 35 (→ Art 35 MN 4), was referred to by some as a **codified exception** to the *pacta tertiis* principle.[113] As regards the genesis of the rule, the

[108] See *Fitzmaurice* V 88: "illegal".

[109] *Waldock* II 57.

[110] *C Laly-Chevalier/F Rezek* in *Corten/Klein* Art 35 MN 3. See also ILC Report 16th Session [1964-II] YbILC 173, 181: "one of the bulwarks of the independence and equality of States".

[111] *B Simma* From Bilateralism to Community Interest in International Law (1994) 250 RdC 217, 358 (footnote omitted).

[112] *C Tomuschat* Völkerrechtlicher Vertrag und Drittstaaten (1988) 28 BDGVR 9, 11; see also *Chinkin* (n 52) 25 *et seq*.

[113] See *eg RD Kearney/RE Dalton* The Treaty on Treaties (1970) 64 AJIL 495, 557; *Fitzmaurice* (n 41) 45; see also *Lachs* [1964-I] YbILC 71.

majority of members of the ILC disagreed with that categorization, arguing that **obligations imposed upon an aggressor State** were to be considered as sanctions, the basis of the obligations concerned therefore being the concept of State responsibility.[114] Consequently, in the commentary to its 1964 report, the ILC stated that "treaty provisions imposed upon an aggressor State [. . .] would fall outside the principle laid down in the present article, and would concern the question of the sanctions for violations of international law."[115]

33 It is not necessary to trace in detail the different positions taken by several members of the ILC with regard to the scope and relevance of the rule contained in Art 75 (→ Art 75 MN 11).[116] Suffice it to say that the wording of the provision ("are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State") clearly shows that Art 75 does indeed constitute an **exception clause,** which also, though not exclusively, covers the rules contained in Part III Section 4 VCLT.[117] Having said that, it seems to be a matter of debate whether the same is true with regard to the legal situation under customary international law.[118]

34 The most relevant but also, as regards its validity under international law, most debated[119] possible exception to the *pacta tertiis* principle is embodied in the **concept of objective regimes**. Irrespective of a considerable amount of unclarity as to its doctrinal basis, it is fair to say that the concept is based on the assumption that certain treaties are, either by their very nature or by the semi-legislative authority of their States Parties, valid *erga omnes*. Examples regularly given are treaties establishing international waterways such as the Panama Canal (→ MN 48), treaties whose subject is the demilitarization of a certain area (such as the Åland Islands Treaty, → MN 49), treaties establishing a special regime of common usage of marine or land territory (*eg* the Antarctic Treaty, → MN 54) and peace treaties.[120]

[114] *Tunkin* [1964-I] YbILC 71; *id* [1966-I/2] YbILC 61; *id* [1966-I/2] YbILC 66; *Waldock* [1966-I/2] YbILC 72; *de Luna* [1966-I/2] YbILC 60; *id* [1966-I/2] YbILC 70; *Briggs* [1966-I/2] YbILC 61; *id* [1966-I/2] YbILC 68; *Jiménez de Aréchaga* [1966-I/2] YbILC 64; *Castrén* [1966-I/2] YbILC 61; *Bartoš* [1966-I/2] YbILC 63; however, see *Lachs* [1966-I/2] YbILC 61: "[T]he source of the obligations of the aggressor State lay both in the rules on State responsibility and in the law of treaties, but the effects were felt mainly in the law of treaties."

[115] ILC Report 16th Session [1964-I] YbILC 181, see also Final Draft, Commentary to Art 31, 227 para 3.

[116] See *Wetzel* (n 61) 165–184.

[117] Final Draft, Commentary to Art 70, 268 para 1.

[118] *Wetzel* (n 61) 184–186.

[119] *Cf Waldock* [1964-I] YbILC 96: "The possibility of treaties creating objective regimes was one of considerable delicacy".

[120] See *Waldock* III 28–32.

I. Negotiating History

35 Prior to the VCLT negotiations, the most elaborate position as to the legal validity of the concept of objective regimes was again taken by *McNair*. In his *magnum opus* on the law of treaties, he stated that

> "certain kinds of treaties produce effects beyond the parties to those treaties is recognized, but it cannot be said that they have finally found a place in any well-recognized juridical category. [...] We incline, however, that we are on surer ground if we are willing to recognize that the effects of certain kinds of treaties *erga omnes* is to be attributed to some inherent and distinctive juridical element in those treaties – in some cases, the 'dispositive' or 'real' character of the transaction effected by the treaty, the permanent nature of the rights created by or in pursuance to the treaty – in others, the semi-legislative authority of groups of States particularly interested in the settlement or arrangement made."[121]

Thus, *McNair* distinguished **two different types of relevant treaties**, namely **dispositive or 'real' treaties,** which create or affect territorial rights, *ie* rights *in rem*, and **constitutive or semi-legislative treaties**.[122] With a view to the second category, he relied on the famous statement he had made with regard to the mandates system of the LoN Covenant in his separate opinion on the ICJ's advisory opinion in the *South-West Africa* case:

> "From time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multipartite treaty some new international régime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence. This power is used when some public interest is involved, and its exercise often occurs in the course of the peace settlement at the end of a great war."[123]

In this respect, the position taken by *McNair*, commonly referred to as the 'public law theory', differed substantially from the reasoning of the ICJ, which was solely based on an analysis of the mandates system of the LoN Covenant and the role of the UN as the successor organization to the LoN.[124] It should also be noted that *McNair* not only additionally referred to the dispositive nature of the provisions of the mandate ("certain rights of possession and government (administrative and legislative) which are valid *in rem – erga omnes*"),[125] thereby weakening the alleged distinction between the two types of treaties, but also added a phrase indicating some doubts as to the *erga omnes* effect of the mandate ("against the

[121] *McNair* 255 (original emphasis).

[122] *Ibid* 256.

[123] ICJ *International Status of South-West Africa* (Advisory Opinion) (separate opinion *McNair*) [1950] ICJ Rep 146, 153.

[124] ICJ *International Status of South-West Africa* (Advisory Opinion) [1950] ICJ Rep 128, 133–136.

[125] ICJ *International Status of South-West Africa* (separate opinion *McNair*) (n 123) 156.

whole world, or at any rate against every State which was a Member of the League or in any other way recognized the Mandate").[126]

Within the ILC, the subject matter was first dealt with by SR *Fitzmaurice* in his fifth report on the law of treaties. He took up a rather critical position as to possible *erga omnes* effects of treaties. It generally seemed very doubtful to him **36**

> "wether any treaty can be regarded as having automatic effects *erga omnes*, unless the system it establishes is one that third States can simply recognize and respect without having to engage in the carrying out of specific obligations that would require their active consent."[127]

He could accept that certain treaties "have all come to be accepted or regarded as effective *erga omnes*" only "as a matter of practice and fact"[128] and "in the result"[129] respectively. Thus, according to *Fitzmaurice*, the duty of a third State to comply with the requirements contained in a treaty to which it is not a party does not arise from "the esoteric basis of some *mystique* attaching of certain types of treaties",[130] but either from the **implied consent** becoming manifest in the exercise of the rights or facilities provided by the treaty,[131] or from

> "a general duty for States [...] to respect, recognize and, in the legal sense, accept, the consequences of lawful and valid international acts entered into between other States, which do not infringe the legal rights of States not parties to them in the legal sense."[132]

Consequently, he included **two different provisions** on the subject matter in his draft articles on the law of treaties (which, however, did not correspond to the two categories of treaties introduced by *McNair*). The first one (Art 14)[133] was linked to the 'implied consent' theory mentioned above and therefore involved an element of positive action on behalf of the third State.[134] It dealt with the case of the use of a maritime or land territory of one or more States by a third State and obliged the latter to comply with the conditions for the use of that territory set up by a treaty.[135] As an example, *Fitzmaurice* mentioned "the classic case [...] of treaties regulating the use of a means of international communications, in particular a waterway, running

[126] *Ibid*.

[127] *Fitzmaurice* V 92 (original emphasis).

[128] *Ibid*.

[129] *Ibid* 98.

[130] *Ibid* (original emphasis).

[131] *Ibid* 92.

[132] *Ibid* 98.

[133] *Ibid* 79.

[134] See *ibid* 92, 97.

[135] Viewed from today's perspective, the situation referred to by *Fitzmaurice* would be covered by Art 36 para 2 VCLT (→ Art 36 MN 26–28).

through the territory of one or more States."[136] The second provision (Art 18)[137] was based on the alleged general duty of all States to recognize and respect situations of law or of fact established under lawful and valid treaties, and explicitly referred to peace treaties (Art 18 para 1 lit a), neutralization or demilitarization treaties (Art 18 para 1 lit b), and treaties of a dispositive character such as treaties of cession, frontier demarcation or treaties creating a servitude (Art 18 para 1 lit c).

37 In contrast, SR *Waldock* proposed in his third report to include only **one provision** on treaties providing for objective regimes in the draft articles on the law of treaties.[138] With a view to the position taken by his predecessor, he doubted that a general duty of all States to respect and not impede the operation of lawful treaties existed under international law, and furthermore rejected any need for differentiation between certain types of treaties.[139] Whereas he generally shared the doubts expressed by *Fitzmaurice* "as to whether States are yet prepared to regard any treaty as being automatically binding upon them regardless of their opposition to it",[140] *Waldock* held the view that State practice furnished considerable evidence as to the existence of "a special category of treaties which, in the absence of timely opposition from other States, will be considered to have objective effects with regard to them."[141] After having undertaken several case studies,[142] he concluded that the **essential elements of these treaties** were

> "(i) the intention of the parties must be to create general rights and obligations in the general interest relating to a particular region, State, territory, *etc* and (ii) the parties must include amongst their number the State or States having territorial competence with reference to the subject-matter of the treaty or, at least, that State or States must have expressly assented to the provisions creating the regime."[143]

Thus, according to *Waldock*, the category of treaties concerned neither included treaties dealing with the high seas or with outer space, nor the case of treaties creating international organizations.[144] He later specified that "there could be no question of the treaties referred to imposing obligations without the consent of the States concerned."[145]

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[136] *Fitzmaurice* V 92.

[137] *Ibid* 80 *et seq*. Note that Draft Art 18 para 1 referred to the conditions contained in Draft Art 17 para 1 lit a. This fact has prompted some sources to count three relevant provisions in the fifth report of SR *Fitzmaurice*.

[138] *Waldock* III 26 *et seq* (Draft Art 63).

[139] *Ibid* 28.

[140] *Ibid* 32.

[141] *Ibid*.

[142] *Ibid* 29–31.

[143] *Ibid* 33; see also *Waldock* [1964-I] YbILC 97.

[144] *Waldock* III 33.

[145] *Waldock* [1964-I] YbILC 104.

38 In the course of the ILC debates that followed, the overwhelming majority of Commission members **opted to reject** the draft article suggested by *Waldock*.[146] From a practical point of view, it was assumed by some that the rule contained in Draft Art 63, being of "considerable delicacy",[147] would appear to be unacceptable for many States.[148] Moreover, many members of the ILC were of the opinion that the **provision was in essence superfluous**, since it was entirely based on the idea of consent,[149] and that therefore the situations envisaged by the article were already completely or partly covered by Draft Arts 62 and 64 (Arts 35, 36 and 38 VCLT).[150] The reply raised by *Waldock* whereby the provision "differed from article 64 [Art 38 VCLT] in that it was intended to provide a means for the speedy consolidation of a treaty as part of the international legal order, without having to await the longer process of formation of a customary rule of international law",[151] ultimately remained unsuccessful. Indeed, if the only purpose of the draft article was "to provide legal machinery for accelerating the process of recognition of such a regime"[152] in comparison to its emergence under customary international law, one cannot but agree with *Tunkin,* who stated that the article was "somewhat ambiguous; although the 'objective regimes' envisaged were based on consent, the very term implied the imposition of conditions by a group of States on other States."[153] Consequently, the ILC stated in its 1966 report to the General Assembly in the context of what is now Art 38 VCLT that

> "[s]ince to lay down a rule recognizing the possibility of the creation of objective regimes directly by treaty might be unlikely to meet with general acceptance, the Commission decided to leave this question aside in drafting the present articles on the law of treaties. It considered that the provision in article 32 [Art 36 VCLT], regarding treaties intended to

[146] *Elias* [1964-I] YbILC 97; *El-Erian* [1964-I] YbILC 99; *Ruda* [1964-I] YbILC 100; *Jiménez de Aréchaga* [1964-I] YbILC 101; *Castrén* [1964-I] YbILC 101; *Pal* [1964-I] YbILC 102; *Paredes* [1964-I] YbILC 103; *Liu* [1964-I] YbILC 105; critical also *Amado* [1964-I] YbILC 102; *Tunkin* [1964-I] YbILC 103; *Tabibi* [1964-I] YbILC 104. The draft article was generally supported only by *Verdross* [1964-I] YbILC 99; *de Luna* [1964-I] YbILC 100; *Rosenne* [1964-I] YbILC 103.

[147] *Waldock* [1964-I] YbILC 96.

[148] See *de Luna* [1964-I] YbILC 100; *Jiménez de Aréchaga* [1964-I] YbILC 101; *Castrén* [1964-I] YbILC 101; *Tabibi* [1964-I] YbILC 104.

[149] *Verdross* [1964-I] YbILC 99; *Ruda* [1964-I] YbILC 100; *Yasseen* [1964-I] YbILC 101.

[150] *Tsuruoka* [1964-I] YbILC 100; *Jiménez de Aréchaga* [1964-I] YbILC 101; *de Luna* [1964-I] YbILC 99; *Briggs* [1964-I] YbILC 103; *contra Rosenne* [1964-I] YbILC 104; *Lachs* [1964-I] YbILC 107; *Waldock* [1964-I] YbILC 108. It was rightly observed by *Yasseen* [1964-I] YbILC 101, though, that the provision concerned would have resulted in widening the scope of the presumption of acceptance by third States recognized under Art 36 of the Convention. See also *id* [1964-I] YbILC 107; *de Luna* [1964-I] YbILC 99; *Jiménez de Aréchaga* [1964-I] YbILC 101; *Paredes* [1964-I] YbILC 102; *Tabibi* [1964-I] YbILC 104.

[151] *Waldock* [1964-I] YbILC 105.

[152] *Ibid* 108.

[153] *Tunkin* [1964-I] YbILC 103.

create rights in favour of States generally, together with the process mentioned in the present article, furnish a legal basis for the establishment of treaty obligations and rights valid *erga omnes*, which goes as far as is at present possible."[154]

II. Treaties Giving Rise to *erga omnes* Obligations

39 Whether, and in case of affirmation, on what doctrinal basis, the concept of objective regimes is valid under public international law is **disputed in legal literature** to this day. Due to the almost complete absence of relevant international jurisprudence on the matter, some authors completely reject the idea of a *sui generis* concept of objective regimes, with the **sole exception of the legal status of the United Nations** (→ MN 53), and thus only accept third party effects of treaty provisions under the condition that the provisions concerned have developed into norms of general customary law.[155] In contrast, other sources conclude that treaties establishing objective regimes may have effects *erga omnes*.[156] However, the latter reasoning, if taken individually, is of a circular nature, since the implication of a legal norm being characterized as 'objective' is by definition its general validity *vis-à-vis* all States.[157]

40 Having said that, it might appear reasonable from today's perspective to refer to the concept of **obligations *erga omnes*** to substantiate the legal validity of objective regimes.[158] Under that concept, "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection".[159] It should be noted, though, that the notion of *erga omnes* obligations as recognized by the ICJ refers to moral-based values accepted by the international community as a whole, such as *eg* the prohibition to commit acts of aggression and genocide, the basic human rights including protection from slavery and racial discrimination,[160] the

[154]Final Draft, Commentary to Art 34, 231 para 4.

[155]*Cf B Simma* The Antarctic Treaty as a Treaty Providing for an 'Objective Regime' (1986) 19 Cornell ILJ 189, 202; *E David* in *Corten/Klein* Art 34 MN 10 *et seq*; *Tomuschat* (n 112) 14 with further references.

[156]See *eg G Dahm/J Delbrück/R Wolfrum* Völkerrecht Vol I/3 (2nd edn 2002) 619–632; *SP Subedi* The Doctrine of Objective Regimes in International Law and the Competence of the United Nations to Impose Territorial or Peace Settlements on States (1994) 37 GYIL 162, 167; *Sinclair* 104.

[157]Similar *Reuter* 124.

[158]For a detailed examination of the relationship between the two concepts, see *Ragazzi* (n 103) 18–42.

[159]ICJ *Barcelona Traction* (n 100) para 33.

[160]*Ibid* para 34; ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595, para 31.

principle of self-determination of peoples[161] and the basic obligations under international humanitarian law.[162] Thus, it does not seem to be identical with the concept relevant in this instance.[163] The present author is not aware of a single source dealing with obligations *erga omnes*, which concludes that this concept must be considered as an exception to the *pacta tertiis* rule. While it is true that the ICJ stated in its judgement in the *Barcelona Traction* case that "[s]ome of the corresponding rights of protection have entered into the body of general international law [. . .]; others are conferred by international instruments of a universal or quasi-universal character",[164] the latter alternative militating in favour of the possibility of a treaty rule being valid *erga omnes*, it has conclusively been demonstrated that the passage concerned is "best interpreted as an indication that obligations *erga omnes* are often *also* protected by international treaties."[165] Indeed, in its subsequent jurisprudence, the ICJ distinguished between the obligations of international humanitarian law contained in the 1949 Geneva Conventions on the one hand and the corresponding obligations, which it considered as being valid *erga omnes* on the other.[166] In the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it observed that a great majority of rules of humanitarian law were binding on "all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[167] By exclusively relying on that statement, the ICJ determined in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that "these rules incorporate obligations which are essentially of an *erga omnes* character."[168] Therefore, it seems justified to conclude that *erga omnes* obligations must be considered as a **customary law concept**.[169] If this reasoning is correct, then it can hardly be referred to as a doctrinal basis for

[161]ICJ *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, para 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 155.

[162]ICJ *Construction of a Wall* (n 161) para 157.

[163]*W Graf Vitzthum* Begriff, Geschichte und Rechtsquellen des Völkerrechts in *id* (ed) Völkerrecht (4th edn 2007) MN 120; *Boyle/Chinkin* (n 7) 240; *Ragazzi* (n 103) 41 *et seq*; but see *Dahm/Delbrück/Wolfrum* (n 156) 625 *et seq*.

[164]ICJ *Barcelona Traction* (n 100) para 34.

[165]*CJ Tams* Enforcing Obligations erga omnes in International Law (2005) 123 (original emphasis).

[166]ICJ *Construction of a Wall* (n 161) paras 157–159.

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

[168]ICJ *Construction of a Wall* (n 161) para 157 (original emphasis).

[169]*Schweisfurth* (n 53) 668; *Tams* (n 165) 120–128 with further references; see also *A Zimmermann* Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters in *C Tomuschat/J-M Thouvenin* (eds) The Fundamental Rules of the International Legal Order (2006) 335, 343, indicating that the exercise of jurisdiction over nationals of a third State by the ICTY can, in light of the *pacta tertiis* rule, only be justified by reference to the validity of the principle of universal jurisdiction under customary international law.

potential third party effects of treaties (→ Art 38 MN 4). The same is true for peremptory norms of general international law (*ius cogens*) in terms of Art 53 VCLT.[170]

III. Dispositive or 'Real' Treaties

41 A third category of authors accepts the objective validity of treaties establishing a boundary, an international legal regime or communication rights, such as passage through an international waterway, by recourse to the **notion of dispositive or 'real' treaties** as developed by *McNair*.[171] However, mere reference to the dispositive nature of a treaty, *ie* the fact that it creates, transfers or recognizes the existence of certain permanent rights of a territorial character,[172] is, again, not sufficient to substantiate an *erga omnes* effect. In this respect, *Reuter* convincingly countered the obvious analogy drawn by the supporters of the concept of dispositive treaties between the situations allegedly covered by that concept and those arising under municipal law for family or real estate matters:

> "First of all [such explanations] are quite vague in that those terms are used merely to identify, rather than to explain upon clear legal grounds, a number of situations where certain effects on a treaty are felt beyond the parties. [. . .] The analogy with municipal law is certainly attractive. But it should be borne in mind that the reasons why in municipal law everyone is bound to acknowledge the status of persons and real estate is that they are ascertained and registered by an authority common to all legal subjects. There is no such common authority in international law; each State itself ascertains the status of legal subjects and territorial titles, and their binding character is dependent on recognition by the State."[173]

He concluded that having regard to the considerable political and economic importance of the situations concerned, "the analogy loses all its relevance and other explanations must be sought to justify the fact that regimes instituted by such treaties can be invoked against non-parties."[174]

42 Indeed, a closer examination of the issue relevant here indicates that it is impossible to accept that every treaty is automatically binding *erga omnes* solely due to its categorization as 'dispositive' or 'real'. Such an automatism was clearly rejected in the *Island of Palmas* case, which, *inter alia*, addressed the potential relevance of a territorial title claimed by Spain *vis-à-vis* third States.[175] While it is

[170] *Cf* ICJ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23: "[T]he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even *without any conventional obligation*" (emphasis added).

[171] See *eg Boyle/Chinkin* (n 7) 239 *et seq*; *Subedi* (n 156) 177 *et seq*.

[172] *Sinclair* 104.

[173] *Reuter* 124 *et seq*.

[174] *Ibid* 125.

[175] *Island of Palmas* (n 16) 850.

true that **treaties establishing a boundary** between two or more States must be considered as generally being valid *erga omnes*, the legal basis of their objective character cannot be seen in the alleged dispositive character of the treaties concerned, but rather in the principle that a State is by its very existence competent to consolidate its territory within the limits established by public international law.[176] As the duty to respect the territorial integrity of other States is the most important of these limits, neighbouring States are obliged to delimit their territories peacefully. Consequently, any treaty which establishes a boundary between two or more States is valid *erga omnes* simply because of the **absent competence of third States** to regulate the subject matter.[177] This conclusion is, arguably, further reinforced by the **principle of stability of boundaries**,[178] which the ICJ has accepted as being of "fundamental" nature, in that "[a] boundary established by treaty [...] achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary."[179] In this respect, it should also be noted that according to Art 62 para 2 lit a VCLT, "[a] fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty [...] if the treaty establishes a boundary" (→ Art 62 MN 67–80).

43 At first sight, it seems that the opposite conclusion may be drawn from the 1978 Vienna Convention on **Succession of States in Respect of Treaties**,[180] which does include two provisions on objective regimes. According to Art 11 of the Convention, "[a] succession of States does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary." Since Art 12 contains a similar rule on other **territorial regimes,** which the ICJ applied and accepted as being valid under customary international law in the *Gabčíkovo-Nagymaros Project* case,[181] a State is, as far as the context of State succession is concerned, precluded from relying on the *pacta tertiis* principle.[182] Therefore, the concept of objective regimes (on which the ILC

[176]See *D-E Khan* Die deutschen Staatsgrenzen (2004) 29 *et seq*.

[177]*Cf E David* in *Corten/Klein* Art 34 MN 10, who draws the same conclusion with regard to the parallel situation of treaties providing for freedom of usage of a waterway, which is located on one or several States' territories. See also *Fitzmaurice* V 99; *Cahier* (n 44) 670. While the ICJ indicated in *Burkina Faso v Mali* (n 39) para 46 that a delimitation agreement only has legal and binding effect as between the parties to it, that judgment does not militate against the position advocated here, since in the case concerned, the end point of the frontier lied on the border of a third State not a party to the proceedings.

[178]See *Reuter* 125; *cf* also *G Gaja* in *Corten/Klein* Art 38 MN 16.

[179]ICJ *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, para 73; see also *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, 34 *et seq*; *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 3, para 85.

[180]1946 UNTS 3. The Convention entered into force on 6 November 1996, but has only 22 parties so far.

[181]ICJ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, para 123.

[182]For a closer analysis of the relationship between the 1978 Convention and the *pacta tertiis* principle, see *Fitzmaurice* (n 41) 77–82.

was unable to reach agreement in the course of the negotiation process of the VCLT) might appear to have found general acceptance in 1978. However, one must note that the ILC, which drafted the 1978 Convention, again, took a restrictive approach as to the concept relevant here. After having referred to its negative attitude which came to the fore in its work on the law of treaties, it stated that

> "[i]n the present context, if a succession of States occurs in respect of the territory affected by the treaty intended to create an objective regime, the successor State is not properly speaking a 'third State' in relation to the treaty. Owing to the legal nexus which existed between the treaty and the territory prior to the date of the succession of States, it is not open to the successor State simply to invoke article 35 of the Vienna Convention under which a treaty cannot impose obligations upon a third State without its consent. The rules concerning succession in respect of treaties also come into play. But under these rules there are cases where the treaty intended to establish an objective regime would not be binding on a successor State, unless such a treaty were considered to fall under a special rule to that effect. Equally, if the succession of States occurs in relation to a State which is the beneficiary of a treaty establishing an objective regime, under the general law of treaties and the law of succession the successor State would not necessarily be entitled to claim the rights enjoyed by its predecessor State, unless the treaty were considered to fall under such a special rule. That such a special rule exists is, in the opinion of the Commission, established by a number of convincing precedents."[183]

Thus, acceptance of the concept of objective regimes was consciously **restricted to the field of State succession**. Consequently, as the successor State is not a third State in terms of the VCLT, the special rules contained in Arts 11 and 12 cannot be applied in the more general context of the law of treaties."[184]

44 With regard to **treaties providing for a right of passage through an international waterway**, the ILC indirectly refused to qualify such treaties as dispositive treaties being automatically valid *erga omnes* by stating that

> *"in the case of a provision* allowing freedom of navigation in an international river or maritime waterway, the territorial State has the right in virtue of its sovereignty to lay down relevant conditions for the exercise of the right provided, of course, that they are in conformity with its obligations under the treaty."[185]

Thus, it seems that third States may only rely on a right of free passage through a waterway if an international treaty accords such a right to third States, or if the right has emerged as a rule of general customary international law. It must be noted, though, that neither of the two situations embodies an unwritten exception to the *pacta tertiis* principle, as the conditions of the underlying processes are set out in Arts 35 and 38 VCLT.

45 **State practice** confirms the **missing dispositive character** of treaties providing for a right of passage through a waterway used for international navigation.[186] In the *Territorial Jurisdiction of the International Commission of the River Oder* case,

[183]ILC Report 26th Session [1974-II/1] YbILC 204.

[184]Similar *Reuter* 128; but see *Sinclair* 105 *et seq*.

[185]Final Draft, Commentary to Art 32, 229 para 8 (emphasis added).

[186]For a virtually exhaustive analysis of relevant practice, see *Fitzmaurice* (n 41) 84 *et seq*.

the PCIJ refused to accept the contention of the applicants that the 1921 **Barcelona Convention** Relating to the Régime of Navigable Waterways of International Concern was to be applied in their favour, irrespective of the fact that the respondent (Poland) had not ratified that treaty.[187]

Regarding the **Kiel Canal**, third States enjoy a right of freedom of passage;[188] **46**
this is because Art 380 of the 1919 Treaty of Versailles expressly accords such a right "to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality." The PCIJ stated in its judgment in the *SS 'Wimbledon'* case with regard to the legal basis of the obligation concerned that "[w]hether the German Government is bound by virtue of a servitude *or by virtue of a contractual obligation undertaken towards the Powers entitled to benefit by the terms of the Treaty of Versailles*, to allow free access to the Kiel Canal in time of war as in time of peace to the vessels of all nations, the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal."[189] Additionally, the Court referred to the precedents of the Suez and Panama Canal, which illustrated "the *general* opinion according to which when an artificial waterway connecting two open seas has been *permanently* dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie."[190] The quoted passages justify the conclusion that the PCIJ based its findings on the terms of the Treaty of Versailles and customary international law. In no way did it state that treaties on international waterways were to be regarded as being automatically valid *erga omnes*.

Freedom of passage through the **Suez Canal** was provided for by Art I para 1 of **47**
the 1888 Constantinople Convention stating that "[t]he Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag."[191] When Egypt nationalized the canal in 1958, it issued a declaration in which it expressly accepted its obligations concerning freedom of passage "for all nations within the limits of and in accordance with the provisions of the Constantinople Convention of 1888."[192] Notwithstanding Egypt claiming that the Constantinople Convention was *res inter alios*

[187]PCIJ *Territorial Jurisdiction of the International Commission of the River Oder* (n 17) 19–22.

[188]The German government unilaterally terminated the passage right through the Canal by note of 14 November 1936 [1936-II] RGBl 361. The issue of whether one must consider States Parties to the Treaty of Versailles, which after having received that note failed to reserve their rights or to protest against it, as having acquiesced to Germany's unilateral measure, need not be decided here. Suffice it to say that a right of freedom of passage existed at the time of conclusion of the Treaty of Versailles. See *R Lagoni* Kiel Canal in MPEPIL (2008) MN 9 *et seq*.

[189]PCIJ *SS 'Wimbledon'* PCIJ Ser A No 1, 24 (1923) (emphasis added).

[190]*Ibid* 28 (emphasis added).

[191]1888 Convention Respecting the Free Navigation of the Suez Maritime Canal, reprinted in (1909) 3 AJIL Supp 123.

[192]265 UNTS 299.

acta for Israel (which was not a party to that Convention),[193] it cannot be doubted that the right of third States of freedom of passage through the Suez Canal is, again, not based on the notion of objective regimes, but either on the process described in Art 36 in conjunction with the terms of the Constantinople Convention, or on customary law (see also → Art 35 MN 14). With a view to the situation, which arose during the two world wars, *Chinkin* argues that the general acquiescence of States in the closure of the Canal suggests "that the extremity of the crisis justified an extreme response. A treaty regime affording third party rights cannot outweigh a State's inherent right to self-defence."[194]

48 A somewhat complicated case is the **Panama Canal**. Whereas under Art III of the 1901 Hay-Pauncefote Treaty concluded between the United States and the United Kingdom, "[t]he Canal shall be free and open to the vessels of commerce and war of all nations" in accordance with the rules contained in the Constantinople Convention on the Suez Canal (to which it explicitly referred),[195] the PCIJ observed in the *'Wimbledon'* case that "there is no clause guaranteeing the free passage of the canal in time of war as in time of peace without distinction of flag".[196] The United States later took the position that third States did at least not acquire a right but only a benefit under the treaty (→ MN 27–28).[197] Art II of the 1977 Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal[198] again emphasized that the Canal "shall remain secure and open to peaceful transit by the vessels of all nations" and obliged all vessels to comply with the rules and regulations relevant to the passage. Therefore, it is submitted that the situation envisaged by the treaty corresponds to the one reflected by Art 36 paras 1 and 2 VCLT in abstract terms. Whether one accepts that third States were accorded a right (and not a mere benefit), relevant practice clearly demonstrates that the treaties relevant to the Panama Canal were never considered as being automatically valid *erga omnes* due to their alleged 'dispositive' nature.

49 Regarding treaties creating **international regimes of demilitarization**, the case of the **Åland Islands** is regularly referred to as the most significant precedent. The Åland Islands were demilitarized in accordance with the terms of the 1856 Convention between the United Kingdom, France and Russia.[199] On the basis of a 1918 plebiscite, the majority of inhabitants of the islands voted in favour of reunification with Sweden rather than to remain under the sovereignty of Finland, which had gained independence from Russia in 1917. The dispute arising therefrom between the two States was submitted to the League of Nations, whose Council referred it to an

[193] *Cf Fitzmaurice* (n 41) 102.

[194] *Chinkin* (n 52) 86.

[195] 1901 Treaty to Facilitate the Construction of a Ship Canal (1909) 3 AJIL Supp 127–129.

[196] PCIJ *'Wimbledon'* (n 189) 26.

[197] *Cf Fitzmaurice* (n 41) 105 *et seq*.

[198] 16 ILM 1040.

[199] 1856 Convention between the United Kingdom, France and Russia Respecting the Aaland Islands 114 CTS 406.

ad hoc Committee of Jurists, since the PCIJ had not then come into existence. In its opinion, the Committee upheld the Swedish claim to be entitled to hold Finland, irrespective of the status of that country as a non-party State, to compliance with the demilitarization regime imposed upon the islands by the Convention. In the present context, it is particularly noteworthy that the Committee, while explicitly refusing to accept that a right had been accorded to Sweden, based its view on "the objective nature of the settlement of the Aaland Islands question by the Treaty of 1856", whose "provisions were laid down in European interests [and] constituted a special international status relating to military considerations [. . .]."[200] Thus, it seems that the case of the Åland Islands does indeed militate in favour of the existence of certain treaties being valid *erga omnes*. Having said that, it is submitted that it cannot be completely ignored that Finland was the successor State (→ MN 43) of one of the contracting parties to the 1856 Convention.[201] Other sources have argued that the situation of the Åland Islands should be treated as a case of regional customary law.[202]

IV. Constitutive or Semi-legislative and Status Treaties

The case of the Åland Islands links the category of dispositive or 'real' treaties with the second category of treaties, which, according to *McNair*, produce effects beyond their parties, *ie* **constitutive or semi-legislative treaties** (→ MN 35). In its opinion, the Committee of Jurists also pointed to the Congress of Vienna structure of power in Europe. It emphasized that "[t]he Powers have, on many occasions since 1815, and especially at the conclusion of peace treaties, tried to create true objective law, a real political status the effects of which are felt outside the immediate circle of contracting parties."[203] *McNair* expressly referred to that section in his separate opinion in the *South-West Africa* case in order to provide evidence for his contention that constitutive treaties are a valid category of treaties under public international law (→ MN 35).[204] **50**

From the perspective of legal doctrine, the 'public law approach' advocated by *McNair* has been adjusted by *Klein* in his monograph on '**status treaties**', that notion being used as a synonym for objective regimes.[205] According to *Klein*, a status treaty requires (1) reference made to a certain territory, (2) the intention of the parties to make an arrangement in the general interest of the international community, (3) the intention that the regime created *vis-à-vis* the respective territory **51**

[200] [1920] Official Journal of the League of Nations, Special Supplement No 3, 18 *et seq*.

[201] See *H Lauterpacht* The Development of International Law by the International Court (2nd edn 1958) 312 n 50; *Cahier* (n 44) 666 *et seq*.

[202] *W Wengler* Völkerrecht Vol I (1964) 609–610 n 4; *Fitzmaurice* (n 41) 100; however, see the critical remarks by *Ragazzi* (n 103) 35.

[203] [1920] Official Journal of the League of Nations, Special Supplement No 3, 17.

[204] ICJ *International Status of South-West Africa* (separate opinion *McNair*) (n 123) 154.

[205] *E Klein* Statusverträge im Völkerrecht (1980); see also *G Dahm* Völkerrecht Vol I (1958) 22–25.

acquires a general *erga omnes* status, and (4) a territorial competence of the parties to the treaty with regard to its subject matter, which third States do not have.[206] As both reference to territory and the existence of a group of States intending to act in the general interest are thus mandatory treaty elements under this theory, the concept of status treaties must be regarded as combining characteristics of the public law theory on semi-legislative treaties and the idea of rights *in rem*.[207] In *Klein*'s view, the power of the parties to a status treaty to settle the respective matter with effect *erga omnes* results from a corresponding competence attributed to them. He claimed that the existence of such a competence must be presumed *vis-à-vis* all third States, which have not objected to the assertion made by the contracting parties to act in the general interest, as long as the powers having the territorial competence with regard to the subject matter of the treaty have participated in its conclusion.[208]

52 Without going into detail, the theory advocated by *Klein* gives rise to considerable dogmatic concerns. Given that an *erga omnes* effect of status treaties can only arise under the condition that third States have not objected to the assertion of the contracting parties to act in the general interest, it seems that the **element of consent** is continuing to be of major importance in determining the normative claim of the treaties concerned. If this is correct, then the initial situation is not so different to that under Arts 35 and 36 VCLT, even though on closer examination, the element of acceptance under the status treaty theory does not directly refer to the right or obligation, but to the competence of the contracting parties to act in the general interest.[209] It must be noted, however, that the aforementioned provisions make stricter demands on the subjective element which ought to be fulfilled by the third State (→ Art 35 MN 12–19; → Art 36 MN 18–26).[210] Hence, it seems problematic to conclude that while the objective validity of a treaty should be assessed under comparable parameters, compliance with the standards contained in the Convention is not required anymore. In any case, it is a matter of debate whether the **absence of objections** in respect of the claim of the contracting parties to act in the general interest satisfies the prerequisites for the **emergence of law-making acquiescence**.[211] It is submitted that in relation to the *pacta tertiis principle*, the answer must be no, as protest against that claim cannot be demanded according to the

[206] *Ibid* 23. Note that the element of territorial competence originates from the suggestion made by SR *Waldock* (→ MN 36).

[207] *Fitzmaurice* (n 41) 71. Against this background, and bearing in mind the case of the Åland Islands (→ MN 48), the assertion that status treaties differ from law-making treaties in that they do not address the formulation of abstract and general rules appears to be somewhat artificial. But see *Klein* (n 205) 78 *et seq*.

[208] *Klein* (n 205) 209–213.

[209] *Ibid* 224.

[210] *Contra Schweisfurth* (n 36) 666.

[211] See also *Gaja* (n 178) MN 16 n 47; *Simma* (n 155) 205 *et seq*; *Fitzmaurice* (n 41) 129.

general practice of States.[212] Further difficulties arise from the lack of clarity and abuse-prone nature of the notion of 'general interest'.[213]

State practice does not provide any evidence for the existence of constitutive or status treaties respectively. Admittedly, the ICJ accepted in its *Reparation for Injuries* advisory opinion that the United Nations possesses **objective legal personality**. It based its opinion on the thought 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 [such] objective international personality."[214] Indeed, in his book on the law of treaties, *McNair* referred to the examples of the League of Nations and the UN in the context of constitutive or semi-legislative treaties.[215] It should be noted, though, that this classification does not seem to be valid anymore in view of the present stage of international relations.[216] In any event, the legal status of the UN has remained an isolated and, as far as the opinion of the ICJ is concerned, poorly substantiated case.[217] **53**

In particular, the 1959 **Antarctic Treaty**,[218] irrespective of the objective claim embodied in its provisions,[219] cannot be considered as being valid *erga omnes* simply due to its asserted constitutive character. Such reasoning would conflict with the concept of 'freezing and bifocalism' on which the Treaty is based.[220] In this respect, by virtue of Art IV, the alleged quasi-legislative competences of the contracting parties could not work against and between the so-called claimant States, *ie* those seven States that claim portions of Antarctica as their national territory.[221] On the other hand, the *sine qua non* condition for the existence of a status treaty, namely the **territorial competence** of its parties, does not exist from the perspective of the non-claimant States.[222] It has also been suggested that Art X **54**

[212] *Cf* ICJ *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) (separate opinion *Alfaro*) [1962] ICJ Rep 39, 40: "Failure to protest in circumstances when protest is necessary according to the general practice of States in order to assert, to preserve or to safeguard a right does likewise signify acquiescence or tacit recognition".

[213] See *Cahier* (n 44) 665 *et seq*.

[214] ICJ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 185.

[215] *McNair* 259.

[216] *Fitzmaurice* (n 41) 92.

[217] See also *E David* in *Corten/Klein* Art 34 MN 11.

[218] 402 UNTS 71.

[219] *Cf* only *P Birnie* The Antarctic Regime and Third States in *R Wolfrum* (ed) Antarctic Challenge II (1986) 239, 249–260; *Fitzmaurice* (n 41) 123; *Simma* (n 155) 196.

[220] See *eg A Watts* International Law and the Antarctic Treaty System (1992) 124 *et seq*.

[221] *Simma* (n 155) 200.

[222] *Ibid* 201.

Antarctic Treaty[223] would be futile if the general principles contained in Arts I and V would be automatically binding upon third States.[224] This must certainly be true if the statement made by *Klein*, according to which Art X takes into account the activities of third States, is correct.[225] Whether the Antarctic Treaty System (which also includes several other conventions such as the 1980 Convention on the Conservation of Antarctic Marine Living Resources[226]) or at least parts of it have entered the body of customary law need not be discussed here.[227] Suffice it to conclude that the Antarctic Treaty does not fulfil the qualifications under the concept of status treaties established by *Klein*.

55 It seems that the element of territorial competence is undoubtedly present in the case of the **Svalbard (Spitsbergen) archipelago**,[228] which became subject to the sovereignty of Norway with the entry into force of the 1920 Spitsbergen Treaty.[229] Reference to the concept of status treaties is, however, again superfluous, since the *erga omnes* effect of that treaty, as regards the right to freedom of access and utilization, directly follows from its terms (see Art 3). Regarding the objective validity of the territorial claim, a different position could only be taken if one would reject the assertion that Norway, being one of the contracting parties, at the same time lawfully occupied the archipelago. It should be noted, though, that no other State had ever claimed sovereignty over the islands before the conclusion of the treaty, and that thus the archipelago had had the status of a *terra nullius*.[230]

56 Notwithstanding some kind of quasi-legislative character suggested by the use of terms such as "all States", "every State", *etc*[231] the categorization as being the "constitution for the oceans",[232] and the inclusion of the concept of the 'common heritage of mankind' (which refers to the deep seabed and its resources under Art 136), the case of the 1982 **UN Convention on the Law of the Sea** (UNCLOS)[233] appears to be comparable to that of the Antarctic Treaty. As far as the high seas and the deep seabed ("the Area") are concerned, it should be noted

[223] Art X reads: "Each of the Contracting Parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty."

[224] *Cahier* (n 44) 664; see also *Brownlie* (n 71) 254 n 32.

[225] *Klein* (n 205) 72 *et seq*. An alternative interpretation is suggested by *Simma* (n 155) 196 *et seq*.

[226] 19 ILM 837. For a discussion on the appropriateness of the term 'Antarctic Treaty System', see *F Orrego Vicuña* Antarctic Mineral Exploitation: The Emerging Legal Framework (1988) 22; *FM Auburn* Antarctic Law and Politics (1982) 147.

[227] *Cf Simma* (n 155) 202–208; *Fitzmaurice* (n 41) 125–130.

[228] *Klein* (n 205) 117.

[229] 1920 Treaty Concerning the Archipelago of Spitsbergen 2 LNTS 7.

[230] See *Klein* (n 205) 117 with further references.

[231] *LT Lee* The Law of the Sea Convention and Third States (1983) 77 AJIL 541, 546 *et seq*.

[232] See the statement of *TTB Koh*, President of the 3rd UN Conference on the Law of the Sea, reproduced in *M Nordquist et al* United Nations Convention on the Law of the Sea 1982: A Commentary Vol I (1985) 11–16.

[233] 1833 UNTS 3.

that no State may validly purport to subject any part of these common spaces to its sovereignty.[234] Furthermore, coastal States do not exercise territorial competence but only functional and resource-oriented sovereign rights and jurisdiction over their exclusive economic zones (EEZ) and continental shelves.[235] Thus, except for the internal waters, the territorial sea, and the archipelagic waters,[236] States do not have the **territorial competence** mandatory under both *Klein*'s theory of status treaties and the concept of objective regimes as advocated by SR *Waldock*.[237] A different conclusion cannot be drawn from the fact that the Convention was based on the '**package deal**' drafting technique.[238] Under this approach, any interested State must accept the Convention text as a whole, as it reflects a multitude of delicate compromises, which had been reached due to reciprocal trade-offs only. Therefore, Arts 309 and 310 UNCLOS generally prohibit the filing of reservations. It has rightly been stated, though, that the 'package deal' approach may only have an effect on those States that decide to accede to the Convention.[239] As regards the validity of many UNCLOS provisions under customary law, the inapplicability of the 'package deal' argument results from the established principle that treaty rules on the one hand and customary rules on the other may well exist in parallel (→ Art 38 MN 4).[240] Additionally, while it cannot be doubted that UNCLOS in parts has indeed generated new customary law in conformity with the process described in Art 38 VCLT,[241] the legal effects arising therefrom can, again, not be directly attributed to any third party effect of the Convention as such.

57 Regardless of the missing objective character of UNCLOS under treaty law, one might question whether its provisions are always **compatible with the *pacta tertiis* principle**. A particularly noteworthy example is Art 210 para 6 UNCLOS according to which "[n]ational laws, regulations and measures [relevant to the prevention, reduction and control of pollution of the marine environment by dumping] shall be no less effective in preventing, reducing and controlling such pollution than the global rules and standards." It is generally accepted that the term "global rules and

[234] *Cf* Arts 89 and 137 UNCLOS.

[235] *Cf* Arts 56 and 77 UNCLOS. For a detailed analysis of the status of these zones, see *Churchill*/*Lowe* (n 91) 142 *et seq*; *A Proelss* Ausschließliche Wirtschaftszone in *W Graf Vitzthum* (ed) Handbuch des Seerechts (2006) 222, 228–230.

[236] Arts 2 and 49 UNCLOS.

[237] See also *S Vasciannie* Part XI of the Law of the Sea Convention and Third States: Some General Observations (1989) 48 Cambridge LJ 85, 89–93.

[238] For an in-depth analysis, see *R Eustis* Procedures and Techniques of Multinational Negotiation: The LOS III Model (1977) 17 VaJIL 217.

[239] *Fitzmaurice* (n 41) 113 *et seq*.

[240] See *Vasciannie* (n 237) 93–97.

[241] *Lee* (n 231) 553–566. A frequently mentioned example is the establishment of rights to a 200-mile EEZ; see *Churchill*/*Lowe* (n 91) 17 *et seq*. *Cf* also ICJ *Continental Shelf (Tunisia v Libya)* [1982] ICJ Rep 18, para 100.

standards" refers to the rules contained in the 1972 London Dumping Convention.[242] Thus, by acceding to UNCLOS, a State is obliged ("shall") to comply with the minimum standards of the 1972 Convention, irrespective of whether it has become a party to that treaty or not.[243] It should be noted, however, that the situation does not seem to be directly covered by Art 35 VCLT, since the third party effect of the London Dumping Convention arises from a **different** instrument, *ie* UNCLOS (which may hardly be considered as a collateral agreement in terms of Art 35, → Art 35 MN 12–15).[244] Thus, States are free to decide on accession to UNCLOS, which, again, implies acceptance or non-acceptance of the obligations contained in the London Dumping Convention.[245] Consequently, Art 210 para 6 UNCLOS is indeed compatible with the *pacta tertiis* principle.

58 Similar questions arise under the 1995 **Fish Stocks Agreement,** which, notwithstanding its character as an independent treaty,[246] implements and develops the UNCLOS provisions relevant to high seas fisheries.[247] It has been stated that some of the rules contained in the Agreement, in particular Art 8 para 4, Art 17 and Art 21, are intended to be binding on third States.[248] While one author has concluded therefrom that the Agreement ignores the *pacta tertiis* rule,[249] others have taken the position that it is valid *erga omnes* and that thus the *pacta tertiis* principle must be considered as being inapplicable.[250] The latter reasoning is based on the idea to **expand the concept of objective regimes to non-territorial goods** whose protection allegedly lies in the interest of the entire international community

[242] 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1046 UNTS 120.

[243] See Implications of the Entry into Force of the United Nations Convention on the Law of the Sea for the International Maritime Organization, 6 January 2003, IMO Doc LEG/MISC/3/Rev.1, 48.

[244] However, see the considerations of *Fitzmaurice* (n 41) 118 with regard to the 1995 Implementation Agreement.

[245] *Proelss* (n 62) 142.

[246] Different to the Fish Stocks Agreement, the 1994 Agreement Relating to the Implementation of Part XI UNCLOS on the one hand and UNCLOS on the other are to "be interpreted and applied together as a single instrument" (Art 2 para 1 of the 1994 Agreement).

[247] 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 34 ILM 1547.

[248] *L Juda* The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique (1997) 28 Ocean Development and International Law 147, 155; *J Ziemer* Das gemeinsame Interesse an einer Regelung der Hochseefischerei (2000) 193 *et seq*; *PGG Davies/C Redgwell* The International Legal Regulation of Straddling Fish Stocks (1996) 67 BYIL 199, 265 *et seq*.

[249] *J de Yturriaga* Fishing in the High Seas: From the 1982 UN Convention on the Law of the Sea to the 1995 Agreement on Straddling and Highly Migratory Fish Stocks (1996) 3 AYIL 151, 179.

[250] *G Dahm/J Delbrück/R Wolfrum* Völkerrecht Vol I/2 (2nd edn 2002) 397; *id* (n 156) 631; see also *Ziemer* (n 248) 193 *et seq*.

('common goods').[251] Except for highly migratory and straddling fish stocks, one may consider the rain forests or the ozone layer as examples of such goods.[252] With a view to the 1995 Agreement, it is submitted that the correct reasoning is that due to the fact that the treaty is an implementation agreement to UNCLOS, it must generally be interpreted in a **restrictive manner**.[253] While it is true that the Agreement aims at tackling the problem of 'free riders' by submitting to certain limits on the possibility of becoming a member to regional fisheries organizations (Art 8 para 3), by restricting access to fisheries resources to States, which are either members of the competent regional fisheries organizations or which agree to apply the management measures established by them (Art 8 para 4) and by introducing stricter enforcement standards (Arts 21 and 23), it should be noted that only Art 33 addresses the issue of third States directly, that provision however being drafted in very soft terms.[254] Finally, acceptance of the 1995 Agreement in terms of accession numbers does not at all support the claim contained therein to represent a general interest.[255] Therefore, it seems difficult to argue that the Agreement has modified the *pacta tertiis* rule.[256] Its obligations are only applicable to non-parties if and to the extent to which it can be argued that a provision has become part of customary law.[257]

A special case is the 1995 Agreement Regarding the M/S 'Estonia', which was **59**
concluded by Estonia, Finland and Sweden subsequent to the **sinking of the ferry M/S 'Estonia'** in 1994.[258] The Agreement prescribes that the wreck of the vessel and the surrounding area ought to be regarded as a final place of rest for victims of the disaster, and that therefore parties to the Agreement undertake to institute legislation aiming at the criminalization of any activities disturbing the peace of

[251] *Dahm/Delbrück/Wolfrum* (n 156) 625–631.

[252] For a brief overview on the terminology, see *W Durner* Common Goods (2000) 17 *et seq*.

[253] *Cf* Art 4 of the Agreement: "Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention." For an analysis of possible consequences, see *Proelss* (n 62) 155 *et seq*, 173 *et seq*.

[254] Art 33: "(1) States Parties shall encourage non-parties to this Agreement to become parties thereto and to adopt laws and regulations consistent with its provisions. (2) States Parties shall take measures consistent with this Agreement and international law to deter the activities of vessels flying the flag of non-parties which undermine the effective implementation of this Agreement."

[255] *Proelss* (n 62) 158–163; *Davies/Redgwell* (n 248) 274; see also the comment made by *BH Oxman*, reproduced in *J Delbrück* (ed) New Trends in International Lawmaking – International 'Legislation' in the Public Interest (1997) 111: "[P]rofound conviction of public benefit is, in itself, [not] sufficient to generate law binding on those who disagree."

[256] *E Franckx Pacta tertiis* and the Agreement for the Implementations of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea (2000) 8 Tulane JICL 49, 62–71; *Fitzmaurice* (n 41) 118 *et seq*.

[257] Similar *P Örebech/K Sigurjonsson/TL McDorman* The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement (1998) 13 IJMCL 119, 123 *et seq*.

[258] 1890 UNTS 175.

that place. One source has argued that the treaty must be considered as having created an objective regime opposable *erga omnes*.[259] Even if one generally accepts the legal concept concerned, it must be noted, though, that the wreck is located on the Finnish continental shelf, over which a coastal State may only exercise sovereign rights for the purpose of exploring it and exploiting its natural resources (*cf* Art 77 para 1 UNCLOS). As the vessel thus sank beyond the areas under sovereignty of any of the States concerned,[260] the mandatory element of **territorial competence** does not seem to be present. If at all, some kind of special competence of the parties to conclude the agreement could be deduced by way of analogy to Art 303 para 1 UNCLOS, according to which "States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose." However, notwithstanding the existence of a general ethical interest in the avoidance of any disturbance of the final place of rest, it cannot be concluded therefrom that the Agreement is also automatically valid *vis-à-vis* third States.[261] This conclusion seems to be backed by the practice of the States Parties, which adopted an additional protocol in 1996 inviting all States to accede to the Agreement.[262] Indeed, if the latter would be valid *erga omnes* by itself, accession by other States would not appear to be necessary.

V. Conclusion

60 Following the analysis of legal doctrine and practice relevant to the concept of objective regimes, one cannot but agree with *Cahier* according to whom "la notion de traité établissant des situations objectives est surtout une création de la doctrine."[263] Indeed, apart from the case of the United Nations (→ MN 53) and, from the perspective of the Committee of Jurists, that of the Åland Islands (→ MN 49), **no exception to the *pacta tertiis* principle** has ever been recognized on the international plane. Of course, this does not mean that treaties may not legally influence the position of third States. However, such influences either derive from acceptance of a right or obligation in terms of Arts 35 and 36 VCLT or result from the development of a treaty rule into a rule of customary law.

[259] *J Klabbers* On Maritime Cemeteries and Objective Régimes: The Case of the M/S Estonia (1997) http://www.helsinki.fi/eci/Publications/Estonia.pdf.

[260] *Ibid*. Note that even if the regime of the continental shelf would legitimate the coastal State to exercise sovereign rights over wrecks located on its shelf, this would not necessarily imply the existence of territorial competence.

[261] Similar *R Lagoni* Marine Archäologie und sonstige auf dem Meeresboden gefundene Gegenstände (2006) 44 AVR 328, 350.

[262] 1947 UNTS 404.

[263] *Cahier* (n 44) 677; see also *Schweisfurth* (n 53) 665.

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Article 35

Treaties providing for obligations for third States

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Contents

A. Purpose and Function

Art 35 VCLT substantiates the general rule laid down in Art 34 in respect of treaties providing for **obligations** of third States and is, similar to the vast majority of the provisions of the Convention,[1] based on the **principle of consent**. Given that without any express consent of the respective third State no obligation may arise,[2] the provision *stricto sensu* cannot be regarded "as a real exception to the [general] rule, because there could be no question of the treaty itself imposing an obligation on third States."[3] Its comparatively strict requirements verbalize the attempt of the ILC to safeguard the traditional role of treaties as a source of international law for the parties to the treaty only.[4] As regards its object and function, it seems appropriate to refer to the comments made in the context of the general rule (→ Art 34 MN 1–2). One must conclude that Art 35 has, as far as the general necessity of the third State's consent is concerned, developed into a rule of customary international law (see also → MN 19).[5] **1**

[1] Arguably, the rules on *ius cogens* might be regarded as an exception to the consensual character of the law of treaties (→ Art 53 MN 18–23).

[2] PCIJ *Free Zones of Upper Savoy and the District of Gex* PCIJ Ser A/B No 46, 141 (1932).

[3] *Waldock* [1964-I] YbILC 74; *Rosenne* [1964-I] YbILC 75; but see the wording of Draft Art 61 para 1 proposed by *Waldock* III 17: "[e]xcept as provided in article 62 and 63".

[4] *CL Rozakis* Treaties and Third States: A Study in the Reinforcement of the Consensual Standards in International Law (1975) 35 ZaöRV 1, 10.

[5] See *C Laly-Chevalier*/*F Rezek* in *Corten*/*Klein* Art 35 MN 5.

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B. Historical Background and Negotiating History

2 In the course of the *travaux préparatoires*, the elements of Art 35 VCLT were essentially undisputed. In the third report of SR *Waldock*, the rules contained in today's Arts 35–37 were combined in a single Art 62.[6] While the wording of this article not only referred to a third State but rather to a "State or a class of States to which it belongs", the ILC in its report to the General Assembly avoided adopting that notion in the context of treaties providing for obligations and addressed the issue in **two separate provisions** (Arts 59 and 60).[7]

3 The fact that the deletion of the words "or a class of States to which it belongs" in Art 59 (but not in Art 60), suggested by *Elias*,[8] was passed without further discussion indicates that the issue was not considered as a matter of substance,[9] such conclusion being supported by corresponding State practice.[10] In the course of the 18th session, Art 59 was **redrafted** by *Waldock* in that he replaced the opening words "[a]n obligation may arise" with the words "[a]n obligation arises" with the argument that "once the State in question had expressly agreed to be bound, the obligation would in fact arise for it."[11] That suggestion was fully supported by several members of the ILC[12] and ultimately adopted in Art 35 VCLT. In contrast, a suggestion of the government of Israel that the order of Arts 59 and 60 should be reversed in the interests of presentation[13] was not accepted.

4 Except for the prerequisites of how a third State must express its acceptance of an obligation arising from a treaty to which it is not a party (→ MN 16–19), the main issue discussed during the eighteenth session was the proposal submitted by four governments that a reservation made in the 1964 report of the ILC to the General Assembly,[14] according to which Art 59 should not apply with respect to **treaty provisions imposed upon an aggressor State** in consequence of action taken in conformity with the Charter, should be incorporated into that article.[15] The ILC was almost evenly divided on that point and in the end decided to refer the provision to the Drafting Committee in very general terms.[16] The respective rule was eventually included in the draft as a separate article (→ Art 75).[17]

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[6] *Waldock* III 19 *et seq*; for the general historical background, see → Art 34 MN 3–7.

[7] ILC Report 16th Session [1964-II] YbILC 173, 181.

[8] *Elias* [1964-I] YbILC 73.

[9] *Cf Reuter* 102; *C Laly-Chevalier/F Rezek* in *Corten/Klein* Art 35 MN 7.

[10] *Cf* only Art 5 para 4 MARPOL (→ Art 34 MN 16).

[11] *Waldock* [1966-I/2] YbILC 60.

[12] See *de Luna* [1966-I/2] YbILC 60; *Ago* [1966-I/2] YbILC 62; *Reuter* [1966-I/2] YbILC 62.

[13] *Rosenne* [1966-I/2] YbILC 62.

[14] *Cf* ILC Report 16th Session [1964-II] YbILC 173, 181–182.

[15] *Cf* [1966-I/2] YbILC 60–73.

[16] *Ibid* 72–73; *cf* also *Waldock* VI 68 (comments of the USSR and US governments).

[17] See ILC Report 18th Session [1966-II] YbILC 172, 227; see also → Art 34 MN 32.

C. Elements of Article 35

I. Obligation

→ Art 34 MN 13–26 **5**

II. Third State

→ Art 34 MN 10–12 **6**

III. Treaty

→ Art 2 MN 3–45 **7**

IV. Parties

→ Art 2 MN 46–48 **8**

V. Intention to Establish an Obligation

The first of the two most relevant conditions in order for a treaty to lawfully provide an adverse third party effect is the existence of an intention of the parties to the treaty to establish an obligation. As stated in the context of Art 34, it will generally be difficult to determine the intention of the parties (→ Art 34 MN 16, 26), and, indeed, also the ILC **has not given any specific details on** how this intention could be evidenced. In this respect, reference to the element of intensity of the negative impact of the treaty is not admissible as the categories of obligation, on the one hand, and intention, on the other, would otherwise be blurred. **9**

In its 1982 report to the General Assembly, the ILC attempted to substantiate the element of intention in the corresponding context of obligations and rights arising for **States members of an international organization** from a treaty to which the organization is a party. In that case, however, according to the relevant Draft Art 36 *bis*, the intention of the parties concerned must take the form of consent. The ILC concluded that "[a] mere intention, with little thought having been given to the full import of such a step in all its aspects, is here not enough; consent given in the abstract to the actual principle that such rights and obligations should be created is not enough; such consent must define the *conditions* and the *effects* of the obligations and rights thus created. Normally, the parties to the treaty will define the regime for these obligations and rights in the treaty itself, but they may come to **10**

some other arrangement, in a separate agreement."[18] Thus, the commentary of the ILC as well as the particularities of membership in an international organization as a secondary subject of international law militate against deriving any interpretative assistance from the Draft Articles on Treaties Concluded between States and International Organizations or between Two or More International Organizations for the present purposes.[19]

11 Irrespective of the fact that the issue at hand is, due to its exclusively subjective nature, not one of treaty interpretation *stricto sensu*,[20] some sources have reasonably suggested making use of the **principles of interpretation** contained in Arts 31–33 VCLT in order to examine the intention of the parties.[21] If this suggestion is accepted, it seems that the conclusion drawn by *Rozakis* whereby "any piece of evidence, such as preparatory work, the conduct of the States-parties, the text of the treaty, might be considered as legitimate means to find the intention of the parties"[22] is essentially correct. Thus, with a view to their mandatory wording, examples of treaty provisions intended to establish obligations on third States are Art 2 para 6 UN Charter and Art 5 para 4 MARPOL (→ Art 34 MN 16, 21, 23–25). Having said that, one must note that notwithstanding possible exceptions to the *pacta tertiis* rule (→ Art 34 MN 32–59), it is impossible to deduce the intention of the parties to conclude a treaty to produce law for third States from the mere classification of a treaty as being "normative"[23] or "law making".[24]

VI. Consent

12 With regard to the second condition for a treaty to establish an obligation on a third State, *ie* the third State's consent, two issues, namely the **legal nature of the acceptance,** on the one hand, and the formal question **how that acceptance has to be communicated,** on the other, are to be separated. As regards the first issue, acceptance could either lead to the result that the third State becomes a party to the original treaty, or that a separate treaty of equal content materializes between the third State and the parties to the original treaty.[25] This alternative reading has led to some doctrinal ambiguity. In the first event, the State which accepts the obligation is not a third State *stricto sensu* anymore. In the second event, it is bound to the obligations

[18]ILC Report 34th Session [1982-II/2] YbILC 1, 46 (original emphasis).

[19]See also *C Laly-Chevalier*/*F Rezek* in *Corten*/*Klein* Art 35 MN 8.

[20]Undecided *M Fitzmaurice* Third Parties and the Law of Treaties (2002) 6 Max Planck UNYB 37, 48 n 19.

[21]*C Chinkin* Third Parties in International Law (1993) 33 n 44; *C Laly-Chevalier*/*F Rezek* in *Corten*/*Klein* Art 35 MN 8; *Rozakis* (n 4) 11.

[22]*Rozakis* (n 4) 11.

[23]*Ibid.*

[24]See only *VD Degan* Sources of International Law (1997) 489.

[25]*De Luna* [1964-I] YbILC 70.

concerned by virtue of the second treaty only and thus remains a third State from the perspective of the original treaty.[26] It should be noted, though, that this does not seem to be the situation envisaged by the wording of Art 35, which establishes a logical link between the *third* State and an obligation arising from the *original* treaty.[27] Therefore, the conclusion drawn by one source that irrespective of Art 35, the VCLT does not accept treaties providing for obligations for third States at all, is not unfounded.[28]

13 The prevailing view of the members of the ILC was that by the third State's acceptance of the obligation contained in the original treaty, a **separate agreement** between the third State and the parties to the original treaty materialized. In his fifth report, SR *Fitzmaurice* suggested a Draft Art 11 under which "[a] third State becomes bound by the same obligations as those involved by the provisions of a treaty to which it is not a party [. . .] if it agrees to accept or carry out such provisions by a *separate treaty*".[29] The suggested provision went on to state in para 2 that "the obligations [. . .] of [. . .] the third State arise and exist, not under or by reason of the original treaty [. . .] but solely by reason of, and under, the separate treaty into which the third State has itself entered."[30] In the commentary thereto, *Fitzmaurice* analysed that, as the third State has given its consent to be obliged, "there is no violation of the rule that States can only be bound by their consent."[31] This view was strongly ("[n]o doubt") upheld by SR *Waldock* in his third report[32] and supported by several other members of the ILC.[33] In its final commentaries on the Draft Articles, the ILC underlined that when the conditions of the then Art 31 (Art 35 VCLT) were fulfilled "there is, in effect, a second collateral agreement between the parties to the treaty, on the one hand, and the third State on the other; and that the juridical basis of the latter's obligation is not the treaty itself but the collateral agreement."[34]

14 From a **contextual viewpoint**, Art 37 VCLT militates in favour of the existence of a second independent agreement by stating that "the obligation may be revoked or modified only with the consent of the parties to the treaty *and* of the third State".[35] A suggestion made by SR *Waldock*, following corresponding comments of the governments of the Netherlands and the United Kingdom,[36] to downgrade the

[26] *Waldock* [1964-I] YbILC 20; ILC Report 18th Session [1966-II] YbILC 172, 227.

[27] *Cf de Luna* [1964-I] YbILC 78.

[28] *RG Wetzel* Verträge zugunsten und zu Lasten Dritter nach der Wiener Vertragsrechtskonvention (1973) 79 *et seq*, 87; see also *Fitzmaurice* V 73, 91; *Waldock* [1964-I] YbILC 74.

[29] *Fitzmaurice* V 79 (emphasis added).

[30] *Ibid*.

[31] *Ibid* 90.

[32] *Waldock* [1964-I] YbILC 20.

[33] *Cf Jiménez de Aréchaga* [1964-I] YbILC 69; *Tunkin* [1964-I] YbILC 71; *Briggs* [1964-I] YbILC 72; see also the position of the Czechoslovak government, reproduced in *Waldock* VI 67.

[34] ILC Report 18th Session [1966-II] YbILC 172, 227.

[35] Emphasis added. See also *C Laly-Chevalier*/*F Rezek* in *Corten*/*Klein* Art 35 MN 28; *Villiger* Art 35 MN 2; *Reuter* 105.

[36] Reproduced in *Waldock* VI 71–72.

participation of the third State required in **cases of termination or reduction of obligation** to a mere duty of the parties of the original treaty to inform the third State[37] was ultimately rejected. In this respect, *de Luna* concluded that "[i]f [. . .] the obligation of a third State derived not from the initial treaty, but from the 'collateral agreement', then the obligation was not revocable; the question of revocability arose in connexion with the rules concerning the termination of treaties and was linked with the rule on the unilateral denunciation of an agreement or treaty."[38] Against this background, irrespective of the lack of clarity in Art 35 VCLT and the almost complete absence of any significant State practice, there is no room for arguing that the acceptance of the obligation need not take the form of an agreement.[39]

> When in 1958 Egypt expressly accepted its obligations as to freedom of passage through the Suez Canal contained in the 1888 Convention of Constantinople[40] (to which it was not a party) by way of declaration, it transmitted that declaration to the UN Secretary-General, thereby expressing its position that the declaration constitutes an "international agreement" in terms of Art 102 UN Charter.[41]

15 It remains to be examined whether the collateral agreement in terms of Art 35 VCLT has to be **concluded between the third State and all States Parties to the original treaty**, or whether it suffices if the third State concludes the agreement **with only one or more** of them.[42] As far as can be seen, in the course of the negotiations, this issue was only addressed by SR *Fitzmaurice* in his fifth report.[43] When commenting on the relevant provision, he stated that "[i]t is strictly immaterial whether [. . .] the agreement is with the parties to the treaty, or one or some only, or with another interested third State",[44] but did not further elaborate on the issue. From a contextual perspective, Art 37 para 1 VCLT again militates in favour of a comprehensive approach ("only with the consent of the parties to the treaty and of the third State"), *ie* the collateral agreement must be concluded between the third State and **all parties** to the original treaty (though not necessarily in the form of a single instrument). The same understanding is suggested by the wording of Art 35 itself, which refers to the parties to the original treaty in the plural form. Having said that, a State is of course generally free to accept the obligations originating from a different instrument by way of agreement with one or more other States. In such a

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[37] *Ibid* 73.

[38] *De Luna* [1964-I] YbILC 70; see also ILC Report 18th Session [1966-II] YbILC 172, 230.

[39] But see *Chinkin* (n 21) 33; see also *Amado* [1964-I] YbILC 70: "The entire article was overshadowed by the ghostly presence of that agreement which the Special Rapporteur called 'collateral', whereby quasi-parties to a treaty accepted the obligations which the real parties had written into it."

[40] 1888 Convention Respecting the Free Navigation of the Suez Maritime Canal, reprinted in (1909) 3 AJIL Supp 123.

[41] RoP Supp 2 Vol 3 (1955–1959) 505, 506 (Art 102 paras 5–8).

[42] *C Laly-Chevalier/F Rezek* in *Corten/Klein* Art 35 MN 32; *cf* also *Wetzel* (n 28) 85; the first option is advocated in principle by *Villiger* Art 35 MN 4.

[43] *Fitzmaurice* V 79 (Draft Art 11).

[44] *Ibid* 91.

situation, however, the nexus between the original treaty and the subsequent agreement is not as direct as in the case of Art 35 VCLT, in which **any** party to the original treaty may call upon the third State to comply with the obligations contained in the collateral agreement. It is these particularities that have prompted the ILC to state that even though the juridical basis of the third State's obligation is not the treaty itself but the collateral agreement, "the case remains one where a provision of a treaty concluded between certain States becomes directly binding upon another State which is not and does not become a party to the treaty."[45] Were this reasoning not followed, it seems that the classification of the subsequent treaty as 'collateral agreement' would be without any substance.

The interpretation advocated here is supported by the judgment of the PCIJ in the *Free Zones of Upper Savoy and District of Gex* case. In that case, the Court analysed that "it is certain that, in any case, Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it. That extent is determined by the note of the Federal Council of May 5th, 1919, an extract from which constitutes Annex I of the said Article. It is by that instrument, and by it alone, that Switzerland has acquiesced in the provision of Article 435".[46] It should be noted that the instrument referred to by the Court was, while addressed to France, included into the framework of the Treaty of Versailles as an Annex to Art 435 of the Treaty.[47]

VII. In Writing

Art 35 specifies the formal requirements which the third State's consent has to fulfill by the words "in writing". The original proposal by the ILC did not require acceptance of the offer of the parties to the original treaty to be delivered in written form. In his third report, SR *Waldock* suggested that it would even be sufficient if the third State "has [. . .] impliedly consented to the provision" giving rise to a legal obligation.[48] However, in the course of the 16th session, the majority of ILC members took the position that the "consent should be express, precise and definite",[49] thus **rejecting the validity of any implied acceptance**. *Waldock* agreed that reference to "implied consent" need not be retained.[50] Irrespective of the **16**

[45]ILC Report 18th Session [1966-II] YbILC 172, 227; see also *Waldock* [1964-I] YbILC 20: "Accordingly, it seems appropriate to deal with the case under the present article as a form of exception to the *pacta tertiis* rule" (original emphasis).

[46]PCIJ *Free Zones of Upper Savoy and District of Gex* (n 2) 141.

[47]*Ibid* 130.

[48]*Waldock* [1964-I] YbILC 17 (Draft Art 61).

[49]*Paredes* [1964-I] YbILC 68; see also *Verdross* [1964-I] YbILC 69; *de Luna* [1964-I] YbILC 70; *Lachs* [1964-I] YbILC 71; *Castrén* [1964-I] YbILC 71; *Tunkin* [1964-I] YbILC 71; *Briggs* [1964-I] YbILC 72; *Pal* [1964-I] YbILC 73; *Tabibi* [1964-I] YbILC 74; *Tsuruoka* [1964-I] YbILC 76. For the opposite minority view, see *Amado* [1964-I] YbILC 70 and *Ago* [1964-I] YbILC 72 stating that "if the Commission retained only the word 'expressly', it would be denying forms of consent which were perfectly genuine and acceptable."

[50]*Waldock* [1964-I] YbILC 77.

lasting critique by one of its members,[51] the ILC eventually suggested in its 1966 report to the General Assembly that Draft Art 31 should refer in its relevant part to the third State having "expressly accepted" the obligation concerned.[52]

17 During the Vienna Conference, however, some States took the position that the term "expressly accepted" did not provide for the necessary safeguards against unwanted obligations. Hence, in the course of the 14th plenary meeting, the delegation of Vietnam introduced an amendment in which it proposed adding the words "in writing" after the term "that obligation".[53] It reasoned that **only the written form** would constitute "a form which could not give rise to any misunderstanding and which involved no risk of tendentious interpretation."[54] The inclusion of the written form requirement met with opposition from the United Kingdom delegation, stating that "it ran counter to the fundamental principle of international customary law underlying the convention, namely that States were free to bind themselves otherwise than by written treaties."[55] Nevertheless, the proposal was adopted with 44 votes to 19 with 31 abstentions.[56]

18 While one source rightly stated that the written form requirement "established a radical departure from the scheme of informalism which has been traditionally quite acceptable"[57] in international law, it should be noted that the VCLT as such is based on a **formalistic approach** due to its scope being restricted to agreements in written form (*cf* Art 2 para 1 lit a, → Art 2 MN 19–21). Bearing in mind that the third State's consent represents its acceptance of the offer of the parties to the original treaty to conclude a secondary agreement, the addition of the words "in writing", when put in the overall perspective of the Convention, only constituted the last step in the consistent implementation of the notion of 'collateral agreement'.[58]

19 Having said that, it should not be ignored that the **relevant practice of international tribunals** does not always seem to follow the formalistic approach envisaged by the VCLT. However, contrary to what has been indicated by one source,[59] it is difficult to base this assumption on the judgment of the ICJ in the *North Sea Continental Shelf* cases. The potentially relevant passage of this judgment appears to be too vague ("it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has

[51] *Amado* [1966-I/2] YbILC 66.

[52] ILC Report 18th Session [1966-II] YbILC 172, 227.

[53] UN Doc A/CONF.39/L.25, UNCLOT III 268.

[54] UNCLOT II 59.

[55] *Ibid* 60.

[56] *Ibid*.

[57] *Rozakis* (n 4) 13.

[58] Note that if a treaty establishes independent rights and obligations simultaneously, the stricter requirements of Art 35 enjoy priority over those of Art 36 (→ Art 36 MN 12).

[59] But see *C Laly-Chevalier*/*F Rezek* in *Corten*/*Klein* Art 35 MN 20.

nevertheless somehow become bound in another way")[60] to derive any reasoning which deviates from the approach of the VCLT. In contrast, the ICTY indeed seems to rely on an alternative understanding of the term "in writing". When dealing with the Tribunal's power to issue binding orders to States which are not members of the United Nations in the *Blaškić* case, the Appeals Chamber initially referred to Art 35 VCLT but then emphasized that accepting an obligation in writing "may be evidenced in various ways. Thus, for instance, in the case of Switzerland, the passing in 1995 of a law implementing the Statute of the International Tribunal clearly implies acceptance of Article 29."[61] Similarly, when dealing with the issue of succession of States in respect of treaties, the ILC stated with regard to the effect of unilateral declarations by successor States, which provide for the continuance of treaties concluded by the predecessor States (*cf* Art 9 Vienna Convention on the Succession of States in Respect of Treaties) that such declarations "furnish bases for a *collateral* agreement in simplified form between the newly independent State and the individual parties to its predecessor's treaties for the provisional application of the treaties after independence. The agreement may be express but may equally arise from the conduct of any individual State Party to any treaty covered by the declaration, in particular from acts showing that it regards the treaty as still having application with respect to the territory."[62] Against this background, the conclusion drawn by *Laly-Chevalier/Rezek* whereby the written form requirement has **not yet developed into a rule of customary international law**[63] seems to be correct.

D. Legal Consequences

The classification of the third State's consent as a collateral agreement (→ MN 12–14) leads to the question whether the agreement constitutes **a treaty in terms of the VCLT**. *Yasseen* answered this in the negative, as, notwithstanding the definition of the term "treaty" contained in Art 2 para 1 lit a VCLT ("in written form"), "an agreement could be in unwritten form".[64] Other members of the ILC indicated, however, that the provisions of the VCLT on the validity and duration of treaties would be applicable to the collateral agreement.[65] With the addition of the words "in writing" in the relevant provision, it seems that the argument raised by *Yasseen* is superfluous. Indeed, it can no longer be doubted that the collateral agreement fulfills the prerequisites of a treaty under Art 2 para 1 lit a, to which **20**

[60] ICJ *North Sea Continental Shelf (Germany v Denmark, Germany v Netherlands)* [1969] ICJ Rep 3, para 28.

[61] ICTY *Prosecutor v Blaškić* (Appeals Chamber) (Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) IT-95-14 AR, 29 October 1997, para 26.

[62] ILC Report 24th Session [1972-II] YbILC 219, 245.

[63] *C Laly-Chevalier/F Rezek* in *Corten/Klein* Art 35 MN 20.

[64] *Yasseen* [1964-I] YbILC 79.

[65] *Cf Rosenne* [1964-I] YbILC 75.

the rules of the Convention must generally apply.[66] *Laly-Chevalier*/*Rezek* conclude therefrom that the collateral agreement may be considered as an "instrument" in terms of Art 31 para 2 lit b VCLT (→ Art 31 MN 76–88) with the effect that the collateral agreement forms part of the context of the original treaty for the purpose of its interpretation.[67] The persuasiveness of this conclusion seems to depend on whether one accepts the idea of a collateral agreement in terms of Art 35 concluded between the third State and only one of the parties to the original treaty (→ MN 15). In such a case, the element of acceptance of the other parties to the original treaty required under Art 31 para 2 lit b VCLT would arguably be lacking, but it is suggested that this point will hardly be of any practical importance.

Selected Bibliography

See the bibliography attached to the commentary on Art 34.

[66] See *Wetzel* (n 28) 86 *et seq*; *C Laly-Chevalier*/*F Rezek* in *Corten*/*Klein* Art 35 MN 30.

[67] *C Laly-Chevalier*/*F Rezek* in *Corten*/*Klein* Art 35 MN 27.

Article 36

Treaties providing for rights for third States

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Contents

A. Purpose and Function

Art 36 VCLT substantiates the general rule laid down in Art 34 in respect of treaties providing for **rights** of third States. As regards its object and purpose, it is appropriate to refer to the comments made in the context of Art 34 (→ Art 34 MN 1–2). While Art 36 indeed addresses the converse situation, it does not merely repeat the wording of Art 35 but differs from that provision in several ways, the most obvious one being that the beneficiary State need not necessarily accept the right in writing (→ MN 26). Irrespective of its less rigorous requirements, and thus somehow surprisingly, the ILC stated in one of its 1966 reports to the GA that **1**

> "[t]he case of rights is more controversial than that of obligations, because the question of the need for the consent of the third State presents itself in a somewhat different light. The parties to a treaty cannot, in the nature of things, effectively *impose* a right on a third State because a right may always be disclaimed or waived."[1]

[1]Final Draft, Commentary to Art 32, 228 para 1 (original emphasis); see also *Waldock* III 21.

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B. Historical Background and Negotiating History

2 Prior to the adoption of the VCLT, the issue of the **most favoured nation (MFN) clauses** contained in numerous treaties led to some irritation. *Lachs* contended in 1964 that MFN clauses were a "telling example of a stipulation in favour of third States".[2] In its 1964 report to the General Assembly, the ILC refused to follow a proposal to include a provision formally reserving from the operation of the relevant articles the MFN clauses.[3] The issue was resurrected in the course of the 1968 Vienna Conference by the delegations of the USSR and Hungary, supported by Mongolia, Afghanistan and Romania,[4] who introduced an amendment aiming at clarifying that Art 36 (at the time numbered Art 32) did not affect the rights of States, which enjoy MFN treatment under other treaties.[5] The delegate of the USSR stated that as treaties containing MFN clauses would undoubtedly fulfill the pre-requisites of treaties providing for rights for third States, an exception should be included in the relevant provision stating that the concept of MFN treatment, once incorporated in a treaty, does not depend on the consent of the parties to the treaty.[6] The delegate of Japan objected to this reasoning and insisted that the concept concerned does not fall within the scope of Art 36.[7]

3 Indeed, the problem of MFN clauses appears to be different in nature from the situation referred to by Art 36 VCLT. While it is true that under an MFN clause, a State benefits from a right arising out of a treaty to which the State is not a party, on closer examination, the benefit does not stem from the treaty which contains the substance of the benefit but rather from the agreement which contains the MFN clause.[8] As the beneficiary is therefore a party to the treaty in which the clause is codified, it may not be regarded as a third State.[9] Accordingly, upon equivalent objections raised by several delegations, the USSR and Hungary eventually withdrew their amendment.[10]

4 The question whether a treaty could of itself create rights without the consent of the third State was one of the **most controversial points** in the course of the ILC meetings. Two different but equally well-reasoned lines of argument were

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[2] *Lachs* [1964-I] YbILC 83; *contra Waldock* [1964-I] YbILC 110; *Reuter* [1964-I] YbILC 113; *Yasseen* [1964-I] YbILC 113.

[3] ILC Report 16th Session [1964-II] YbILC 173, 176; see also ILC Report 18th Session [1966-II] YbILC 172, 177.

[4] UNCLOT II 61–62.

[5] UN Doc A/CONF.39/L.22, UNCLOT III 268.

[6] UNCLOT II 60.

[7] *Ibid* 61. See also the position of the United States (*ibid* 62), Switzerland (*ibid* 62), Israel (*ibid* 62) and New Zealand (*ibid* 62).

[8] See *ibid* 61.

[9] *CL Rozakis* Treaties and Third States: A Study in the Reinforcement of the Consensual Standards in International Law (1975) 35 ZaöRV 1, 21; *Villiger* Art 36 MN 10; *Reuter* 106 *et seq*; *P D'Argent* in *Corten/Klein* Art 36 MN 2.

[10] *Cf* UNCLOT II 63.

advanced. According to one train of thought, a treaty cannot of its own force create an actual right in favour of a third State. Thus, as in the case of obligations, a third State can only acquire an actual right through some form of collateral agreement between it and the parties to the treaty.[11] According to the second view, which was, *inter alia*, advocated by SR *Fitzmaurice* and *Waldock*,[12] "there is nothing in international law to prevent two or more States from effectively creating a right in favour of another State by treaty, if they so intend".[13] The fundamental difference between the two trains of thought is that under the second view, the right is not conditional upon any specific act of acceptance by the third State.

The members of the ILC were also divided as to the favourability of the underlying concepts of **collateral agreement** and ***stipulation pour autrui***.[14] After intensive debates, the need to follow a pragmatic approach and draft a rule acceptable under both lines of argument was emphasized.[15] The issue came up again in the course of the 854th meeting when *Jiménez de Aréchaga* encouraged the ILC to "reconsider the 1964 compromise" due to some government comments favourable to the concept of *stipulation pour autrui*.[16] Several members objected and pointed to the fact that the wording of the respective provision "reconciled the various schools of thought and also seemed satisfactory from the practical point of view."[17] Thus, apart from the replacement of the words "may arise" at the beginning of para 1 by the word "arises"[18] and the issue of presumed assent (→ MN 18–26), the text of the then Art 60 was not further touched upon. In the 868th meeting, after *Verdross* had insisted that although the wording of the provision had evolved in a spirit of conciliation, it was still influenced by the theory of consent,[19] SR *Waldock* immediately called for refraining from reopening the discussion on that fundamental issue.[20] When the matter finally came on the agenda of the Vienna Conference on the occasion of a Finnish proposal to delete the second sentence of Art 36 para 1,[21] *Waldock* again reminded the delegations that

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[11] See *McNair* 309–321.

[12] *Fitzmaurice* V 81 (Draft Art 20), 102–104; *Waldock* III 22.

[13] *Waldock* III 21.

[14] See, in support of the *stipulation pour autrui* concept: *Verdross* [1964-I] YbILC 81; *Lachs* [1964-I] YbILC 83; *Waldock* [1964-I] YbILC 86; *Briggs* [1964-I] YbILC 95. For advocates of the collateral agreement theory, see: *Castrén* [1964-I] YbILC 81; *Paredes* [1964-I] YbILC 82; *Reuter* [1964-I] YbILC 83; *Ago* [1964-I] YbILC 84; *Elias* [1964-I] YbILC 84; *Yasseen* [1964-I] YbILC 85; *Tunkin* [1964-I] YbILC 85; *Pal* [1964-I] YbILC 89; *El-Erian* [1964-I] YbILC 92.

[15] *Jiménez de Aréchaga* [1964-I] YbILC 87; *Rosenne* [1964-I] YbILC 88.

[16] *Jiménez de Aréchaga* [1966-I/2] YbILC 73; see also *Verdross* [1966-I/2] YbILC 74.

[17] *Castrén* [1966-I/2] YbILC 74; see also *Ago* [1966-I/2] YbILC 76; *Briggs* [1966-I/2] YbILC 76; *Yasseen* [1966-I/2] YbILC 77; *El-Erian* [1966-I/2] YbILC 77; *Waldock* VI 70.

[18] See the respective proposals made by *Castrén* [1966-I/2] YbILC 75; *Yasseen* [1966-I/2] YbILC 77.

[19] *Verdross* [1966-I/2] YbILC 173.

[20] *Waldock* [1966-I/2] YbILC 173.

[21] UN Doc A/CONF.39/C.1/L.141.

> "[t]here had been a division of opinion on a point of principle as to whether a treaty could of itself create rights without the consent of a third State. The Commission had had to seek common ground and at the same time to reflect the practice of States and take into account the needs of the international community."[22]

The Finnish amendment was subsequently rejected.

6 The issue of **presumption of the third State's assent** was discussed in the course of the 16th session of the ILC and came up again 2 years later in several meetings. At first sight, the amount of time invested in that issue appeared to be somewhat surprising, as even the proponents of the collateral agreement theory agreed that the assent of the third State does not have to meet any special requirements similar to those contained in Art 35 (→ Art 35 MN 16–19), but that, *eg,* the exercise of the right conferred could be regarded as a manifestation of the third State's assent.[23] However, based on his support of the concept of *stipulation pour autrui* ("rejected"), SR *Waldock* had originally drafted Art 62 para 2 lit b in the following terms: "the right has not been rejected, either expressly or impliedly, by that State".[24] The **phrasing in the negative form** met with criticism of some members of the ILC,[25] partially due to the fact that conclusion of a collateral agreement depended on acceptance by the third State of the offer made by the parties to the original treaty. Therefore, the Drafting Committee suggested amending the wording of lit b to "the State expressly or impliedly assents thereto".

7 In the course of the 854th and 855th sessions, members of the ILC initially rejected the proposal submitted by the governments of the Netherlands[26] and Turkey[27] to delete the words "or impliedly".[28] Discussions then focused on a suggestion made by *Jiménez de Aréchaga* that lit b, as drafted by the Committee, should be **completely deleted**.[29] Proponents of the collateral agreement theory immediately dismissed that suggestion with the argument that the text of the relevant paragraph, now numbered Art 60 para 2 lit b, reconciled the various trains of thought and should therefore not be altered.[30] A third group of members argued for returning to the original negative wording as proposed by SR *Waldock*.[31] In an attempt to find a compromise on the matter, *Ago* finally suggested the provision to

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[22] UNCLOT I 196.

[23] Note that under Art 36 para 2 VCLT II, assent given by the third organization "shall be governed by the rules of the organization."

[24] *Waldock* III 19.

[25] *Cf Castrén* [1964-I] YbILC 82; *Rosenne* [1964-I] YbILC 85; *id* [1964-I] YbILC 89; *Tunkin* [1964-I] YbILC 85 *et seq*: "real consent was necessary".

[26] [1966-II] YbILC 321.

[27] [1966-II] YbILC 342.

[28] *Waldock* [1966-I/2] YbILC 73; *Tunkin* [1966-I/2] YbILC 75.

[29] *Jiménez de Aréchaga* [1966-I/2] YbILC 73; consenting *Verdross* [1966-I/2] YbILC 74; *Rosenne* [1966-I/2] YbILC 77.

[30] *Castrén* [1966-I/2] YbILC 74; *Yasseen* [1966-I/2] YbILC 77.

[31] *Reuter* [1966-I/2] YbILC 75; *de Luna* [1966-I/2] YbILC 75.

read as follows: "Its assent shall be presumed in the absence of any indication to the contrary."[32]

8 The Drafting Committee carefully rephrased the text ("Unless after becoming aware of the provision it indicates the contrary, its assent shall be presumed.") without changing its substance. However, the suggested wording again met with opposition by several ILC members who either preferred to draft the presumption in the opposite sense, *ie* that "[i]f a State which had been offered a right remained silent on the subject of that right, it should be assumed that it did not accept the right",[33] or favoured to return to the original proposal of the Drafting Committee ("expressly or impliedly assents thereto").[34] The impression that the ILC was about to go in circles on the issue of presumption was concisely expressed by *Ago* stating that "[h]e could not see why all those who had been in favour of assent, whether express or implied, were now finding it necessary to show such concern about the wording."[35] Rightly assuming that much objection stemmed from the inclusion of the words "after becoming aware of the provision", he proposed to **revert to the original formula,** which he had suggested in the course of the 855th session.[36] This proposal seemed acceptable for all members of the ILC.[37] At the suggestion of SR *Waldock*, the provision was rephrased for linguistic reasons to "[t]he assent of the third State shall be presumed so long as it does not indicate the contrary."[38] In the final draft submitted to the GA, the second sentence of Art 32 para 1 read: "Its assent shall be presumed so long as the contrary is not indicated."

9 The addendum "unless the treaty otherwise provides" can be traced back to an amendment proposed by Japan in the course of the Vienna Conference.[39] The Japanese delegate explained that the amendment had been submitted "to make it clear that the presumption in the second sentence of paragraph 1 was applicable **only if the treaty was silent on the point**."[40] It met with general acceptance and was included into Art 36 in a slightly modified form.

10 In the course of the relevant ILC meetings, in particular after the Drafting Committee had introduced a corresponding element in its formula for the second sentence of para 1,[41] the issue of presumed assent became increasingly associated

[32] *Ago* [1966-I/2] YbILC 81; consenting *Bartoš* [1966-I/2] YbILC 81; *Yasseen* [1966-I/2] YbILC 81; *de Luna* [1966-I/2] YbILC 82; *Waldock* [1966-I/2] YbILC 82.

[33] *Paredes* [1966-I/2] YbILC 171.

[34] *Yasseen* [1966-I/2] YbILC 171; *Bartoš* [1966-I/2] YbILC 171; *Tabibi* [1966-I/2] YbILC 172; *Tunkin* [1966-I/2] YbILC 172; *contra Jiménez de Aréchaga* [1966-I/2] YbILC 171; *Waldock* [1966-I/2] YbILC 172.

[35] *Ago* [1966-I/2] YbILC 172.

[36] *Ibid* 173 (paras 33 et seq).

[37] *Tunkin* [1966-I/2] YbILC 174; *de Luna* [1966-I/2] YbILC 174; *Tabibi* [1966-I/2] YbILC 174; *Yasseen* [1966-I/2] YbILC 174; *Bartoš* [1966-I/2] YbILC 174.

[38] *Waldock* [1966-I/2] YbILC 174.

[39] UN Doc A/CONF.39/C.1/L.218, UNCLOT III 153.

[40] UNCLOT I 194.

[41] See *Jiménez de Aréchaga* [1966-I/2] YbILC 173.

with the question of whether there was any **specific time limit within which the third State had to reject the right** that was intended to be accorded to it. While some ILC members argued in favour of determining such a limit,[42] others found the idea, if not specified in the respective treaty itself, difficult to accept.[43] *Bartoš* had claimed as early as 1964 that settlement of the time factor was very important for reasons of legal certainty,[44] but no specification was included in Draft Art 60. SR *Waldock* admitted "that one of the difficulties of drafting the provision had been the objections that had been raised in the Commission to the various ways of expressing the idea of 'a reasonable time'".[45] It appeared that particularly some of the members of the Commission advocating the collateral agreement theory seemed to share the position that "by stating categorically that the assent should be presumed, the article violated the principle whereby no one could be obliged to express his view at the request of another person."[46] Despite persisting concerns,[47] the issue was ultimately solved with *Ago*'s suggestion to return to the 1966 formula of the ILC, which implied deletion of the time element ("unless after becoming aware of the provision") introduced by the Drafting Committee.[48]

C. Elements of Article 36

11 Just as in Art 35 VCLT, Art 36 contains two major elements for a right arising for a State from a provision of a treaty to which it is not a party, namely the intention of the parties to the original treaty to accord the right to the State in question and the corresponding assent of the beneficiary State.

I. Right

12 Art 36 is only applicable in respect of treaties providing for rights (→ Art 34 MN 27–28) for third States. However, it sometimes appears to be difficult to **draw a clear-cut line between rights and obligations**. In the course of the 736th meeting of the ILC, *Lachs* was the first to point to the fact that in many situations, rights and obligations contained in a treaty are often interwoven.[49] In

[42] *Lachs* [1964-I] YbILC 83: "at the first possible opportunity"; *Elias* [1964-I] YbILC 84; *Bartoš* [1966-I/2] YbILC 81; *Yasseen* [1966-I/2] YbILC 81.

[43] *Castrén* [1964-I] YbILC 82; *Jiménez de Aréchaga* [1964-I] YbILC 88; *Rosenne* [1964-I] YbILC 89.

[44] *Bartoš* [1964-I] YbILC 92.

[45] *Waldock* [1966-I/2] YbILC 172.

[46] *Bartoš* [1966-I/2] YbILC 172.

[47] *Bartoš* [1966-I/2] YbILC 173; *Yasseen* [1966-I/2] YbILC 174.

[48] *Cf Ago* [1966-I/2] YbILC 173.

[49] *Lachs* [1964-I] YbILC 83; see also *Ago* [1964-I] YbILC 84.

such a situation, the question arises as to whether Art 35 or Art 36 or both provisions ought to be applied.[50] The issue is only partially addressed by Art 36 para 2 VCLT. Under that provision, the third State is obliged to comply with the conditions for the exercise of the right as stipulated by the parties to the original treaty. The example given by *Sinclair*[51] points to the truly problematic constellation, namely that the right is accorded to the third State **in return for acceptance of an independent obligation** in favour of the parties to the original treaty. The VCLT is silent on that issue. In the light of the object and purpose of the relevant provisions as well as the general validity of the *pacta tertiis* principle being based on the principles of sovereignty and independence of States (→ Art 34 MN 1), it seems that in such a situation, Art 35 VCLT must enjoy priority. Indeed, all relevant sources[52] confirm that in case of doubt, the stricter criteria applying to obligations shall prevail, *ie* the third State has to give its express consent in writing.

II. Third State

→ Art 34 MN 10–12 **13**

III. Treaty

→ Art 2 MN 3–45 **14**

IV. Parties

→ Art 2 MN 46–48 **15**

V. Intention to Accord a Right

As regards the intention of the parties to the original treaty to accord a right to the third State, it was uncontested in the ILC that it is "of cardinal importance, since it is only when the parties have such an intention that a legal right, as distinct from **16**

[50] See *Waldock* UNCLOT I 196; *Reuter* 105.

[51] *Sinclair* 102–103: "a treaty between two States confers a right upon a third State to the use of ports situated in the territories of the States Parties to the treaty in return for a right of passage by the States Parties to the treaty over the territory of the third State."

[52] *Lachs* [1964-I] YbILC 83; *Waldock* [1964-I] YbILC 87; *P Cahier* Le problème des effets des traités à l'égard des États tiers (1974) 143 RdC 589, 647 *et seq*; *M Fitzmaurice* Third Parties and the Law of Treaties (2002) 6 Max Planck UNYB 37, 54; *C Chinkin* Third Parties in International Law (1993) 40 *et seq*; *C Laly-Chevalier*/*F Rezek* in *Corten*/*Klein* Art 35 MN 21; *P D'Argent* in *Corten*/*Klein* Art 36 MN 9; *Sinclair* 103; *Rozakis* (n 9) 17; *Villiger* Art 35 MN 2.

a mere benefit, may arise from the provision."[53] As a right *stricto sensu* only exists if the respective beneficial position can be enforced by the third State (→ Art 34 MN 27–28) and is thus logically linked with a corresponding obligation of the parties to the original treaty, the latter must be protected against unfounded allegations by which they have agreed to confer such a position on the third State.[54] However, as stated in the commentary on Art 35 (→ Art 35 MN 9–11), the ILC has not given any specific details as to how the intention to accord a right could be evidenced. Yet, the aforementioned point seems to place high demands on the essential subjective element.[55] It cannot be doubted, therefore, that the parties to the treaty **must have manifested their will to create a right in some visible form**.[56] *Rozakis* rightly concludes that "there must be clear and unambiguous proof of the intention of the parties in the text of the treaty or in some other document relating to it."[57] The same is true in relation to the **necessary degree of precision** of the beneficial position concerned.[58] In this respect, the PCIJ held in the *Free Zones of Upper Savoy and District of Gex* case that "[t]he question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State *meant to create for that State an actual right* which the latter has accepted as such."[59]

17 The follow-up question of whether the beneficiary State needs to be **designated by name**[60] was negated by SR *Waldock*, who referred to the majority of systems of law and common treaty practice.[61] In its 1966 report to the GA, the ILC referred to, *inter alia*, Art 35 para 2 UN Charter and, implicitly, Arts 380 and 386 Treaty of Versailles as providing evidence for the correctness of this view.[62] The final text of Art 35 expressly accepts that the intention of the parties to the original treaty may refer "either to the third State, or to a group of States to which it belongs, or to all States". In this regard, it is submitted that the observation made by *D'Argent* whereby the beneficiary of the right must at least be determinable by way of treaty

[53] Final Draft, Commentary to Art 32, 229 para 7.

[54] *Rozakis* (n 9) 18.

[55] Arguably, the rules on treaty interpretation contained in the VCLT may be applied by way of analogy (→ Art 35 MN 10).

[56] See *Verdross* [1964-I] YbILC 81.

[57] *Rozakis* (n 9) 18; see also *Fitzmaurice* V 102.

[58] *P D'Argent* in *Corten/Klein* Art 36 MN 7.

[59] PCIJ *Free Zones of Upper Savoy and the District of Gex* PCIJ Ser A/B No 46, 147 *et seq* (1932) (emphasis added).

[60] In the affirmative, see opinion of Judge *Negulesco* in PCIJ *Free Zones of Upper Savoy and the District of Gex* PCIJ Ser A No 22, 37 (1929). The question was re-raised in the course of the Vienna Conference by the delegate of Tanzania; see UNCLOT I 196.

[61] *Waldock* III 25; consenting *Lachs* [1964-I] YbILC 83. See also Harvard Draft 935; *Fitzmaurice* V 103; *E Jiménez de Aréchaga* Treaty Stipulations in Favour of Third States (1956) 50 AJIL 339, 356.

[62] Final Draft, Commentary to Art 32, 228 para 2.

interpretation[63] is essentially correct. The same author convincingly concludes that the notion of a "group of States" does not imply that the right concerned would be accorded to the group of States in their collectivity, the latter thereby gaining collective legal personality. On the contrary, **every single State**, notwithstanding being a member of a group of States or of the entirety of States itself, is to be considered as the owner of the right which arises from a treaty provision under the terms of Art 36 VCLT.[64]

VI. Assent

18 From a **grammatical as well as** a **contextual viewpoint**, one might tend to accept the collateral agreement theory rather than the *stipulation pour autrui* doctrine (→ MN 5). Calling for the conclusion of a collateral agreement between the third State and the parties to the original treaty brings Art 36 VCLT perfectly into line with the scheme that was generally accepted by the ILC with regard to Art 35 (→ Art 35 MN 13–15),[65] all the more so as SR *Waldock* stated in the course of the Vienna Conference that "Articles 31, 32 and 33 must be read as a whole and article 32 assumed the simultaneous operation of article 31."[66] The same conclusion may be drawn from Art 36 para 2 VCLT whereby the exercise of a right based on a treaty could be subject to special conditions which "might constitute onerous obligations"[67] and thus seem to fall within the ambit of Art 35. Furthermore, the fact that Art 36 adheres to an element of acceptance, even if presumed, militates in favour of a contractual approach, since the third State's assent would otherwise be superfluous.[68]

19 Having said that, it is not necessarily irrelevant that Art 36, different to the general rule laid down in Art 34, requires the third State's "assent" but not its "consent". In this respect, the conclusion drawn by *Rozakis* that "[t]he word 'assent' cannot mean anything less than consent" due to the fact that Art 36 constitutes a specification of the general principle codified in Art 34 and thus has to be interpreted in conformity with its terms[69] seems unavoidable only from the perspective of the collateral agreement theory. An **alternative understanding** could be based on the assumption that "consent" merely constitutes an umbrella term (which is, as should be noted, also not used by Art 35 VCLT) as to the necessary participation of the third State, which is further substantiated in the specific contexts of rights and obligations. If this reasoning is agreed with, then the use of the term "assent"

[63] *P D'Argent* in *Corten/Klein* Art 36 MN 13.

[64] *Ibid* MN 14.

[65] See *Tunkin* [1966-I/2] YbILC 76; see also *Villiger* Art 36 MN 5.

[66] UNCLOT I 196. The Draft Articles mentioned correspond with Arts 34, 35 and 36 VCLT.

[67] *Castrén* [1966-I/2] YbILC 75; see also *Tsuruoka* [1966-I/2] YbILC 79.

[68] *Reuter* 104; *Fitzmaurice* (n 52) 51; *contra Sinclair* 103. See also *Waldock* VI 70.

[69] *Rozakis* (n 9) 18 *et seq*.

in Art 36 VCLT could indeed symbolize an intentional reference to the *stipulation pour autrui* theory. However, as the ILC was unable to agree on a common doctrinal understanding (→ MN 4–5), it seems problematic to argue that Art 36 is generally consistent with only one of the two trains of thought.

20 Some sources have concluded from the foregoing that due to the fact that Art 36 VCLT can be interpreted as an expression of either of the two views, the controversy lacks any practical importance.[70] It is submitted that this conclusion is not completely correct as it seems to ignore the significance of the controversy with regard to the scope of corresponding **customary international law**. From a methodological perspective, regardless of whether the elements of State practice and *opinio iuris* exist in a certain context, determination of a rule of customary law always requires a **sufficient degree of clarity** as to the content of the respective rule. Thus, arguing that at least one of the two lines of argument is a manifestation of customary law is a contradiction in terms.[71] As it cannot be doubted that under customary law a right might be accorded to a third State by conclusion of a collateral agreement between the third State and the States Parties to the original treaty, the decisive point rather seems to be whether the theory of *stipulation pour autrui* has found any resonance in relevant State practice.

21 In this respect, the members of the ILC were, again (*cf* → MN 4–5), divided into two groups.[72] While in any case, the wording of Art 36 VCLT does not exclude the legality of a *stipulation pour autrui* from the outset, there has hardly been any **relevant State practice** since the conclusion of the Convention in 1969.[73] In the course of the consultations, only few governments commented directly or indirectly on the controversy.[74] Both the Harvard Draft[75] and international adjudication seem to suggest the **legal validity of *stipulation pour autrui* in international custom**. It should not be ignored that in the case of the conclusion of a collateral agreement, it is not the original treaty which forms the basis of the third State's right but rather the collateral agreement itself. If viewed from that perspective, the statement made by the PCIJ in the *Certain German Interests in Polish Upper Silesia* case ("[a] treaty only creates law as between the States which are parties to it; *in case of doubt*,

[70] *David* in *Corten/Klein* Art 34 MN 16; *Jiménez de Aréchaga* (n 61) 354; see also Final Draft, Commentary to Art 32, 228 para 5; *Briggs* [1966-I/2] YbILC 76.

[71] See *P D'Argent* in *Corten/Klein* Art 36 MN 4.

[72] In the affirmative *Verdross* [1964-I] YbILC 85; *Lachs* [1964-I] YbILC 83; *Amado* [1964-I] YbILC 86; *Jiménez de Aréchaga* [1966-I/2] YbILC 73; *de Luna* [1966-I/2] YbILC 81; *contra Ago* [1964-I] YbILC 84; *id* [1964-I] YbILC 90; *id* [1966-I/2] YbILC 76; *id* [1966-I/2] YbILC 79; *Yasseen* [1964-I] YbILC 85; *Briggs* [1966-I/2] YbILC 78.

[73] *P D'Argent* in *Corten/Klein* Art 36 MN 4 n 9 observes that since the adoption of the Convention in 1969, no relevant State practice has been reported in the respective fora of the United States, France, Germany, United Kingdom and Switzerland.

[74] See *eg* the comments made by the Dutch and Argentine delegations, reproduced in *Waldock* V 69 *et seq*; as for the Vienna Conference, see the comments made by representatives of Finland, the Netherlands and Italy UNCLOT I 193–194.

[75] Harvard Draft 661 (Art 18 lit b); see also the comment on that provision *ibid* 935.

no rights can be deduced from *it* in favour of third States"),[76] seems to militate in favour of the possibility that a right in favour of a State not party to the respective treaty may emerge from one of its provisions. While the Court left that question open in its 1929 order in the *Free Zones of Upper Savoy and District of Gex* case,[77] it famously stated in its judgment of 1932, handed down in the same case, by way of an *obiter dictum* as follows:

> "It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such."[78]

Therefore, even if the existence of a *stipulation pour autrui* cannot be presumed, the legitimacy of that concept does not seem to have been generally called into question by the PCIJ. Admittedly, the pronouncement on the stipulation in favour of a third State did not contribute in any way to the merits of the judgment, as the Court based its findings solely on the fact that the creation of the Gex zone formed part of a territorial arrangement in which Switzerland participated as a party.[79] Thus, it is true that the *Free Zones of Upper Savoy and District of Gex* case cannot be referred to as an **example** of the principle of *stipulation pour autrui*.[80] However, contrary to *McNair*,[81] the mere fact that the Court made the statement concerned in the form of an *obiter dictum* does not lead to the conclusion that it cannot be cited as an authority in favour of the **legal validity** of such a stipulation. Otherwise, the same would certainly apply to the separate opinions to the 1929 order of the Court given by judges *Nyholm*,[82] *Negulesco*[83] and *Dreyfus*[84] on which the proponents of the collateral agreement theory so strongly rely.[85]

Other **decisions of international tribunals,** which, according to *McNair,* militate against the validity of a *stipulation pour autrui* in customary international law,[86] do not seem to provide any authority as they either only deal with the *pacta* **22**

[76]PCIJ *Certain German Interests in Polish Upper Silesia* (Merits) PCIJ Ser A No 7, 29 (1926) (emphasis added).

[77]PCIJ *Free Zones of Upper Savoy and District of Gex* (n 60) 20.

[78]PCIJ *Free Zones of Upper Savoy and District of Gex* (n 59) 147 *et seq.*

[79]*Ibid* 147.

[80]See *Fitzmaurice* (n 52) 51 *et seq.*

[81]*McNair* 312.

[82]PCIJ *Free Zones of Upper Savoy and District of Gex* (n 60) 26 *et seq.*

[83]*Ibid* 36 *et seq.*

[84]*Ibid* 43 *et seq.*

[85]See, on the other hand, the joint dissenting opinion by judges *Altamira* and *Hurst* to the 1932 judgment (n 59) 185. Note that the relevant passage seems to have been misconceived in the Harvard Draft 935.

[86]*McNair* 312–315.

tertiis principle in general terms,[87] or, when actually addressing the issue of rights deriving from a treaty for a third State, do not comment on the controversy at all.[88] Against this background, it is submitted that the statement made by the PCIJ in the *Free Zones of Upper Savoy and District of Gex* case is of lingering importance in the context relevant here. The same conclusion may be drawn from the judgment of the ICJ in the *North Sea Continental Shelf* cases in which the Court held that

> "if it were a question not of obligation but of rights, – if, that is to say, a State which, though entitled to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional régime, it would simply be told that, not having become a party to the convention it *could not claim any rights under it* until the professed willingness and acceptance had been manifested in the prescribed form."[89]

It should be noted that the ICJ did not at all hint at the existence of a collateral agreement but rather referred to the third State being, depending on the circumstances, able to claim rights under the original treaty, and to this extent seemed to have followed the reasoning of the PCIJ.

23 **State practice** prior to the adoption of the Convention in 1969 also seems to point to the legal validity of a *stipulation pour autrui*.[90] Examples of treaties by which rights were accorded to third States are peace treaties[91] and treaties establishing a right of free passage through internationalized canals.[92] As has been demonstrated, none of the two categories of treaties can be considered as falling within the (in terms of international law non-existing) category of so-called objective regimes (→ Art 34 MN 32–59). Similarly, Art 32 and Art 35 para 2 UN Charter are subject to the requirements contained in Art 36 VCLT.[93] While in all these instances, it seems at first sight that the legal basis for the third State's right could equally be seen in a collateral agreement, this line of argument does not stand up to closer analysis. *Jiménez de Aréchaga* has conclusively examined that the collateral agreement theory fails to explain "the case of States *in status nascendi*, such as

[87] *Forests in Central Rhodopia (Greece v Bulgaria)* 3 RIAA 1405, 1417 (1933); see also the *Clipperton Island Case (Mexico v France)* 2 RIAA 1105, 1110 (1931).

[88] See, in particular, the *Pablo Nájera Case (France v Mexico)* 5 RIAA 466, 471–473 (1928).

[89] ICJ *North Sea Continental Shelf (Germany v Denmark, Germany v Netherlands)* [1969] ICJ Rep 3, para 28.

[90] See Final Draft, Commentary to Art 32, 228 para 2.

[91] *Cf* only Arts 109, 328, 332, 335, 380 and 386 Treaty of Versailles. See *Waldock* III 24 *et seq* on the 1948 Finnish Peace Treaty.

[92] *Waldock* III 22; *id* [1964-I] YbILC 86; *Jiménez de Aréchaga* [1966-I/2] YbILC 74. The argument raised by *Fitzmaurice* (n 52) 51 is of a circular nature, since the author rejects reference to the example of the Suez Canal by referring to the objective regime theory whose applicability in respect of international waterways she subsequently denies; see *ibid* 86 *et seq*, 103 *et seq*.

[93] *Waldock* III 25; *Jiménez de Aréchaga* [1964-I] YbILC 87 *et seq*; *id* [1966-I/2] YbILC 74, 78.

Uruguay in relation to the 1828 Peace Treaty between Brazil and Argentina."[94] In addition, acceptance of a right, such as freedom of passage through a canal, has never been and could not be registered with the UN Secretary-General under Art 102 UN Charter or with the Secretariat of the League of Nations under Art 18 League of Nations Covenant.[95] Thus, it must be concluded that the sparsely existing State practice rather militates in favour of the legal validity of stipulations favourable to third States under customary international law.

24 Viewed from the **perspective of legal doctrine**, the arguments raised by *Ago*[96] and *Paredes*[97] against the validity of a *stipulation pour autrui* do not seem to be persuasive.[98] As was stated by SR *Waldock*[99] and *Jiménez de Aréchaga*,[100] the contention that the creation of rights for third States could be a violation of the principle of sovereign equality of States is unfounded, because there is no obligation of the third State to accept the right offered. Thus, with regard to its legal consequences, a *stipulation pour autrui* constitutes a species of **collective unilateral declaration**,[101] the latter concept having been accepted in the meantime in its individual variant by the ICJ in the *Nuclear Tests* case.[102] Against this background, due to the fact that the concept of stipulations beneficial to third States seems to have found recognition in customary international law, there is no need to decide whether that legal concept can be accepted as a general principle of international law in terms of Art 38 para 1 lit c ICJ Statute.[103]

25 Whether the third State's assent must be seen as an acceptance of the offer to conclude a collateral agreement, or whether it has to be regarded as a unilateral reaction to a *stipulation pour autrui* made by the parties to the original treaty, is of practical importance in two respects: first, with regard to the moment in which the right of the third State emerges (→ MN 27–30), and second, in terms of the requirements of its revocation or modification, the latter aspect being addressed by Art 37 VCLT.

[94] *Jiménez de Aréchaga* (n 61) 353.

[95] *Ibid* 353; *Chinkin* (n 52) 41.

[96] *Ago* [1966-I/2] YbILC 81.

[97] *Paredes* [1966-I/2] YbILC 80.

[98] However, see the comment made by the Finnish delegate in the course of the Vienna Conference UNCLOT I 193–194 and the dissenting opinion of Judge *Nyholm* in PCIJ *Free Zones of Upper Savoy and District of Gex* (n 60) 26: "The principle of sovereignty is opposed thereto."

[99] *Waldock* [1966-I/2] YbILC 80; *Waldock* III 26.

[100] *Jiménez de Aréchaga* [1966-I/2] YbILC 78; *de Luna* [1966-I/2] YbILC 75.

[101] *Fitzmaurice* (n 52) 70, 102; see also *Reuter* 103; *P D'Argent* in *Corten/Klein* Art 36 MN 6.

[102] ICJ *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, paras 43–46; *Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457, paras 46–49.

[103] In the affirmative: *Jiménez de Aréchaga* (n 61) 348; however, see the critique expressed in the separate opinion of Judge *Dreyfus* to the 1929 order in PCIJ *Free Zones of Upper Savoy and District of Gex* (n 60) 43 *et seq*; see also *Fitzmaurice* (n 52) 51.

VII. Presumption of Assent

26 If one assesses the element of presumed assent on the grounds of the *travaux préparatoires* (*cf* → MN 6–10), it is clear that the third State is generally **under no obligation to fulfill any formal requirement** whatsoever,[104] provided that the respective treaty does not expressly determine any specific requirements as to the way the third State has to communicate its acceptance.[105] Submission of a notification, exercise of the conferred right as well as complete silence meet the demands of Art 36, irrespective of whether one supports the collateral agreement theory or the *stipulation pour autrui* theory. Thus, existence of the third State's assent can be proved by merely establishing that the third State has never rejected the right.[106] In any case, the fact that Art 36 para 1 represents a compromise between two contrary schools of thought compels the admission that under an interpretation based on good faith, not only must it be ensured that the third State has the possibility to become aware of the existence of the right, but also that it must be allowed a reasonable interval to take its decision.[107]

D. Legal Consequences

I. Time of Emergence of the Right

27 If one accepts the position of the present author, namely that the concept of stipulations beneficial to third States is valid under customary international law, it seems that regarding the **time of emergence of the right**, one must distinguish between the situation under the Convention, on the one hand, and that under customary law, on the other.

28 Due to the fact that the final text of Art 36 constitutes a carefully drafted compromise between the supporters of the two opposing trains of thought, which was considered to be generally acceptable, it seems problematic to hold that the right of the third State may arise prior to its assent, namely at the time when the original treaty enters into force.[108] Otherwise, one would ignore the fact that Art 36 VCLT is, as regards its drafting record, at least **to some extent** based on the collateral

[104] If a treaty establishes independent rights and obligations simultaneously, the third State must give its consent in writing under Art 35 VCLT (→ MN 12).

[105] In this respect, *Rozakis* (n 9) 19 rightly states that "the specific requirements of a particular treaty apparently prevail over the general provision of Art 36".

[106] *Rozakis* (n 9) 19. Note that where the third State rejects the right altogether, "the right is, of course, destroyed and can then only be *re*-established by a new agreement" (*Waldock* III 26; original emphasis).

[107] *Waldock* [1966-I/2] YbILC 172. In this respect, it would be appropriate to refer to the time-limits contained in the provisions on denunciation (Art 56) of the VCLT only from the perspective of the collateral agreement theory; see *P D'Argent* in *Corten/Klein* Art 36 MN 21.

[108] Imprecise *Rozakis* (n 9) 19; *P D'Argent* in *Corten/Klein* Art 36 MN 21.

agreement theory (under which the third State must necessarily accept the offer made by the parties to the original treaty for any rights in its favour being able to come into existence).[109]

In contrast, in case of a valid *stipulation pour autrui*, it is true that the right of the third State emerges at the very moment of entry into force of the original treaty.[110] **29**

While in practice both approaches will generally lead to the same result because assent is, according to the second sentence of Art 36 para 1, presumed as long as the contrary is not indicated (→ MN 26), it seems inevitable to carefully distinguish the consequences of the two dogmatic approaches for reasons of doctrinal clarity. In any event, if the respective treaty provides that the third State has to express its acceptance in a specific way, the right does not arise unless the third State complies with these requirements.[111] **30**

II. Presumption of Assent

It derives from the presumption of assent that after a considerable period of time has passed since the entry into force of the treaty, the third State is arguably **estopped from submitting that it has rejected its assent**.[112] Therefore, the third State must, depending of the circumstances, express its objection to the conferral of the right without undue delay. If it neglects to act accordingly, renouncement of the right may be exercised only under the terms of the underlying treaty.[113] **31**

III. Compliance with the Conditions for the Exercise of the Right (para 2)

Art 36 para 2 VCLT clarifies that if a third State exercises the right contained in a treaty to which it is not a party, it must **comply with the conditions for its exercise** provided for in the treaty or established in conformity with the treaty. The rule contained in Art 36 para 2 did not provoke any discussion within the ILC,[114] and, indeed, SR *Waldock* considered it as "self-evident".[115] His predecessor, *Fitzmaurice,* had already dealt with the matter in his fifth report in the context of the use of maritime or land territory under a treaty or international regime.[116] In his **32**

[109] *Cf Yasseen* [1966-I/2] YbILC 77. *Chinkin* (n 52) 41 states that "[i]f the right arises through third party assent, that time cannot be definitely ascertained where assent is presumed through silence."

[110] *Verdross* [1964-I] YbILC 81; *Lachs* [1964-I] YbILC 83; *de Luna* [1966-I/2] YbILC 75.

[111] *Rozakis* (n 9) 20.

[112] *Cf P D'Argent* in *Corten/Klein* Art 36 MN 21.

[113] See *Waldock* [1966-I/2] YbILC 173.

[114] *P D'Argent* in *Corten/Klein* Art 36 MN 5.

[115] *Waldock* III 26; see also the comment made by the US delegation, reproduced in *Waldock* VI 70.

[116] *Fitzmaurice* V 81 (Draft Art 14).

commentary on the relevant provision, he had identified treaties regulating the use of a waterway which runs through the territory of one or more States as a typical example for conditions set down, to which the third State must conform.[117] This example was later adopted by the ILC in its commentary on Draft Art 32 stating that

> "in the case of a provision allowing freedom of navigation in an international river or maritime waterway, the territorial State has the right in virtue of its sovereignty to lay down relevant conditions for the exercise of the right provided, of course, that they are in conformity with its obligations under the treaty."[118]

Irrespective of its marginal practical importance, Art 35 para 2 UN Charter is to be regarded as an expression of the rule contained in Art 36 para 2 VCLT.[119]

33 Prior to the adoption of the paragraph by the ILC, the Turkish government had objected to the rule contained in Art 36 para 2 with the argument that it constitutes an **undue restriction on the power of the parties** to the original treaty to amend the rights conferred on third States.[120] SR *Waldock* in his sixth report,[121] as well as the ILC in its 1966 report to the GA,[122] refused that objection in very clear terms by referring to the fact that the question of any modification of the right of the third State arises under Art 37 and not under Art 36 para 2. Indeed, the notion "in conformity with the treaty", which seemingly caused the confusion on the part of the Turkish government,[123] does not refer to any amendment of rights accorded to third States under the original treaty but rather takes "account of the fact that not infrequently conditions for the exercise of the right may be laid down in a supplementary instrument or in some cases unilaterally by one of the parties."[124]

34 It must be noted that any condition in terms of Art 36 para 2 is **inextricably connected** to the exercise of the right.[125] The third State is completely free to decide whether it complies with the conditions laid down by the parties to the original treaty or not. If it prefers not to comply with them, it loses the entitlement to exercise the right accorded to it but is not subject to any obligation *stricto sensu*

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[117] *Ibid* 92.

[118] Final Draft, Commentary to Art 32, 229 para 8.

[119] See *Y Dinstein* The Interaction between Customary International Law and Treaties (2006) 322 RdC 243, 336 *et seq*. Art 35 para 2 UN Charter reads: "A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter."

[120] Reproduced in *Waldock* VI 69.

[121] *Waldock* VI 71.

[122] Final Draft, Commentary to Art 32, 229 para 8.

[123] *Cf Waldock* VI 69.

[124] Final Draft, Commentary to Art 32, 229 para 8; *Waldock* VI 71.

[125] *Waldock* III 26; *Rozakis* (n 9) 20.

established to its disadvantage.[126] Only where a "condition" applies irrespective of the exercise or subsequent to the exercise of a right must that condition be considered as constituting an obligation in terms of Art 35.[127]

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E Jiménez de Aréchaga Treaty Stipulations in Favour of Third States (1956) 50 AJIL 338–357.
For further references, see the bibliography attached to the commentary on Art 34.

[126]See *Fitzmaurice* (n 52) 53.
[127]*Rozakis* (n 9) 20.

Article 37

Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Contents

A. Purpose and Function

Art 37 complements the rules on the establishment of obligations and rights for third States contained in Arts 35 and 36 in respect of their **revocation and modification**. In the course of negotiations, several members of the ILC[1] and government delegations[2] assumed that the provision was partly or even completely superfluous. Considerable confusion and disagreement arose from the fact that the Commission could not agree on a uniform position as to the doctrinal fundament of rights for **1**

[1] *Jiménez de Aréchaga* [1966-I/2] YbILC 83; *Tsuruoka* [1966-I/2] YbILC 88.

[2] See the comments made by the governments of the Netherlands and Greece, reproduced in *Waldock* VI 71 *et seq*.

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third States in terms of Art 36.[3] In this respect, the question whether the consent of the third State was mandatory for the revocation or modification of a right accorded to that State could, as a matter of principle, only be answered in the negative from the perspective of the concept of *stipulation pour autrui* (→ Art 36 MN 18–25).[4] Naturally, the issue concerned also influenced the positions taken as to whether a presumption of revocability or a presumption of irrevocability should be included. The examples given clearly show that the problems which appeared in the context of the preceding articles are likely to have a strong impact on any interpretation of Art 37 VCLT. While the **doctrinal inconsistencies** resulting therefrom prompted one ILC member to abstain from voting since "there should be some logic in the matter",[5] which, according to that member, was not the case with regard to the wording of the then Draft Art 61, the majority of the members of the ILC accepted that the theoretical differences must not prevent it from reaching an agreement on the provision.[6] Thus, the view was taken that "[t]he Commission should adopt as neutral a formulation as possible".[7] As will be shown in the following (→ MN 8–11), the approach chosen brings about considerable problems in the interpretation of the provision.

B. Historical Background and Negotiating History

2 With regard to the rules contained in Art 37 VCLT, negotiations conducted within the ILC mainly focused on three separate, yet intimately connected aspects, namely whether revocation and modification of rights and obligations should be treated in an equal way, whether the modification of an obligation or right required the consent of the third State, and whether there should be any presumption in favour of acceptance of that State.

3 The provision originally suggested by SR *Waldock* in his third report only referred to the amendment or termination of a treaty provision providing for a **right** for a third State[8] and was based on the concept of *stipulation pour autrui*, the consequence being that the parties to the original treaty could subsequently alter its provisions without seeking the consent of the beneficiary. Unsurprisingly, the proposed article met with **opposition from several members** of the ILC in the course of the 16th session who, based on the collateral agreement theory, insisted on the necessity of the third State's consent.[9] *Waldock* conceded that disagreement

[3] See *Ago* [1966-I/2] YbILC 89; *El-Erian* [1966-I/2] YbILC 89.

[4] *Jiménez de Aréchaga* [1964-I] YbILC 88; but see *Waldock* [1964-I] YbILC 86.

[5] *Reuter* [1966-I/2] YbILC 176.

[6] See *eg Ago* [1964-I] YbILC 91; *Verdross* [1964-I] YbILC 94.

[7] *De Luna* [1966-I/2] YbILC 90.

[8] *Waldock* III 20 (Draft Art 62 para 3); for the general historical background, see Art 34 MN 3–4.

[9] *Castrén* [1964-I] YbILC 82; *Yasseen* [1964-I] YbILC 86; *Bartoš* [1964-I] YbILC 92; *Lachs* [1964-I] YbILC 93.

on a matter of principle should not prevent the formulation of a provision satisfactory to all and suggested redrafting the paragraph "by indicating that, where the State had accepted the right conferred on it, that right would be irrevocable without its consent".[10] He thereby drew a direct line to the compromise achieved in respect of the conditions under which a treaty could lawfully provide for rights of third States (→ Art 36 MN 18–25).

4 In its 1964 report to the General Assembly, the ILC presented a **separate** Draft Art 61 dealing with the revocation or amendment of provisions regarding **obligations and rights** of third States, which contained the compromise formula proposed by *Waldock*[11] as well as a **presumption of irrevocability** of the respective provision.[12] Although the ILC reasoned that a beneficiary State would normally not have any interest in objecting to the revocation of a provision subjecting it to an obligation, it decided to implement the requirement of consent also for obligations in order to cover all possible circumstances.[13]

5 The provision suggested by the ILC met with **considerable criticism** from several governments. For example, the delegation of Hungary pointed to the fact that as an obligation could only lawfully be established for a third State in the event that the State expressly accepts the obligation, the same should hold true with regard to the revocation or modification of the obligation concerned.[14] The government of the Netherlands embraced the doubts expressed by the Commission in its 1964 report by stating that the complete or partial withdrawal of an obligation imposed on a third State would not require that State's assent as long as it did not give rise to a new obligation. Furthermore, it claimed that the rule should protect the third State against withdrawal or modification of the right accorded, rather than of the provision from which the right was derived.[15] The United Kingdom argued that as far as rights were concerned, the provision should contain a presumption of revocability instead of irrevocability, as it might otherwise over-safeguard the position of the third State.[16] In his sixth report, SR *Waldock* essentially agreed with the contention made by the Netherlands that "it is somewhat illogical to require [the consent of the third State] for the termination or reduction of an obligation".[17] In order to provide the ILC with a basis for discussion, he drafted a new Art 61, which directly referred to and differentiated between obligations and rights. It also took note of the objection made by the United Kingdom by

[10] *Waldock* [1964-I] YbILC 86.

[11] ILC Report 16th Session [1964-II] YbILC 174, 184. Draft Art 61 read: "When an obligation or right has arisen under article 59 or 60 for a State from a provision of a treaty to which it is not a party, the provision may be revoked or amended only with the consent of that State, unless it appears from the treaty that the provision was intended to be revocable."

[12] *Cf* the comments made by *Rosenne* [1964-I] YbILC 89; *Waldock* [1964-I] YbILC 96.

[13] The extension of the provision to obligations had not been a matter of discussion within the ILC.

[14] Reproduced in *Waldock* VI 71.

[15] *Ibid* 71 *et seq*.

[16] *Ibid* 72; see also the comment made by the Government of Israel *ibid* 71.

[17] *Ibid* 73.

including a presumption of revocability in the case of rights accorded to a third State.[18]

6 The new draft provision suggested by *Waldock* was intensely debated within the ILC. While most members supported the **separate treatment of obligations and rights**,[19] the Commission was divided on the suggestion to **reverse the presumption of revocability** on the question of rights.[20] However, as even the advocates of the collateral agreement theory admitted that the 1964 text went too far in safeguarding the rights of third States,[21] the ILC eventually agreed to adopt the proposal presented by *Waldock*. The Drafting Committee slightly rephrased the proposal and submitted a text virtually identical to Art 37 VCLT. After the members of the Commission agreed to include references to the preceding articles on obligations and rights,[22] para 1 was adopted by 16 votes to none with two abstentions, and para 2 by 15 votes to one with two abstentions. The provision was not subject to any further controversy in the course of the Vienna Conference.

7 The *travaux préparatoires* of Art 37 clearly reveal the close interrelationship between the issue of revocation or modification of rights and the persisting **doctrinal ambiguity** as to the legal basis for the conferral of rights on third States. In this respect, it is not surprising that those members of the ILC advocating a presumption of revocability consisted of the same group of persons who supported the concept of *stipulation pour autrui* in the context of Art 36. The primary reason for the representatives of the collateral agreement theory to be able to agree to the rule contained in Art 37 para 2 is arguably to be seen in the fact that the uniform treatment of obligations and rights contained in the 1964 draft would have seriously limited the freedom of States Parties to the original treaty to revoke or modify their **obligations resulting directly from the conferral of rights** on third States.[23] This consideration was most clearly expressed by the governments of Israel, the United Kingdom and the United States observing that the proposed rule would excessively safeguard the position of third States.[24] In the case of obligations, the respective interests of the parties to the original treaty and the third State are reversed, since it

[18] *Ibid* 73.

[19] *Briggs* [1966-I/2] YbILC 83; *Castrén* [1966-I/2] YbILC 87; *El-Erian* [1966-I/2] YbILC 89; *contra Ago* [1966-I/2] YbILC 85; *Rosenne* [1966-I/2] YbILC 87.

[20] In the affirmative, *Briggs* [1966-I/2] YbILC 83; *Jiménez de Aréchaga* [1966-I/2] YbILC 84; *id* [1966-I/2] YbILC 90; *de Luna* [1966-I/2] YbILC 86; *Castrén* [1966-I/2] YbILC 90; *Tsuruoka* [1966-I/2] YbILC 90; *contra Yasseen* [1966-I/2] YbILC 85; *Bartoš* [1966-I/2] YbILC 86; *Tunkin* [1966-I/2] YbILC 86 *et seq*; *Ago* [1966-I/2] YbILC 89.

[21] *Ago* [1966-I/2] YbILC 84.

[22] See the comments made by *Yasseen* [1966-I/2] YbILC 175; *Briggs* [1966-I/2] YbILC 175; *Bartoš* [1966-I/2] YbILC 176; *Waldock* [1966-I/2] YbILC 176; *contra Rosenne* [1966-I/2] YbILC 176.

[23] See also *CL Rozakis* Treaties and Third States: A Study in the Reinforcement of the Consensual Standards in International Law (1975) 35 ZaöRV 1, 22.

[24] *Cf Waldock* VI 71 *et seq*.

is the obligated third State whose legal position must be protected.[25] Having said that, in contrast to what was stated by SR *Waldock* and the government of Netherlands in 1966, it is submitted that the rule contained in Art 37 para 1 dealing with the revocation or modification of obligations is consistent with Art 35 VCLT only due to the existence of the requirement of the third State's consent. Holding that a simple notice to the third State is fully sufficient[26] would conflict with the received opinion that an obligation can only arise for a third State on the basis of a collateral agreement concluded between the parties to the original treaty, on the one hand, and the third State, on the other (→ Art 35 MN 12–14).[27] Consequently, any such collective unilateral notice of revocation or modification of the obligation concerned must be interpreted as an offer made *vis-à-vis* the third State to conclude a further secondary agreement by virtue of which the obligation is revoked or modified. Against this background, the ILC, by adhering to the presumption of irrevocability in the context of obligations, provided for the necessary systematic consistency within Part III Section 4 of the Convention.

C. Scope of the Provision

With regard to the **scope of Art 37**, one source has stated that "it is not entirely clear whether the provisions of article 37 relate exclusively to revocation or modification of rights and obligations of the third State, or whether they also relate to the very treaty which established them".[28] The underlying issue, namely the **relation between Art 37 and the provisions of Parts IV and V of the Convention** on modification and termination of treaties, was first raised by the government of Israel in a comment to the 1964 Draft Articles.[29] SR *Waldock* reacted in his sixth report by stating that **8**

> "[c]learly, the ordinary rules regarding termination and modification of treaties apply as between the parties with respect to the termination or modification of the treaty provision giving rise to the third State's obligation or right. But it is not so clear that the termination or modification of the obligation or right as between them and the third State is a simple question of the termination or modification of treaties. [. . .] The Special Rapporteur feels that the question of termination or amendment of the 'provision' as such should be left to be governed by the general law laid down in the articles concerning termination and modification of treaties; and the present article should confine itself to the relationship between the parties and the third State."[30]

[25] See Final Draft, Commentary to Art 33, 230 para 2.

[26] *Waldock* VI 73; see also Final Draft, Commentary to Art 33, 230 para 3.

[27] *Verdross* [1966-I/2] YbILC 83; *Yasseen* [1966-I/2] YbILC 85; *Tunkin* [1966-I/2] YbILC 86; see also *Sinclair* 103.

[28] *M Fitzmaurice* Third Parties and the Law of Treaties (2002) 6 Max Planck UNYB 37, 57; see also *C Chinkin* Third Parties in International Law (1993) 42; *P D'Argent* in *Corten/Klein* Art 37 MN 3.

[29] Reproduced in *Waldock* VI 71.

[30] *Waldock* VI 73; see also *Yasseen* [1966-I/2] YbILC 85; *Castrén* [1966-I/2] YbILC 87.

9 The subject matter was further examined in the 855th and 868th meetings of the ILC. *Rosenne* pointed to the fact that the word "revoke" instead of "terminate" had intentionally been used in order to distinguish the scope of Art 37 from that of the general provisions dealing with termination of treaties.[31] In respect of the line of argument advocated by *Waldock*, he criticized that it should be taken into account that any collateral agreement, when concluded in written form (as required under Art 35), was a treaty in terms of the Convention, and, thus, the provisions on modification and termination of treaties would generally be applicable.[32] Other members of the ILC pleaded that the respective provision failed to cover the cases of fundamental change of circumstances and emergence of a new rule of *ius cogens*.[33] In such a situation of nullity of the original treaty, the question arose whether the collateral agreement (if deemed necessary), and the rights and/or obligations contained therein respectively, **could continue to exist independent of the main treaty**.[34]

10 When assessing the issue relevant here, it should be noted that the wording of Art 37, as opposed to the text of the corresponding provision originally proposed by SR *Waldock* in his third report,[35] does not refer to the treaty provision containing the respective obligation or right conferred upon the third State, but rather to the obligation or right itself. Indeed, both the textual analysis and the *travaux préparatoires* reveal that Art 37 on the one hand and the general provisions on modification and termination of treaties on the other do not refer to the same situation. The difference in substance was expressed most clearly by SR *Waldock* in his sixth report and strongly militates against any interpretation under which Art 37 would displace the relevant provisions contained in Parts IV and V of the Convention.[36]

11 The remaining question is whether nullity of the original treaty resulting from *eg* the emergence of a new rule of *ius cogens* (→ Art 64 MN 14–15) **automatically renders the obligations and/or rights of the third State null and void**. With regard to rights, if one follows the concept of *stipulation pour autrui* (which, according to the present author, is valid under customary international law; → Art 36 MN 18–25), it seems that the answer to that question must mandatorily be yes, as the validity of the right concerned derives directly from the original treaty. The situation is more complicated with regard to obligations or, with a view to rights, on the grounds of the collateral agreement theory. In this respect, *de Luna* recalled that there is "a second, or collateral, agreement between the third State and the parties to the main treaty, a collateral agreement that was governed by all the rules applicable to

[31] *Rosenne* [1966-I/2] YbILC 85.

[32] *Rosenne* [1966-I/2] YbILC 87.

[33] *Ago* [1966-I/2] YbILC 85.

[34] Negatively *Ago* [1966-I/2] YbILC 175; *Jiménez de Aréchaga* [1966-I/2] YbILC 175; *Bartoš* [1966-I/2] YbILC 175.

[35] *Waldock* III 20 (Draft Art 62 para 3).

[36] See also *Chinkin* (n 28) 42.

treaties".[37] Thus, the decisive point seems to be whether the legal consequence of nullity of a treaty under the general provisions of the Convention extends to the mere offer of the parties to the original treaty made *vis-à-vis* the third State to conclude a collateral agreement, and not only to the (original) treaty itself.[38] It is submitted that while there is a clear presumption in favour of a positive answer, the issue is one of treaty interpretation and furthermore depends on the scope of Arts 62 and 64.

D. Elements of Article 37

I. Obligation (para 1)

→ Art 34 MN 13–26 **12**

II. Third State (paras 1 and 2)

→ Art 34 MN 10–12 **13**

III. In Conformity with Article 35 (para 1)

With regard to its clear wording, Art 37 para 1 VCLT is only applicable if the obligation concerned has arisen in conformity with Art 35. This is of particular importance with regard to the written form requirement contained in that provision. Additionally, the obligation **must still be effective** at the time the third State or the States Parties to the original treaty invoke the rule on revocation or modification of obligations. Should its continuing validity be contested, it is up to the State invoking Art 37 para 1 to prove that an obligation has validly been established for a third State, and that the obligation has not yet ceased to exist.[39] **14**

IV. Revocation or Modification (para 1)

Revocation of an obligation refers to the act of its annulment. It is meant to lead to the **final termination** of the obligation concerned. In case of modification, it seems that the obligation originally established *vis-à-vis* the third State is changed in its substance but not completely terminated. However, on closer analysis, **every modification involves an element of revocation**, as the previous obligation is terminated in its original scope and replaced with a new (and not necessarily **15**

[37] *De Luna* [1966-I/2] YbILC 175.

[38] In the affirmative, see *Ago* [1966-I/2] YbILC 175.

[39] *Rozakis* (n 23) 23.

weaker) one.[40] If this reasoning is accepted, then the second element of the process of a modification, *ie* the establishment of a new obligation, directly falls into the scope of Art 35 VCLT.[41] It is submitted that this conclusion is highly relevant in respect of the element of consent of the States Parties to the original treaty and the third State (→ MN 16–18).

V. Consent (para 1)

16 Art 37 para 1 requires the consent of the parties to the original treaty and the third State for an obligation to be revoked or modified in a legally valid way. The ILC took the view that this rule "is clearly correct if it is the third State which seeks to revoke or modify the obligation" but found the requirement of **cumulative acceptance** less mandatory in cases where the parties to the original treaty simply renounce their right to call for the performance of the obligation by the third State.[42] However, according to the present author, this reasoning neglects that the obligation is established by way of a collateral agreement concluded between the parties to the original treaty, on the one hand, and the third State, on the other, which cannot be modified unilaterally without the consent of the third State (→ MN 7).

17 Art 37 para 1 does not indicate whether the States concerned have to comply with any **formal requirements** when expressing their consent. This is particularly striking since the general provision dealing with the establishment of obligations for third States, Art 35 VCLT, insists on acceptance being communicated in writing (→ Art 35 MN 16–19). As far as can be seen, in the course of the negotiations, the issue was only addressed by the government of Hungary, claiming that the relevant article should be brought in line with the preceding provisions on the creation of obligations and rights of third States (→ MN 7). Due to the fact that the second element of every **modification** of an obligation, *ie* the establishment of a new obligation, falls within the scope of Art 35 (→ MN 14), it is submitted that in such a situation, consent of the third State **must be given in writing**, irrespective of whether or not the new obligation appears to be more severe from the perspective of the third State.[43] Any other conclusion would ignore that consent of the third State is always mandatory due to the contractual relationship established by the conferral of the obligation. Having said that, since revoking an obligation does not

[40] *G Napoletano* Some Remarks on Treaties and Third States under the Vienna Convention on the Law of Treaties (1977) 75 Italian YIL 75, 81; *Fitzmaurice* (n 28) 56 *et seq*.

[41] *Cf* the comment made by the Netherlands, reproduced in *Waldock* VI 72.

[42] Final Draft, Commentary to Art 33, 230 para 3; see also *P D'Argent* in *Corten/Klein* Art 37 MN 5.

[43] Partly different *P D'Argent* in *Corten/Klein* Art 37 MN 6: "mais il paraît logique d'appliquer dans un tel cas des exigences de l'article 35, dans la mesure où la modification de l'obligation initiale s'apparente à la création d'une nouvelle obligation *plus lourde* pour le tiers débiteur" (emphasis added).

imply the establishment of a new obligation, in that alternative, consent of the third State can even be communicated implicitly.

As regards the **point of time** in which consent must be expressed, the decisive consideration, though it is with regard to rights, is contained in a statement made by *Yasseen* in the course of the 16th session in which he pointed to the relevance of the original treaty.[44] Indeed, while the consent would normally have to be given when one of the parties to the collateral agreement expresses its willingness to revoke or modify the obligation of the third State contained therein, Art 37 para 1 does not exclude the situation that the parties to the original treaty and the third State agree in advance on the possibility of a future revocation or modification of the obligation concerned in the collateral agreement.[45] In that case, the "previous consent to this procedure would be the legal basis to establish different rights and obligations for the third State itself".[46] **18**

VI. Unless It Is Established That They Had Otherwise Agreed (para 1)

The second clause of Art 37 para 1 reveals that the rule contained in the first clause is of **residual character**, *ie* it only applies if and to the extent to which the parties to the collateral agreement have not provided for an alternative arrangement as to the revocation or modification of the obligation.[47] The use of the word "unless" implies that the burden of proof for providing evidence of the conclusion of such an arrangement must be carried by the States Parties to the original treaty objecting to the necessity of consent of the third State.[48] It may, thus, be said that Art 37 para 1 embodies a **presumption of irrevocability** of the obligation concerned. Contrary to what has been argued by one source,[49] the relevant rule may also be contained in the collateral agreement itself, and no reason exists as to why that agreement should not be able to provide for the revocation or modification of the third State's obligation **without the consent** of the parties to the original treaty and the third State.[50] Even if "otherwise" agreed in a separate instrument, it should be noted that any such alternative agreement must be concluded by *all* States Parties to the collateral agreement.[51] **19**

[44] *Yasseen* [1964-I] YbILC 93.

[45] *Fitzmaurice* (n 28) 57; *Napoletano* (n 40) 82.

[46] *Napoletano* (n 40) 82.

[47] *Cf Rozakis* (n 23) 23; *P D'Argent* in *Corten/Klein* Art 37 MN 7; *Sinclair* 103.

[48] Similar *P Cahier* Le problème des effets des traités à l'égard des États tiers (1974) 143 RdC 589, 648 *et seq*.

[49] *Fitzmaurice* (n 28) 56.

[50] *Napoletano* (n 40) 79.

[51] See *P D'Argent* in *Corten/Klein* Art 37 MN 7.

VII. Right (para 2)

20 → Art 34 MN 27–28

VIII. In Conformity with Article 36 (para 2)

21 Similar to the situation under Art 37 para 1 (→ MN 14), the *sine qua non* requirement for the applicability of para 2 of the provision is that the right concerned must have been established in accordance with Art 36, and it must still be valid at the time when Art 37 para 2 is invoked by the parties to the original treaty.

IX. Revocation or Modification (para 2)

22 As regards the revocation or modification (→ MN 15) of rights, it should be noted that Art 37 para 2, different to para 1, is drafted **in a negative form**, thereby unfolding the underlying notion of a **presumption of revocability**.[52] As already indicated, the text of the provision represents a compromise formula by which two opposite concerns were merged. In this respect, the ILC in its 1966 report to the General Assembly

> "took note of the view of some Governments that the 1964 text went too far in restricting the power of the parties to revoke or modify a stipulation in favour of the third State and in giving the latter a veto over any modification of the treaty provision. It considered, however, that there are conflicting considerations to be taken into account. No doubt, it was desirable that States should not be discouraged from creating rights in favour of third States, especially in such matters as navigation in international waterways, by the fear that they might be hampering their freedom of action in the future. But it was no less important that such rights should have a measure of solidity and firmness."[53]

Therefore, while agreement on the general presumption of revocability could be reached only due to the fact that the third State would otherwise be over-safeguarded, the element of consent of the third State needed in all cases where the right was intended to be irrevocable or unmodifiable was included to meet the concerns of the supporters of the collateral agreement theory.

X. By the Parties (para 2)

23 Art 37 para 2 only addresses the revocation or modification of the right by the parties to the original treaty.[54] It does **not deal with determining the conditions**

[52] *Rozakis* (n 23) 23.

[53] Final Draft, Commentary to Art 33, 230 para 4.

[54] *Cf* Art 18 lit b Harvard Draft.

which have to be met **by the third State** with regard to the revocation or modification of its acceptance of the right.[55] In this respect, *Aust* argues that "[t]here is no need to provide for revocation by the third state of its rights, since it can always decline to exercise them".[56] From a factual viewpoint, this line of argument is certainly correct. However, as regards legal doctrine, at least from the perspective of the collateral agreement theory, it seems problematic to refer the third State to the possibility to withdraw its assent made under Art 36 by its attitude or by an express position,[57] since in that case, the restrictions on unilateral termination of treaties would apply.[58] Even under the concept of *stipulation pour autrui*, a third State may be estopped from withdrawing its assent due to the presumption contained in Art 36 (→ Art 36 MN 26). In these situations, renouncement of the right may be exercised only under the terms of the original treaty or (if deemed necessary) the collateral agreement.

XI. If It Is Established (para 2)

As stated above, Art 37 para 2 is based on the concept of a presumption of revocability. The usual situation foreseen by Art 37 para 2 is thus that the parties to the original treaty wish the third State's rights to be revocable, and "they could so specify in the treaty or in negotiations with the third State".[59] The second clause of the provision serves as a counterbalance to that concept by laying down conditions under which a right may only be revoked or modified with the consent of the third State. It may, thus, be best understood in terms of an **exception clause**. Consequently, different to the situation under Art 37 para 1, the **burden of proof** to establish that the right was intended not to be revocable or subject to modification without the consent of the third State rests with that very State.[60] If it succeeds in doing so, revocation or modification without its consent is unlawful. **24**

XII. Intended Not to Be Revocable or Subject to Modification (para 2)

Whether the presumption of revocability applies depends mainly on the **intention** of the parties to the original treaty, or, if a collateral agreement is deemed necessary, of the parties to the original treaty and the third State. The element of intention, which is by definition of **subjective** nature, may cause problems for the third State who carries the burden of proof to establish that the right was intended not to be revocable or **25**

[55]Final Draft, Commentary to Art 33, 230 para 4; *Napoletano* (n 40) 79.

[56]*Aust* 260; consenting *P D'Argent* in *Corten/Klein* Art 37 MN 9.

[57]However, see *Rozakis* (n 23) 24.

[58]*Chinkin* (n 28) 42.

[59]Final Draft, Commentary to Art 33, 230 para 4.

[60]See *P D'Argent* in *Corten/Klein* Art 37 MN 11; *Cahier* (n 48) 636.

subject to modification without its consent.[61] The ILC, being well aware of the situation, concluded that "[t]he irrevocable character of the right would normally be established either from the terms or nature of the treaty provision giving rise to the right or from an agreement or understanding arrived at between the parties and the third State".[62] The conclusion that must be drawn from the foregoing is that the subjective element can be approached by recourse to objective parameters. Similar to the cases of Arts 35 and 36 VCLT (→ Art 35 MN 11), the third State may arguably rely on the general principles of interpretation in order to prove that the right concerned may not be revoked or modified without its consent. In this respect, one source has asked whether the **lack of a specific clause** on the subject contained in the original treaty indicates that the right is revocable.[63] It is submitted that the answer to that question must be yes. If one agrees with the general view that Art 37 para 2 is based on a presumption of revocability and that it is up to the third State to submit evidence in favour of any rule to the contrary, it seems problematic to refer to a general principle under which a treaty must generally be considered as established for an open period of time.[64] Having said that, the lack of any such provision defining the right concerned as irrevocable constitutes no more than a mere presumption, which may be refuted by the third State.

XIII. Consent (para 2)

26 In the same way as Art 36, Art 37 para 2 does not contain any **formal requirements** relevant to the way in which the third State shall communicate its consent. Thus, consent may be forwarded expressly or impliedly by conduct. It should be noted that the presumption of assent contained in Art 36 cannot be applied to the third State's consent in terms of Art 37 para 2. Such reasoning would not only overstretch the wording of that provision (which does not contain any reference similar to that of Art 36), but would also ignore the main purpose of its second clause, namely to act as a counterbalance to the presumption of revocability on which Art 37 para 2 is based.

E. Customary Law Status

27 Given the lack of State practice, Art 37 **cannot be considered as reflecting international customary law**.

Selected Bibliography

See the bibliography attached to the commentary on Art 34.

[61] *P D'Argent* in *Corten/Klein* Art 37 MN 12.

[62] Final Draft, Commentary to Art 33, 230 para 4.

[63] *Fitzmaurice* (n 28) 56.

[64] For the contrary view, see *Napoletano* (n 40) 80.

Article 38

Rules in a treaty becoming binding on third States through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

Contents

A. Purpose and Function

SR *Fitzmaurice* stated in his fifth report with regard to the proposed Draft Art 16, addressing the case of customary international law obligations mediated through the operation of law-making or norm-enunciating treaties that it "attempts to describe a process rather than to formulate a rule".[1] Indeed, viewed from today's perspective, the legal statement contained in Art 38 of the Convention seems to be self-evident in nature. The ILC was well aware of its **limited substantive scope**. By including a corresponding provision in its 1964 and 1966 Draft Articles respectively, it only **1**

> "desired to emphasize that the provision in the present article is purely and simply a reservation designed to negative any possible implication from articles 30 to 33 that the draft articles reject the legitimacy of the above-mentioned process. In order to make it absolutely plain that this is the sole purpose of the present article, the Commission slightly modified the wording of the text provisionally adopted in 1964."[2]

Notwithstanding these very clear terms, some governments argued that the inclusion of the then Draft Art 62 was unnecessary.[3] During the Vienna Conference, amendments were submitted by Finland[4] and Venezuela,[5] which aimed at a **2**

[1] *Fitzmaurice* V 94.

[2] Final Draft, Commentary to Art 34, 231 para 3; see also *Waldock* VI 74; *Ago* [1966-I/2] YbILC 93: "an absolute truth".

[3] See the comments made by the governments of Finland, Greece and the Netherlands, reproduced in *Waldock* VI 73 *et seq*.

[4] UN Doc A/CONF.39/C.1/L.142, reprinted in UNCLOT III 155.

[5] UN Doc A/CONF.39/C.1/L.223, reprinted in UNCLOT III 268.

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complete deletion of Art 38 from the Convention, but were **ultimately rejected** by a comparatively large majority of 63 votes to 14, with 18 abstentions.[6] According to the representative of Finland, the reason for the amendment was that the provision "had no place in a convention exclusively concerned with the law of treaties".[7] However, this was countered by the representative of Poland stating that "[t]he practical importance of the article lay in the fact that it could provide an effective safeguard against the temptation for a State to invoke its non-participation in a treaty in order to evade rules which were binding on it under another heading".[8] Another reason had been given by individual members of the ILC who referred to the fact that the relevant article had to be retained because the decision not to include an article concerning objective regimes had been accepted by some members of the ILC only on the basis that it would at least partially fill the gap.[9]

3 Against this background, it is justified to conclude that Art 38 is of **declaratory nature** only. The provision neither contains any new conception as to the relationship between treaty law and custom,[10] nor does it prejudge or modify the requirements for the establishment of a rule of customary international law.[11] If this reasoning is accepted, prudence in terms is essential when examining the scope of Art 38. In this respect, it does not seem to be entirely correct to qualify the provision as a "general reservation",[12] "safeguard"[13] or "corrective",[14] since all of these notions imply a legal significance which goes beyond that of the concept of a mere **clarification clause** advocated here. Indeed, the process contained in Art 38 would even be valid if the provision concerned were not included in the Convention.[15]

4 According to the aforementioned, the main objective of Art 38 is to emphasize that Arts 34–37 VCLT do not have any impact on the well-accepted principle that a rule of treaty law may, depending on the circumstances, develop into a rule of customary international law. Nonetheless, it must be noted that in such a case, it is the **rule of customary international law** rather than the treaty rule which binds the

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[6] UNCLOT I 201.

[7] *Ibid* 197.

[8] *Ibid* 197.

[9] *Verdross* [1964-I] YbILC 109; *Reuter* [1964-I] YbILC 109; *Jiménez de Aréchaga* [1964-I] YbILC 109; *El-Erian* [1966-I/2] YbILC 92.

[10] See *Waldock* VI 74: "The article does not establish any new rule".

[11] *Ibid*.

[12] *Waldock* [1966-I/2] YbILC 91; *Rosenne* [1966-I/2] YbILC 178; *Yasseen* [1966-I/2] YbILC 178; Final Draft, Commentary to Art 34, 231 para 2, see also *CL Rozakis* Treaties and Third States: A Study in the Reinforcement of the Consensual Standards in International Law (1975) 35 ZaöRV 1, 38.

[13] *Waldock* [1966-I/2] YbILC 176; *Tunkin* [1966-I/2] YbILC 177. From the domain of legal literature, see *eg G Gaja* in *Corten*/*Klein* Art 38 MN 1.

[14] *Waldock* [1964-I] YbILC 112.

[15] For the lack of legal significance of a reservation formulated by Guatemala relating to Art 38, see *G Gaja* in *Corten*/*Klein* Art 38 MN 3.

third State.[16] Consequently, the respective treaty provision, on the one hand, and the customary rule, on the other, exist **in parallel**.[17] The process contained in Art 38 is therefore not really a situation of the legal effects of treaties on third States,[18] and its integration in Part III Section 4 of the Convention seems appropriate for clarification purposes only.[19] It is submitted that this conclusion might serve as a justification as to why Art 38 only refers to treaties which become "binding on a third State as a customary rule of international law", and not also to the relationship between the States Parties to the original treaty.[20] Having said that, Art 38 is hardly satisfactory as a whole, and it might have been preferable to insert it subsequently to Art 4, to which it is closely associated.[21] In any event, the narrow scope of the provision as indicated by its wording might give rise to the misunderstanding that a rule of customary international law may only emerge from a rule of treaty law under the conditions mentioned therein.

B. Historical Background and Negotiating History

One source has rightly analysed that irrespective of its lack of practical relevance, few articles presented by the ILC provoked the degree of controversy within the Vienna Conference of the level of Draft Art 34 (Art 38 VCLT).[22] **5**

Except for the efforts mentioned above to completely delete the provision from the Convention (→ MN 2), discussions focused on **two main issues**, namely whether reference should be made to the general principles of international law, and whether the words "recognized as such" should be included at the end of the article. Prior to the Vienna Conference, the Commission had furthermore concentrated on the relationship between Art 38 and the concept of objective regimes. **6**

[16] *Fitzmaurice* V 96; ILC Report 16th Session [1964-II] YbILC 173, 184; Final Draft, Commentary to Art 34, 231 para 2; *Ago* [1966-I/2] YbILC 91; *Waldock* [1966-I/2] YbILC 176 *et seq*; see also *RF Roxburgh* International Conventions and Third States (1917) 73 *et seq*.

[17] *Bartoš* [1966-I/2] YbILC 177; *id* [1966-I/2] YbILC 179. That a rule of international customary law and treaty law may exist in parallel is a well-established phenomenon in international law; *cf* only ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, para 73; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, para 178; *G Gaja* in *Corten/Klein* Art 38 MN 9.

[18] *Waldock* III 34; *Tunkin* [1964-I] YbILC 110; *de Luna* [1964-I] YbILC 111; ILC Report 16th Session [1964-II] YbILC 173, 184; Final Draft, Commentary to Art 34, 231 para 2. See also *CJ Tams* Enforcing Obligations *erga omnes* in International Law (2005) 83 n 167.

[19] *Tsuruoka* [1964-I] YbILC 111; *Liu* [1964-I] YbILC 111; but see *Tunkin* [1964-I] YbILC 110; *de Luna* [1964-I] YbILC 111, who considered transferring the article to a different part of the draft.

[20] See the question posed by *G Gaja* in *Corten/Klein* Art 38 MN 9.

[21] *G Gaja* in *Corten/Klein* Art 38 MN 10.

[22] *Rozakis* (n 12) 28; for the general historical background, see → Art 34 MN 3–4.

While the latter aspect has already been commented upon earlier (→ Art 34 MN 32–59), it seems appropriate to deal with the other two points in the context of the relevant elements of the provision.

C. Elements of Article 38

I. Nothing in Articles 34–37 Precludes

7 The first element of Art 38 clarifies that Arts 34–37 do not have any impact on the generally accepted principle that a rule of treaty law may develop into a rule of customary law, provided that the legal requirements for such a development are fulfilled in the respective situation. While its wording exclusively refers to the preceding provisions of Part III Section 4 of the Convention, the rule contained in the provision is by no means limited to third States under general international law (→ MN 3).[23] Art 38 was included in the context of the *pacta tertiis* principle primarily **for clarification purposes** (→ MN 1–2), and the fact that the provision was drafted in negative terms further indicates the lack of substantial content.[24] Viewed from that perspective, the proposal made by one member of the Commission in the course of the 856th meeting to delete the words "Nothing in articles 58 to 60 precludes" would have deserved approval[25] for its dogmatic consistency. However, the majority of ILC members rejected the proposal with reference to the fact that the Commission had intentionally decided to frame an article of a restricted character in its 1964 session.[26]

II. A Rule Set Forth in a Treaty

8 The process described in Art 38 is initiated by "a rule set forth in a treaty", the latter term referring to the definition of "treaty" contained in Art 2 VCLT (→ Art 2 MN 3–45). Both the inclusion of Art 38 in Part III Section 4 of the Convention and the reference made to a "third State" reveal that the provision requires the treaty concerned to have **entered into force**. This conclusion may easily be drawn from the definition of the term "third State" contained in Art 2 para 1 lit h VCLT

[23] See *Rosenne* [1964-I] YbILC 331.

[24] *Waldock* [1964-I] YbILC 109; see also *ME Villiger* Customary International Law and Treaties (2nd edn 1997) 171.

[25] *Ago* [1966-I/2] YbILC 93. The Drafting Committee had initially replaced the reference to Draft Arts 58–60 (Arts 34–37 VCLT) by the words "the present articles", but the specific reference was restored following corresponding comments of some members of the Commission; see *Yasseen* [1966-I/2] YbILC 178; *Rosenne* [1966-I/2] YbILC 178; *Tunkin* [1966-I/2] YbILC 178–179.

[26] See *eg Tunkin* [1966-I/2] YbILC 93; *Waldock* [1966-I/2] YbILC 93–94.

(→ Art 34 MN 6–9).[27] Therefore, it is significant that the advance made by one member of the ILC challenging the necessity of any reference to third States[28] was rejected, as Art 38 would otherwise "be stating a rule which was already applied in general international law and it would not be necessary to state it in the draft".[29] Having said that, for the sake of clarity it must be emphasized again that the process described in Art 38 is valid with regard to **any** State under general international law.

9 Art 38 does not differentiate between '**normative**' or '**law-making**' **treaties**, on the one hand, which were considered by some sources as stipulating abstract principles and rules of general application,[30] and mere '**contracts**', on the other (→ Art 2 MN 14).[31] The ILC addressed the issue (on which agreement has never been reached in legal literature) in the course of its 1964 session,[32] but ultimately decided not to deal specially with the case of 'law-making' treaties.[33] From the perspective of legal doctrine, one source has rightly stated that "[e]ven bilateral contract-treaties are 'law-making' for their parties [and] as long as they are in force".[34] It is true, though, that not every treaty provision is suited to development into a norm of customary law. In this respect, the ICJ held in the *North Sea Continental Shelf* cases that "the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law".[35] While no general agreement exists on the parameters which ought to be fulfilled for a treaty rule to be of such **fundamentally norm-creating character**, it is submitted that the provision concerned must at all events be of a sufficiently abstract and general (non-technical) nature.[36] However, it should be noted that the conclusion drawn is primarily relevant not with regard to the scope of Art 38 as such, but rather with regard to the formation of a rule of customary law, *ie* the process described by Art 38.

[27] *Reuter* [1966-I/2] YbILC 177; *Waldock* [1966-I/2] YbILC 179; *Yasseen* [1966-I/2] YbILC 179; see also *G Gaja* in *Corten/Klein* Art 38 MN 6.

[28] *Tsuruoka* [1966-I/2] YbILC 177.

[29] *Amado* [1966-I/2] YbILC 178; see also *Jiménez de Aréchaga* [1966-I/2] YbILC 178; *Tunkin* [1966-I/2] YbILC 178.

[30] *Brierly* 57 *et seq*; *Rozakis* (n 12) 11, 33.

[31] The differentiation seems to emanate from national legal thinking; *cf VD Degan* Sources of International Law (1997) 256. Note that the issue relevant here must not be confused with the distinction made between 'constitutive' and 'declaratory' treaties which only refers to whether a treaty is a mere codification of customary law ('declaratory') or aims at a progressive development of international law ('constitutive') in terms of Art 13 para 1 lit a UN Charter; see *Y Dinstein* The Interaction between Customary International Law and Treaties (2006) 322 RdC 243, 346 *et seq*.

[32] *Waldock* [1964-I] YbILC 109; *Reuter* [1964-I] YbILC 109.

[33] See the observation made by *Waldock* [1964-I] YbILC 112.

[34] *Degan* (n 31) 490.

[35] ICJ *North Sea Continental Shelf (Germany v Denmark, Germany v Netherlands)* [1969] ICJ Rep 3, para 72.

[36] See also *Villiger* (n 24) 178.

III. Becoming Binding upon a Third State

10 It is well accepted in public international law that a rule of treaty law may influence the legal position of third States (→ Art 34 MN 10–12) in two respects, namely as **evidence of a corresponding norm** of customary international law, or as constituting the **starting point for the development** of new customary law.[37] The fact that treaty law may affect the scope of customary law was explicitly acknowledged by the ICJ in the *North Sea Continental Shelf* cases. In its judgment, the Court held that it was perfectly possible that a treaty provision

> "has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio iuris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention."[38]

11 In light of the aforementioned, the Commission naturally had to decide whether Art 38, which directly (even though only declaratorily) addresses the relationship between treaty and custom, should focus on the second option only, or whether it should encompass both alternatives. Whereas SR *Fitzmaurice* had opted for a comprehensive solution in his fifth report,[39] the ILC was somewhat divided on the matter. Those members emphasizing the declaratory character of Art 62 of the 1966 Draft (Art 38 VCLT) reasoned that it would be dangerous to consider only the case where a treaty rule subsequently developed into a rule of customary law.[40] Others took the position that where treaties merely confirmed existing customary law, the binding force of the rules concerned was completely independent of the treaty and should thus not be dealt with in the context of the *pacta tertiis* principle.[41] SR *Waldock* finally reminded the Commission that it had already been decided in 1964 to frame an article of only **restricted character** in order not to go into the details of the controversial relationship between treaty and custom.[42] It was subsequently decided to opt for the limited alternative.

12 The **wording** of Art 38 ("from becoming binding") confirms that the provision only addresses the situation in which a treaty provision **generates a new rule of customary international law** that did not exist at the time when the treaty entered

[37] See only *Fitzmaurice* V 95.

[38] ICJ *North Sea Continental Shelf* (n 35) para 71 (original emphasis).

[39] *Fitzmaurice* V 80 (Draft Art 16).

[40] *Jiménez de Aréchaga* [1964-I] YbILC 109; *Ago* [1966-I/2] YbILC 93; *Briggs* [1966-I/2] YbILC 93; *Amado* [1966-I/2] YbILC 178.

[41] *Lachs* [1964-I] YbILC 110; *Tunkin* [1966-I/2] YbILC 93; *El-Erian* [1966-I/2] YbILC 93.

[42] *Waldock* [1966-I/2] YbILC 93 *et seq*; *id* [1966-I/2] YbILC 178. See also *Tunkin* [1966-I/2] YbILC 177: "there had been no intention on the part of the Commission in 1964, or of the Drafting Committee and the Commission at the present session, to go into the question of substance of the relationship between treaty law and customary law".

into force for its parties.[43] It must be noted, however, that Art 38 does not at all exclude the general validity of ("declaratory") treaties giving evidence of corresponding norms of customary law.[44] On the contrary, the limited scope of the provision is owed to its declaratory nature (→ MN 3, 7) and its incorporation into Part III Section 4 of the Convention.

13 The process described in Art 38 is a **regular phenomenon** in respect of virtually all fields of public international law,[45] and corresponding comments in legal literature, each relating to particular norms, are legion. In the course of the ILC debates, one member of the Commission pointed to the prohibition of war laid down in the Briand–Kellogg Pact as an example of a treaty rule, which subsequently developed into a rule of customary international law.[46] In the *North Sea Continental Shelf* cases, the ICJ undertook an in-depth analysis as to whether Art 6 of the 1958 Geneva Convention on the Continental Shelf dealing with the relevance of the equidistance principle for the process of continental shelf delimitation has developed into a norm of customary law.[47] In the *Fisheries Jurisdiction* case, it discussed whether the concept of preferential fisheries rights of coastal States was to be recognized as valid under customary law due to its inclusion in several bi- and multilateral agreements.[48] An example of a treaty provision which has arguably not yet emerged as a rule of customary international law is Art 218 UNCLOS on port States enforcement jurisdiction (→ Art 34 MN 25).

IV. Customary Rule of International Law

14 The much debated conditions for the emergence of a new rule of customary international law need not be traced in detail in a commentary on Art 38 VCLT. It is quite sufficient to refer to Art 38 para 1 lit b ICJ Statute and, with a view to the present context, to the Court's famous *dictum* in the *North Sea Continental Shelf* cases in which it stated:

[43] *Rozakis* (n 12) 26; *G Gaja* in *Corten/Klein* Art 38 MN 5; unclear *M Fitzmaurice* Third Parties and the Law of Treaties (2002) 6 Max Planck UNYB 37, 61. Due to the reference made to "third States", Art 38 does not cover the situation of customary law crystallizing *ahead* of the consummation of the treaty-making process, let alone the entry into force of the treaty. The validity of the latter situation was emphasized by the ICJ in 1974; see ICJ *Fisheries Jurisdiction (United Kingdom v Iceland)* (Merits) [1974] ICJ Rep 3, para 52.

[44] Note that the ICJ has treated the VCLT itself as an example of such a declaratory treaty; *cf* only ICJ *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 Rep 16, para 94.

[45] See the exemplary list of relevant instruments compiled by *Fitzmaurice* V 95.

[46] *Tunkin* [1966-I/2] YbILC 177.

[47] ICJ *North Sea Continental Shelf* (n 35) para 60 *et seq*.

[48] ICJ *Fisheries Jurisdiction* (n 43) para 58.

> "With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, [that] it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected."[49]

The International Law Association declared in its 2000 London Principles that only "the conduct of parties to a treaty in relation to *non-parties* [. . .] counts towards the formation of customary law", since what "States do in pursuance of their treaty obligations is *prima facie* referable only to the treaty",[50] but it is not beyond all doubt whether such a **clear-cut distinction** between conduct *vis-à-vis* the parties to a treaty and conduct *vis-à-vis* non-parties must be considered as being generally accepted.[51] While the statement of the ICJ cited above seems to point to the negative, the Court stressed in a later passage of its judgment that from the action of States Parties to the respective treaty "no inference could legitimately be drawn as to the existence of a rule of customary international law".[52] Be that as it may, it has rightly been observed that the recent jurisprudence of the Court, if compared with the strict requirements established in the *North Sea Continental Shelf* cases, generally seems to follow a **more pragmatic approach** as to the development of a rule of customary international law from a rule of treaty law.[53]

15 In the course of ILC proceedings, as well as the Vienna Conference, particular attention was paid to two different issues, namely whether the scope of the provision concerned should, with a view to the sources of public international law, be restricted to the relationship between treaty and custom, and, as regards customary international law, whether it would also cover **regional customary law**. While the fifth report of SR *Fitzmaurice* and the third report of SR *Waldock* remained completely silent on these issues, both matters were marginally touched upon in the course of the 1964 session of the ILC.[54] In 1966, the question of regional custom was raised in a comment made by the Netherlands delegation[55] and subsequently became a point of debate in the 856th meeting of the ILC. *Verdross* suggested the insertion of the word "general" before the words "international law" in order to clarify that customary rules of regional or local character were not covered by the article concerned.[56] However, the overwhelming majority of ILC members not only objected to that proposal but explicitly argued in favour of the

[49]ICJ *North Sea Continental Shelf* (n 35) para 73. See also *Nicaragua* (Merits) (n 17) para 184; see also → Art 4 MN 10.

[50]ILA Final Report: Statement of Principles Applicable to the Formation of General Customary International Law (2000) 758 (original emphasis); see also *Fitzmaurice* (n 43) 59.

[51]For a discussion on this issue, see *Dinstein* (n 31) 376–379; *Villiger* (n 24) 183 *et seq*.

[52]ICJ *North Sea Continental Shelf* (n 35) para 76.

[53]See only *G Gaja* in *Corten/Klein* Art 38 MN 14.

[54]*Lachs* [1964-I] YbILC 110: "reference should be made to generally accepted principle [sic!] of law"; *de Luna* [1964-I] YbILC 111; *Ruda* [1964-I] YbILC 111.

[55]Reproduced in *Waldock* VI 74.

[56]*Verdross* [1966-I/2] YbILC 91.

opposite solution.[57] Similarly, suggestions made by Greece and Switzerland in the course of the Vienna Conference to add the term "general" to the wording of the article[58] failed to meet with sufficient support. Against this background, and if one takes into account the wording of the provision as well as the relevant jurisprudence of the ICJ, which has generally accepted the idea of regional customary law,[59] it seems hardly possible to conclude that Art 38 VCLT does not cover regional customary law.[60]

16 In the course of the 1966 session, the inclusion of **general principles of law** in the text of the draft article was advocated by one member of the ILC[61] but not further discussed. The issue came up again during the Vienna Conference when Mexico proposed to add the words "or as a general principle of law" at the end of the article.[62] Notwithstanding considerable support expressed by some delegations,[63] the representative of Iraq rightly observed that while the amendment "was wholly justified from the technical point of view, inasmuch as written law and custom were not the sole sources of international law" and regardless of the fact that

> "[a] general principle could undoubtedly be conceived as being established on the basis of a rule, [. . .] that was hardly likely in practice. A general principle flowed from a legal order, from a whole set of rules. It could not be established on the basis of an article in a treaty without passing through the stage of custom."[64]

The amendment was nevertheless initially adopted by the Committee of the Whole by 38 votes to 28, with 28 abstentions.[65]

17 Prior to the plenary meetings, Nepal and the United Kingdom introduced amendments which aimed at once again **deleting** the reference to the general principles of law.[66] In the following discussions, the crucial point was most clearly expressed by the representative of Greece:

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[57] *Tunkin* [1966-I/2] YbILC 91; *Ago* [1966-I/2] YbILC 91; *Jiménez de Aréchaga* [1966-I/2] YbILC 92; *Yasseen* [1966-I/2] YbILC 92 *et seq*; *Rosenne* [1966-I/2] YbILC 92; *El-Erian* [1966-I/2] YbILC 92; *de Luna* [1966-I/2] YbILC 92.

[58] UNCLOT II 70, 71.

[59] ICJ *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, 276–277; *Right of Passage over Indian Territory (Portugal v India)* (Merits) [1960] ICJ Rep 3, 39. The ILC was well aware of the jurisprudence of the ICJ; *cf Verdross* [1966-I/2] YbILC 91; *Jiménez de Aréchaga* [1966-I/2] YbILC 92.

[60] See *G Gaja* in *Corten/Klein* Art 38 MN 7 consenting.

[61] *Bartoš* [1966-I/2] YbILC 177.

[62] UN Doc A/CONF.39/C.1/L.226, reprinted in UNCLOT III 155.

[63] *Cf* UNCLOT I 198–200.

[64] *Ibid* 200; see also the corresponding statement by *Waldock ibid* 201.

[65] *Ibid* 201.

[66] UN Doc A/CONF.39/L.27, reprinted in UNCLOT III 269; UN Doc A/CONF.39/L.23, reprinted in UNCLOT III 268.

> "The effect of both those amendments would be to delete from the article a reference to the general principles of law. That would be desirable because article 34 [Art 38 VCLT] was a reservation, or a safety clause, which drew attention to the contribution of treaties to the formation of international custom and pointed out that the question of that contribution did not apply to Section 4, especially to article 30 [Art 34 VCLT]. In his delegation's opinion, however, general principles of law should not be mentioned in that context, for those principles of law had their own separate existence, were the result of the coincidence of internal legal systems and, as soon as that coincidence ceased, became customary international law. Thus, although a treaty could play a part in the formation of custom, it could not contribute to the establishment of general principles of law."[67]

The words "or a general principle of law" were **ultimately rejected** by 50 votes to 27, with 19 abstentions by the 15th plenary meeting.[68]

18 From the perspective of legal doctrine, the exclusion of the general principles of law from the scope of Art 38 VCLT appears to be justified.[69] Different to the norms of customary international law, the general principles originate from the **sphere of domestic law**. The impact of a rule of treaty law on the development of a general principle can, if at all, only be of indirect nature, as in all conceivable cases, the rule concerned will first develop into a norm of customary law before enriching the set of principles in terms of Art 38 para 1 lit c ICJ Statute. Having said that, in order to guard against misunderstandings, it must be emphasized that the conclusion drawn here in no way touches the validity of the general principles of law as a source of public international law.

V. Recognized as Such

19 At first sight, the final element of Art 38 appears to be somewhat **superfluous**, since a rule of customary law by definition calls for the existence of a uniform practice "accepted as law" (Art 38 para 1 lit b ICJ Statute). Thus, the words "recognized as such" seem to be a mere repetition of what is already included in the notion of "customary rule of international law". However, if viewed from the historical perspective, a closer analysis reveals that the element concerned represented the **main reason** for the tremendous amount of controversy that Art 38 provoked.

20 The issue came to the fore for the first time on the occasion of a comment made by the Syrian delegation in 1966 suggesting "that the element of recognition should be expressly mentioned in the article in order to avoid any ambiguity".[70] In his sixth report, SR *Waldock* presumed that the delegation had in mind the modification of the draft article concerned "so as to make it read: 'if they have become recognized as customary rules of international law'",[71] but it seems that he misunderstood the

[67] UNCLOT II 70.

[68] *Ibid* 71.

[69] But see *G Gaja* in *Corten*/*Klein* Art 38 MN 4.

[70] Reproduced in *Waldock* VI 74 (footnote omitted).

[71] *Ibid* 74.

underlying intention and clearly underestimated the explosiveness of the proposal. Syria initiated a second (and ultimately successful) attempt in the course of the Vienna Conference by formally introducing an **amendment** to add the words "recognized as such" at the end of the article.[72] This course of action was substantiated by the Syrian delegate in the following terms:

> "More and more new States were joining the international community as subjects of international law with the same sovereign rights as other States and there was no question of imposing upon them customary rules in the formulation of which they had not taken part, particularly since some of the rules originated in treaties that were aimed at safeguarding the individual interests of particular States. [. . .] For such rules to become binding on third States, particularly new States, their obligatory character must be recognized *by the States in question*."[73]

Thus, different to what a superficial reading of Art 38 might imply, the amendment aimed at emphasizing that the rules concerned **must specifically be accepted** by the third State in order to become binding upon it.

21 It is not necessary to trace in detail the fierce discussions held at the Vienna Conference concerning the amendment. Suffice it to point to the fact that the position of Syria was shared by a number of States, primarily newly established and socialist States,[74] but was equally objected to by others.[75] In this respect, the statement made by the delegate of Trinidad and Tobago according to which "it had long been recognized that customary international law was based not only on the existence of a general practice but also on the *opinio juris sive necessitates*",[76] seems particularly noteworthy. It demonstrates that "the Vienna Conference resuscitated thus, through its discussions on that draft article, the age old problem of the binding character of the rules of customary international law".[77] Irrespective of persisting opposition, the amendment was ultimately adopted by 59 votes to 15, with 17 abstentions.[78]

22 Viewed from a contemporary perspective, it seems difficult to hold that Art 38 only applies to those rules of customary law which have been individually recognized by the respective third State.[79] Such reasoning would be **contrary to the concept of customary international law** generally accepted today. It may thus be

[72]UN Doc A/CONF.39/C.1/L.106, reprinted in UNCLOT III 155.

[73]UNCLOT I 197 (emphasis added).

[74]Romania *ibid* 197, Greece *ibid* 198, Czechoslovakia *ibid* 199, Democratic Republic of Congo *ibid* 199, United Arab Republic *ibid* 200, Yugoslavia *ibid* 200.

[75]For example, Italy *ibid* 198 [para 81] (see also UNCLOT II 66), Trinidad and Tobago (UNCLOT I 199).

[76]UNCLOT I 199 (original emphasis).

[77]*Rozakis* (n 12) 31. Further evidence for this contention may be adduced by referring to the statement made by the delegate of the Democratic Republic of Congo (UNCLOT I 199): "It would still be necessary to give a precise definition of international custom. In particular, how many times must a usage be repeated in order to become international custom?"

[78]UNCLOT I 201.

[79]No decision is made on this matter by *Fitzmaurice* (n 43) 62, and *Dinstein* (n 31) 372.

argued that the situation at hand is one covered by Art 31 para 3 lit b VCLT (→ Art 31 MN 76–88). Nor does the wording of Art 38 compel adherence to a strict interpretation of "recognized as such" either, since these words can just as well be understood as a reference to **general recognition**, *ie* recognition by a great number of States, of the rule concerned.[80] As regards its drafting record, it seems that a liberal interpretation could be justified by pointing to the fact that States did not reach agreement on the matter, but such reasoning would, admittedly, ignore the fact that the opponents of the Syrian amendment failed to succeed in preventing its adoption at the Vienna Conference. In any event, it should be noted that Art 38, if strictly interpreted, would not conform to its object and purpose (→ MN 1–4), as it seems difficult to maintain a clear-cut differentiation between individual recognition under Art 38, on the one hand, and consent as required pursuant to Arts 34–37, on the other.[81] In the end, insisting on an individual recognition in the context of customary international law would threaten to blur the difference between treaty and custom as individual sources of public international law.

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[80] *Rozakis* (n 12) 33; *G Gaja* in *Corten/Klein* Art 38 MN 7.

[81] *Cf Rozakis* (n 12) 36 who, while generally advocating a strict interpretation of Art 38, "must admit that the term 'recognition' should in principle mean express acceptance of a rule by a State".

Part IV
Amendment and Modification of Treaties

Article 39

General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide.

Contents

A. Purpose and Function

All treaties may be revised. Part IV of the VCLT (**Arts 39–41**) lays down the two common methods of modifying the content of a treaty: amendment and modification. The term **amendment**, used in Arts 39 and 40, denotes a formal agreement between the States Parties to alter the provisions of a treaty with respect to all of them, whereas the term **modification**, employed in Art 41, refers to an *inter se* agreement concluded between certain States Parties intended to vary provisions of a multilateral treaty in their mutual relations.[1] This theoretically clear-cut distinction, however, proves to be difficult to handle in practice. A modification, for example, might be open to all other States Parties, and in case they accept it, the intended modification finally operates as an amendment. Therefore, the distinction between amendment and modification only refers to the initial intent of the States Parties, and not necessarily to the legal effect they have in the end.[2] **1**

Arts 39 and 40 govern the amendment of treaties. While Art 39 lays down the general principle that a treaty may be amended by an agreement between the States Parties, Art 40 contains specific procedural rules on the amendment of multilateral treaties. Therefore, the **importance of Art 39** mainly lies in its applicability to bilateral treaties[3] as well as in its residual character. Since its content **2**

[1] Final Draft, Commentary to Art 35, 232 para 3.

[2] Final Draft, Commentary to Art 35, 233 para 6; *Sinclair* 107; *RD Kearney*/*RE Dalton* The Treaty on Treaties (1970) 64 AJIL 495, 524.

[3] *Waldock* [1964-I] YbILC 189 para 58; *Briggs* [1966-I/2] YbILC 114 para 29; *Villiger* Art 39 MN 5.

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remains vague, the "elegantly drafted"[4] article allows States to agree on their own procedure for amendment[5] while at the same time providing for stability of treaties.[6]

3 Art 39 **is closely linked to several other provisions** of the VCLT. The general rule that a treaty can only be amended by agreement follows from two principles embodied in the VCLT: the *pacta sunt servanda* principle (→ Art 26), and the general rule of *res inter alios acta* according to which no State can be bound by a treaty against its will (→ Art 34). Therefore, the unilateral action of one or more States Parties does not have any effect on the content of a treaty. On the contrary, it might constitute a breach of the treaty (→ Art 60).[7] A treaty may only be modified according to the common will of the States Parties. Should the treaty provide for rights and obligations of third States, however, their consent might be necessary as well (→ Art 37).[8] Finally, Art 39 explicitly refers to Part II (→ Arts 6–25) and determines that its rules are to be applied to the conclusion and the entry into force of the amending agreement.

B. Historical Background and Negotiating History

4 Neither SR *Brierly*, SR *Fitzmaurice*, SR *Lauterpacht* nor SR *Reuter* included the topic of the amendment and modification of treaties in their reports. This omission was due to the diversity of States practice[9] as well as to the prevailing opinion that the revision of treaties was mainly "a matter for politics and diplomacy".[10] It was **not until 1964** that SR *Waldock* finally presented three articles on the subject (Draft Arts 67–69) in his third report.[11] He explicitly stated, however, that the intention was not to frame a comprehensive system of rules but to formulate basic provisions regarding the revision of treaties.[12]

5 The original articles did not have very much in common with today's Arts 39–41. They initially focused on the right to put forward a proposal to amend or revise a treaty, on the right to be consulted and on the effects of an amending or revising agreement with regard to the rights and obligations of States Parties. The term "modification" was not used. Intense discussions within the ILC followed,[13] and

[4] *Villiger* Art 39 MN 16; *P Sands* in *Corten/Klein* Art 39 MN 13.

[5] *Waldock* [1966-I/2] YbILC 115 para 48.

[6] *P Sands* in *Corten/Klein* Art 39 MN 1 *et seq*, 15; *J Klabbers* Treaties, Amendment and Revision in MPEPIL (2008) MN 2.

[7] *RK Dixit* Amendment or Modification of Treaties (1970) 10 IJIL 37.

[8] *Dixit* (n 7) 39.

[9] *Waldock* III 49 para 19; UN Handbook of Final Clauses (1957) UN Doc ST/LEG/6, 130–152; *ME Giraud* Modification et terminaison des traités collectifs (1961) 49 AnnIDI 5 *et seq*.

[10] *McNair* 534.

[11] *Waldock* III 47 *et seq*.

[12] *Waldock* III 49 para 19.

[13] Statements [1964-I] YbILC 147 *et seq*.

finally SR *Waldock* proposed the presentation of a new draft.[14] The revised version of the three articles of 1964[15] constituted the basis of the provisions subsequently adopted. The distinction between amendment and modification was introduced. In 1966, SR *Waldock* presented a draft consisting of four articles (Draft Arts 65–68).[16] The first three articles corresponded to a large extent to the new draft presented in 1964. The fourth article, however, contained provisions on the modification of treaties by subsequent practice. All four provisions were included into the 1966 Final Draft as Draft Arts 35–38.[17] At the Vienna Conference, only Draft Arts 35–37 were adopted whereas Draft Art 38 was rejected by 53 votes to 15 with 26 abstentions.[18] Most delegations opted for this decision as the content and the conformity of Draft Art 38 with international law had remained too controversial.[19]

Draft Art 65, which became **today's Art 39**, was one of the rather undisputed articles presented by SR *Waldock* in his sixth report in 1966. Only the explicit reference to the written form of the amendment as well as the priority given to "established rules of an international organization" when referring to Part I (today's Part II) of the VCLT led to remarks by five governments.[20] As a consequence, SR *Waldock* proposed the deletion of these words and a presentation of a shorter version of the provision.[21] The new wording was included in the Final Draft as Draft Art 35. After a brief discussion at the Vienna Conference and the withdrawal of two amendment proposals,[22] Draft Art 35 was adopted by 86 votes to none.[23] **6**

The question whether Art 39 reflects **customary law** has to be answered in a differentiated way. Most commentators agree that the provision did not codify an already existing rule of customary law since there was no uniform States practice (→ MN 4) at that time.[24] Due to its wide recognition, however, some authors conclude that its content has become part of customary law in the meantime.[25] According to others, only the principle that a treaty may be amended by agreement between the parties, *ie* only the first sentence of Art 39 reflects customary law.[26] The former customary principle that all States Parties have to agree to an **7**

[14]Statement of the Chairman [1964-I] YbILC 157 para 49.

[15]*Waldock* [1964-I] YbILC 189.

[16]Revised Draft Articles [1966-II] YbILC 112, 119.

[17]Final Draft 182.

[18]UNCLOT I 215.

[19]UNCLOT I 207 *et seq*.

[20]*Waldock* VI 79 *et seq*.

[21]*Waldock* VI 81.

[22]UNCLOT I 205.

[23]UNCLOT II 72.

[24]*Castrén* [1964-I] YbILC 135 para 14; Final Draft, Commentary to Art 35, 232 para 2; *Villiger* Art 39 MN 15.

[25]*Villiger* Art 39 MN 15; UN Handbook of Final Clauses of Multilateral Treaties (2003) 95.

[26]*P Sands* in *Corten/Klein* Art 39 MN 18, 19; *G Dahm/J Delbrück/R Wolfrum* Völkerrecht Vol I/3 (2nd edn 2002) 663.

amendment[27] is, therefore, nowadays only valid for bilateral treaties.[28] The careful wording of Art 39 allows the incorporation of both principles (unanimity for bilateral treaties and agreement between States Parties for multilateral treaties) into the general rule.

C. Elements of Article 39

I. Amendment

8 The **term** amendment denotes a formal agreement between the States Parties to alter the provisions of a treaty with respect to all of them (→ MN 1). In States practice and legal writing, the terminology differs. In some cases, the term "amendment" is used with reference to the alteration of single treaty provisions, while the term "revision" is used for a general review of the whole treaty.[29] In other cases, the terms "revision", "review" and "amendment" are employed synonymously.[30] However, since the terminological differentiation was never uniform,[31] the ILC opted for the term "amendment" covering both the amendment of single provisions and of the whole treaty.[32]

II. Agreement

9 The amendment of a treaty requires an agreement between the States Parties. Therefore, as a general rule, there is **no unilateral right** to demand an amendment or to modify the provisions of a treaty.[33] The *pacta sunt servanda* principle (Art 26) implies the need to act unanimously. A unilateral action might constitute the breach of a treaty.[34]

10 The **form** of the amending agreement is left to the States Parties' discretion; they may choose whatever form they deem appropriate.[35] The ILC considered that the

[27] *H Blix* The Rule of Unanimity in the Revision of Treaties: A Study of the Treaties Governing Tangier (1956) 5 ICLQ 447; *Giraud* (n 9) 97; *P Sands* in *Corten/Klein* Art 39 MN 7; *Aust* 262.

[28] *Dixit* (n 7) 39; *Klabbers* (n 6) MN 1. The author who first recognized and showed the limitations of the former overall principle of unanimity was *EC Hoyt* The Unanimity Rule in the Revision of Treaties: A Re-Examination (1959) 254 *et seq*.

[29] See *eg* Arts 108 and 109 UN Charter; *Dahm/Delbrück/Wolfrum* (n 26) 662.

[30] See *eg WG Grewe* Treaties, Revision in (2000) 4 EPIL 980, 981; *Klabbers* (n 6) MN 1; Final Clauses (n 25) 96.

[31] *P Sands* in *Corten/Klein* Art 39 MN 20; *Grewe* (n 30) 981; *Dixit* (n 7) 38.

[32] Final Draft, Commentary to Art 35, 232 para 3.

[33] *McNair* 534; *Grewe* (n 30) 980; *Dahm/Delbrück/Wolfrum* (n 26) 663; *Dixit* (n 7) 37.

[34] *Dixit* (n 7) 37.

[35] *S Bastid* Les traités dans la vie internationale (1985) 174; *P Sands* in *Corten/Klein* Art 39 MN 22; *Villiger* Art 39 MN 17; *Sinclair* 107; *Dahm/Delbrück/Wolfrum* (n 26) 663; *Aust* 263.

theory of the "*acte contraire*" was not applicable in public international law.[36] Furthermore, oral agreements are covered by the general reservation in Art 3.[37] Therefore, the range of possible types of agreements varies widely.[38] Probably, the most common form is the conclusion of a **written** agreement, often called "protocol".[39] However, the agreement may also take the form of an **oral agreement**,[40] or consist of an **oral agreement of ministers**,[41] an **exchange of diplomatic notes**[42] or a **resolution of the Conference of the States Parties**.[43]

Tacit agreements, although difficult to handle, are nevertheless possible.[44] One type of tacit agreement is the emergence of a **subsequent practice**.[45] The constant, contractual practice of States Parties may lead to a modification of the application of certain provisions of the treaty. Art 38 Final Draft explicitly mentioned this form of amendment. The fact that it was not adopted (→ MN 5) does not represent an obstacle to its acceptance.[46] On the contrary, according to the majority of delegations,[47] as well as of legal doctrine,[48] the rule that a treaty may be amended by subsequent practice forms part of customary law. Furthermore, the ILC had thought it wiser to propose a separate article even though it was not necessary to include it. The amendment by subsequent practice was considered to be covered by Art 3 lit b.[49] **11**

[36]Final Draft, Commentary to Art 35, 232 para 4.

[37]Statement of *Waldock* UNCLOT I 204.

[38]The most comprehensive list of possible types of agreement is provided by *P Sands* in *Corten/Klein* Art 39 MN 32 *et seq*.

[39]*P Sands* in *Corten/Klein* Art 39 MN 33; *Aust* 264.

[40]Statement of *Waldock* [1966-II] YbILC 80; Final Draft, Commentary to Art 35, 232 para 4. All forms of amending agreement which are not concluded by a written agreement may lead to some internal problems for States Parties, since in many cases it might not be clear whether such treaty amendments require ratification by parliaments or not, see *DA Koplow* When Is an Amendment Not an Amendment? Modification of Arms Control Agreements without the Senate (1992) 59 UCLR 981 *et seq*; *R Bernhardt* Völkerrechtliche und verfassungsrechtliche Aspekte konkludenter Vertragsänderungen in *H-W Arndt/F-L Knemeyer/D Kugelmann/W Meng/M Schweitzer* (eds) Festschrift Rudolf (2001) 15 *et seq*.

[41]Statement of *Waldock* UNCLOT I 204; *P Sands* in *Corten/Klein* Art 39 MN 33.

[42]*P Sands* in *Corten/Klein* Art 39 MN 33.

[43]*Ibid*; *Aust* 263 *et seq*.

[44]Statement of *Waldock* [1966-II] YbILC 80 para 1; Final Draft, Commentary to Art 35, 232 para 4; *P Sands* in *Corten/Klein* Art 39 MN 34.

[45]*Villiger* Art 39 MN 7, 14; *Aust* 264; *Dahm/Delbrück/Wolfrum* (n 26) 673 *et seq*.

[46]See the very detailed argumentation of *P Sands* in *Corten/Klein* Art 39 MN 39.

[47]The delegations of Iraq, Poland, Italy, Austria, Israel, Switzerland and Argentina explicitly regarded the rule on subsequent practice as part of customary law. The delegations of Russia, Turkey, Uruguay and Czechoslovakia denied it (UNCLOT I 210 *et seq*).

[48]*W Karl* Vertrag und spätere Praxis im Völkerrecht (1983) 292 *et seq*, 350 *et seq*; *Villiger* Art 39 MN 14; *P Sands* in *Corten/Klein* Art 39 MN 37 *et seq*; *Giraud* (n 9) 59 *et seq*.

[49]Statement of *Waldock* UNCLOT I 214.

In 2003, an arbitral tribunal examined whether the Headquarters Agreement between France and UNESCO[50] had been amended due to subsequent practice. According to its Art 22 lit b the officials of UNESCO residing in France shall be exempt from all direct taxation on salaries. Since the tax administration had also applied this provision to retired officials for more than 40 years, UNESCO argued that Art 22 lit b had been amended due to subsequent practice. France denied this, stating that only the practice of those State organs that had concluded the treaty, and not the practice of subsidiary State organs, had to be taken into account. The French government had never officially accepted the tax-free residence of former UNESCO officials, and considered the practice of the tax administration as a temporary form of politeness. The arbitral tribunal accepted the French argumentation and denied an amendment of Art 22 lit b by subsequent practice.[51]

12 Another type of tacit agreement is the subsequent emergence of a **new rule of customary law**.[52] A newly developed customary rule with regard to subject matter regulated by a prior treaty might amend its provisions.[53] Since customary law requires the *opinio iuris* of all States involved, its development is based on a tacit agreement. The difference between subsequent practice and customary law lies in the parties involved and in the focus of their behaviour. Whereas subsequent practice refers to the behaviour of States Parties with regard to a certain treaty provision, customary law may also be established by the practice of Non-States Parties, independent of a treaty.[54] Art 68 lit c of the 1964 ILC Draft[55] had acknowledged this possibility of modifying a treaty. The ILC had justified its deletion with the complexity of the relationship between treaties and customary law.[56] The fact that this type of treaty amendment forms part of customary law, however, was not brought into question.[57]

[50] 1954 Agreement Regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory 357 UNTS 5103.

[51] *Tax Regime Governing Pensions Paid to Retired UNESCO Officials Residing in France (France v UNESCO)* 25 RIAA 233 (2003). For a comment on the decision and for further examples of (successful) amendments by subsequent practice, see *R Kolb* La modification d'un traité par la pratique subséquente des parties (2004) 14 Schweizerische Zeitschrift für internationales und europäisches Recht 9, 16 *et seq*.

[52] *Klabbers* (n 6) MN 16; *P Sands* in *Corten/Klein* Art 39 MN 35; *Villiger* Art 39 MN 14; *N Kontou* The Termination and the Revision of Treaties in the Light of New Customary International Law (1994).

[53] *Giraud* (n 9) 58 *et seq*. In the law of the sea, many important conventional rules were derogated by subsequent customary law, see *R Bernhardt* Custom and Treaty in the Law of the Sea (1987) 205 RdC 247, 275 *et seq*.

[54] *Villiger* Art 39 MN 16.

[55] ILC Report [1964-II] YbILC 19.

[56] Final Draft, Commentary to Art 38, 236 para 3; [1966-II] YbILC 177.

[57] *Villiger* Art 39 MN 32; *P Sands* in *Corten/Klein* Art 39 MN 34 *et seq*; *Dahm/Delbrück/Wolfrum* (n 26) 678 *et seq* (the new customary rule does not amend the treaty but gives the States Parties the right to ask for an amendment).

One example of a treaty modification by the subsequent emergence of a new rule of customary law is the modification of a boundary line. In the *Taba* case the boundary line between Egypt and Israel had been agreed upon in a treaty and was later jointly demarcated by the States Parties. The arbitrators declared that in the case of there having been a contradiction between the boundary line as laid down in the treaty and as demarcated by the States Parties, the demarcated boundary line would have prevailed over the boundary line laid down in a treaty if a long time had elapsed since the joint demarcation.[58]

13 Even though the **different forms of tacit agreement** seem to be clearly distinguishable, the line between the emergence of a rule of new customary law, the treaty amendment by subsequent practice and the treaty interpretation according to subsequent practice (Art 31 para 3 lit b), is often difficult to draw. States practice may gradually wander from one form to another.[59]

In the *Temple of Preah Vihear* case of 1962, a treaty between Cambodia and Thailand described the frontier line between both countries in general terms. The subsequent production and acceptance of a map was classified as an interpretation, not as an amendment of the treaty, since it specified the treaty provisions.[60] In the *Namibia* case of 1971 the ICJ stated that the abstention of a permanent member of the Security Council on a vote on a substantive matter did not constitute a veto even though Art 27 para 3 UN Charter requires an "affirmative" vote. According to the ICJ there had been a general practice of the UN which interpreted abstentions as not constituting a bar to the adoption of resolutions.[61] Obviously, the ICJ classified this situation as an interpretation according to subsequent practice. However, since the practice was not in conformity with the wording of Art 27 para 3, the UN Charter had been amended by subsequent practice.[62]

14 Closely linked to the various forms of tacit agreement is the possibility to amend a treaty due to the subsequent **emergence of a new rule of *ius cogens***. According to Art 64, an existing treaty, which is in conflict with a new peremptory norm of general international law, becomes void. Read together with Art 44 para 3, however, it becomes clear that in the case of severability of treaty provisions, not the whole but only certain provisions of a treaty may be terminated. In such a case, the treaty is amended by the emergence of a new rule of *ius cogens*.[63]

[58] *Location of Boundary Markers Between Egypt and Israel (Egypt v Israel)* 20 RIAA 1, paras 209–211 (1988).

[59] *Villiger* Art 39 MN 33; *P Sands* in *Corten/Klein* Art 39 MN 38; *Dahm/Delbrück/Wolfrum* (n 26) 673 *et seq*.

[60] ICJ *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, 33 *et seq*.

[61] ICJ *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 Rep 16, paras 21–22.

[62] *Dahm/Delbrück/Wolfrum* (n 26) 674 *et seq*. Further examples of treaty amendment by subsequent practice are provided by *NQ Dinh/P Daillier/A Pellet* Droit international public (7th edn 2002) 296 para 188.

[63] *Sands* in *Corten/Klein* Art 39 MN 41; *Dahm/Delbrück/Wolfrum* (n 26) 675 *et seq*.

III. Between the Parties

15 The agreement must be concluded between the parties. This does **not imply**, however, that the agreement has to include **all States Parties**.[64] Solely bilateral treaties require the agreement of both, *ie* all States Parties (→ MN 7).[65] The agreement to amend a multilateral treaty, however, may also be concluded between certain States Parties only. The question whether all or only the States Parties who concluded the amendment agreement are bound by the amendment is answered by the amendment clause in the respective treaty (→ MN 18) or by Art 40 para 4.

IV. Application of the Rules of Part II

16 Since the amendment of a treaty usually consists of the conclusion of another **treaty in written form** (→ MN 10), the ILC included the provision that the rules of Part II are to be applied to the amending agreement.[66] This way, procedural rules for the most common form of amendment agreement are established. The provision does not apply to oral or tacit agreements, since Part II only refers to treaties concluded in writing.

17 The reference to Part II is, however, of a **residual nature**.[67] First, it is only applicable if the treaty does not otherwise provide for such (→ MN 18). Secondly, specific procedural rules for multilateral treaties are provided by Art 40. Therefore, the provision is of special importance for bilateral treaties which are silent on the procedure to be chosen for their amendment.

V. Except Insofar as the Treaty May Otherwise Provide

18 If a treaty contains an **amendment clause,** the procedure laid down in the treaty provision prevails. Art 39 is, therefore, of residual nature. An amendment clause should, if possible, regulate the right to propose amendments, the procedure of adoption, the procedure of acceptance as well as the question upon whom the amendments will be binding.[68] Amendment clauses in multilateral treaties (→ Art 40) show a great variety. In bilateral treaties, they are usually either left apart or do not pose specific problems since only two States Parties are involved.

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[64] Final Draft, Commentary to Art 35, 232 para 4; *Bastid* (n 35) 174; *P Sands* in *Corten/Klein* Art 39 MN 23.

[65] *Dixit* (n 7) 39; *Sinclair* 107; *Villiger* Art 39 MN 6; *Klabbers* (n 6) MN 1.

[66] Final Draft, Commentary to Arts 35–36, 232 para 4.

[67] *Villiger* Art 39 MN 10; *Klabbers* (n 6) MN 2; *P Sands* in *Corten/Klein* Art 39 MN 13.

[68] *Klabbers* (n 6) MN 3; *Aust* 267.

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WG Grewe Treaties, Revision (2000) 4 EPIL 980–985.
J Klabbers Treaties, Amendment and Revision in MPEPIL (2008).

Article 40

Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Contents

A. Purpose and Function

Since the end of World War II, the number of multilateral treaties and thus also the complexity of international relations with regard to treaties have increased dramatically. Complexity and fragmentation increase even more when multilateral treaties are amended, *ie* changed with respect to all the States Parties, or modified, *ie* altered between certain States Parties only (on the terminology → Art 39 MN 1). Art 40 embodies the **basic procedural rules** concerning the amendment of multilateral treaties. A specific article with regard to the amendment procedure **1**

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
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of bilateral treaties was deemed unnecessary. According to the ILC, the rules contained in Part II suffice in such cases.[1]

2 The **main purpose** of Art 40 is to preserve the membership structure of the original and the amended treaty; should this not be possible, Art 40 regulates the relationship between the States Parties to the treaty in its original form and to the treaty in its amended form.[2] The provision seeks to strike a balance between the stability of contractual relations and the States' freedom of decision making in an international society.[3] Accordingly, the rules laid down in Art 40 do not require all States Parties to agree to an amendment. Instead, they guarantee the right of each States Party to participate in the process of amendment.[4]

3 The **structure** of Art 40 is based on a simple, clear logic, which focuses on the single steps of an amendment procedure. Para 1 determines the scope of Art 40. Art 40 paras 2 and 3 lay down the amendment procedure *stricto sensu*. The procedure starts with the proposal to amend the treaty, it continues with the participation rights of the other States Parties in the process of negotiation and conclusion, and it finishes with the definition of the States that are entitled to become a party to the amended treaty. Art 40 paras 4 and 5 concern the legal situation after the entry into force of the amending agreement and regulate the relationship between the various States. While para 4 is dedicated to the States Parties to the original treaty, para 5 contains rules with regard to States that become a party to the amended treaty.

4 Art 40 has **to be read together with** several other articles of the VCLT, especially with Art 39 and Art 41. Art 39 lays down the basic principles governing the amendment of both bilateral and multilateral treaties, and is, therefore, residuary to Art 40, which provides for specific procedural rules regarding the amendment of multilateral treaties. Art 41 regulates the modification of multilateral agreements and, therefore, deals with a different subject matter to Art 40. However, since amendment and modification differ with regard to their original intent but not necessarily to their legal effects (→ Art 39 MN 1), Arts 40 and 41 are closely related to each other. Another important provision is Art 30 para 4 lit b. Since no States Party is obliged to accept the amending agreement, Art 40 para 4 refers to Art 30 para 4 lit b in order to regulate the relationship between those States Parties that became a party to the amending agreement and those that opted not to adhere to the amended treaty. Finally, the rules laid down in Art 77 and Art 78 apply to the notification referred to in Art 40 para 2.

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[1] Final Draft, Commentary to Art 36, 233 para 5.

[2] *H von Heinegg* in *K Ipsen* Völkerrecht (2004) 164.

[3] *S Bastid* Les traités dans la vie internationale (1985) 178; *K Ardault*/*D Dormoy* in *Corten*/*Klein* Art 40 MN 4.

[4] Final Draft, Commentary to Art 35, 232 para 4; *G Dahm*/*J Delbrück*/*R Wolfrum* Völkerrecht Vol I/3 (2002) 665.

B. Historical Background and Negotiating History

At the time of drafting the VCLT, there were no common rules applicable to the amendment of multilateral treaties. In many respects, the content of Art 40 proved to be innovative.[5] Therefore, Art 40 **did not codify an existing rule of customary law**.[6] 5

Provisions on the amendment of treaties were included **quite late** during the negotiation process of the VCLT (→ Art 39 MN 4). It was SR *Waldock* who proposed three articles on the subject (Draft Arts 67–69) in his third report 1964.[7] After intense discussions within the ILC, he presented a revised version of the provisions in 1964.[8] They constituted the basis for the revised draft of 1966 (Draft Arts 65–68),[9] which was later included into the Final Draft (Draft Arts 35–38).[10] 6

The specific provisions on the amendment of multilateral treaties underwent **considerable changes** during the negotiation process. The three articles of the first version of 1964 regulated the amendment proposal, the right of a party to be consulted, and the effects of the amending instruments. Therefore, all aspects mentioned in today's Art 40 were presented in three articles in a much more detailed manner. They resembled a code.[11] The second version of 1964 was much more concise. The amendment of multilateral treaties was only dealt with in Draft Art 68. Its content, however, focused on the relationship between the various States after the entry into force of the amending agreement. Draft Art 66 of the revised draft articles of 1966 constituted an almost complete reformulation of the provision by regulating each step of an amendment procedure, including the present paras 3 and 5. At the Vienna Conference, Draft Art 36 (the former Draft Art 66) was only briefly discussed. Following a proposal of the Netherlands, the words "every party" in para 2 were replaced by "all the contracting States" in order to enlarge the circle of States entitled to participate in the negotiations.[12] This slightly revised version of Draft Art 36 was adopted by 91 votes to none.[13] 7

The question whether, in the meantime, Art 40 **has become part of customary law** is answered divergently. Some authors come to the conclusion that its content reflects "recently crystallised customary law",[14] since Art 40 was accepted unanimously at the UNCLOT 1968/1969 and since, obviously, no State has called Art 40 8

[5] *Waldock* [1964-I] YbILC 274 para 102.

[6] *Sinclair* 14; *RD Kearney/RE Dalton* The Treaty on Treaties (1970) 64 AJIL 495, 523; *Villiger* Art 40 MN 15; *K Ardault/D Dormoy* in *Corten/Klein* Art 40 MN 7.

[7] *Waldock* III 47 *et seq*.

[8] *Waldock* [1964-I] YbILC 189.

[9] Revised Draft Articles [1966-II] YbILC 112, 119.

[10] Final Draft 182.

[11] *Villiger* Art 40 MN 16.

[12] UNCLOT I 204.

[13] UNCLOT II 72.

[14] *Villiger* Art 40 MN 15.

into question. Others reject the customary nature of the procedural rules laid down in Art 40.[15] Their arguments are convincing: the existing amendment clauses in modern treaties are so divergent (→ MN 10) that no common practice has developed with regard to the amendment process of multilateral treaties. Furthermore, where an amendment clause is lacking, States are free to opt for a different procedure than the one provided for by Art 40.

C. Elements of Article 40

I. Unless the Treaty Otherwise Provides (para 1)

9 Art 40 para 1 determines the scope of Art 40. It emphasizes that the rules laid down in the provision are of a **residuary nature**: they only apply if the multilateral treaty in question does not contain an amendment clause[16] or if the amendment clause is not exhaustive. [17] Most multilateral treaties concluded after World War II are equipped with such specific provisions.[18] The great complexity of modern multilateral treaties, the large number of States Parties and the need to adapt these main legal instruments to a changing international society require precise and effective rules with regard to their amendment.[19]

10 The **types of amendment clauses** in multilateral treaties are, however, manifold[20]: they may be very vague[21] or extremely detailed[22]; they are usually applicable to the whole treaty, but they may also contain different rules for amending basic principles and rules for amending provisions of a rather technical nature[23]; they

[15] *K Ardault/D Dormoy* in *Corten/Klein* Art 40 MN 8.

[16] Final Draft, Commentary to Art 36, 233 para 7; *Aust* 272; *K Ardault/D Dormoy* in *Corten/Klein* Art 40 MN 6; *J Klabbers* Treaties, Amendment and Revision in MPEPIL (2008) MN 2; *Bastid* (n 3) 177.

[17] *Aust* 272.

[18] *K Ardault/D Dormoy* in *Corten/Klein* Art 40 MN 6; *WG Grewe* Treaties, Revision (2000) 4 EPIL 980, 982.

[19] *Aust* 266.

[20] For examples, see UN Handbook on Final Clauses of Multilateral Treaties (2003) 95 *et seq*. Detailed analyses of the application of specific amendment clauses are provided by *MJ Bowman* The Multilateral Treaty Amendment Process – A Case Study (1995) 44 ICLQ 540 *et seq*; *AI Sow* La spécificité des procédures de révision des traités de l'Organisation mondiale de la propriété intellectuelle (2002) 80 Revue de droit international, des sciences diplomatiques et politiques 169 *et seq*.

[21] See *eg* Art 26 para 2 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13, according to which the UN General Assembly shall decide what to do if a States Party proposes an amendment.

[22] See *eg* Art VII of the 1996 Comprehensive Nuclear Test Ban Treaty 35 ILM 1439.

[23] This is the usual procedure within the IMCO, see *AO Adede* Amendment Procedures for Conventions with Technical Annexes: The IMCO Experience (1977) 17 VaJIL 201 *et seq*.

may allow for majority decisions[24] or require explicit acceptance by States in order to be applicable to them[25]; and they may lay the procedure in the hands of the States Parties[26] or in the hands of an organ created by the treaty.[27]

II. Proposal and Rights of Other Contracting States (para 2)

11 According to para 2, any amendment procedure of a multilateral treaty starts with an **amending proposal**. Art 40 does not specify who has the right to make such a proposal. Therefore, depending on the case, it might be every States Party, every contracting State or even an organ established by the treaty.[28]

12 The proposal has to be **notified** to all the contracting States. The purpose of the notification is to ensure that all States that might be affected by the amendment are consulted and may take part in the reviewing process.[29] The ILC considered the obligation to notify and to consult the other States as flowing directly from the obligation to perform a treaty in good faith.[30] Furthermore, the notification guarantees transparency.[31] The notification will usually be made in written form and will be received, examined and transmitted by the depositary of the multilateral treaty or by all States concerned (→ Arts 77 and 78).[32]

13 The notification shall be addressed to **all the contracting States**. This formulation, which was included in Art 40 during the Vienna Conference (→ MN 7), comprises all States that have expressed their consent to be bound by the treaty.[33]

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[24]See *eg* Art XIII para 4 of the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 2221 UNTS 120. It is interesting to note that treaties establishing international organizations often allow for majority decisions in amending the treaty, see *F Kirgis* Specialized Law-Making Processes in *O Schachter/C Joyner* (eds) United Nations Legal Order (1995) 109, 121 *et seq*; *Bastid* (n 3) 175; *Grewe* (n 18) 980. The specific amendment procedures for treaties establishing international organizations raise many subsequent questions, see *eg JA Frowein* Are There Limits to the Amendment Procedures in Treaties Constituting International Organisations? in *G Hafner et al* (eds) Festschrift Seidl-Hohenveldern (1998) 201 *et seq*; *Sienho Yee* The Time Limit for the Ratification of Proposed Amendments to the Constitutions of International Organizations 4 Max Planck UNYB 185 *et seq*.

[25]See *eg* Art 39 para 5 of the 2000 UN Convention Against Transnational Organized Crime 40 ILM 335.

[26]See *eg* Art 109 UN Charter providing for the convening of a revision conference in case of a revision.

[27]See *eg* Art 108 UN Charter according to which amendments are decided by the General Assembly. See also *Bastid* (n 3) 176 *et seq*.

[28]A different approach is taken by *K Ardault/D Dormoy* in *Corten/Klein* Art 40 MN 10 according to whom only States Parties have the right to make an amendment proposal.

[29]Final Draft, Commentary to Art 36, 233 para 8; *Bastid* (n 3) 177.

[30]Final Draft, Commentary to Art 36, 233 para 9.

[31]*Villiger* Art 40 MN 5.

[32]*Villiger* Art 40 MN 6.

[33]Statement of Riphagen (Netherlands) UNCLOT I 204 MN 9.

Since the consent is expressed at the moment when a State signs a treaty,[34] Art 40 extends the scope of the amendment procedure in two directions. First, if a treaty has already entered into force, States that have signed but not ratified the treaty have to be included in the process as well.[35] Secondly, the formulation allows that a treaty may be amended even though it has not yet entered into force.[36]

> The most famous example of such an amendment of a treaty before its entry into force is the 1994 Agreement Relating to the Implementation of Part XI of the 1982 UN Convention on the Law of the Sea.[37] Even though formally the Convention was supplemented with an agreement, its effect was an amendment of the Convention.[38]

14 Once the notification has been made, all contracting States have the right, but not the obligation,[39] to **take part in the amendment procedures** as provided for in Art 40 para 2 lit a and b. If they decide to participate, however, they have to act in good faith and give due consideration to the amendment proposal.[40] The participation right is twofold: it consists of the right to **take part in the decision as to the action to be taken** and of the right to **participate in the process of negotiation and conclusion**. The first right mainly refers to the decision at the beginning on the need for an amendment and the next steps to be taken.[41] The second right arises if it has been decided to continue the process and to deal with the amendment proposal in detail. In such cases, every contracting State has the right to attend all conferences and meetings on the subject and to make its own proposals.[42] Ultimately, the State has the right to take part in the process of conclusion, *ie* to become a party to the amending agreement.

15 The fact that Art 40 establishes a right to participation shows that according to the VCLT, the **amendment of a multilateral treaty may also be valid if not all contracting States are involved in the amendment procedure**. Only bilateral treaties require unanimity (→ Art 39 MN 7). Contracting States to a multilateral treaty are free to reject an amendment proposal and, therefore, not to take part in the amendment process. However, they cannot prevent other States Parties from initiating and applying a procedure that may lead to the adoption of an amending agreement.

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[34] See the definitions of "contracting State" vs the definition of "party" in Art 2 para 1 lit f and g.

[35] *K Ardault*/*D Dormoy* in *Corten*/*Klein* Art 40 MN 12; *Bastid* (n 3) 178.

[36] *Villiger* Art 40 MN 5.

[37] 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 33 ILM 1309.

[38] See the concise analysis of *Aust* 275–276.

[39] *Villiger* Art 40 MN 7; *K Ardault*/*Dormoy* in *Corten*/*Klein* Art 40 MN 13, 15.

[40] Final Draft, Commentary to Art 36, 233 para 5; *Villiger* Art 40 MN 7; *K Ardault*/*D Dormoy* in *Corten*/*Klein* Art 40 MN 13.

[41] *Villiger* Art 40 MN 8.

[42] *Villiger* Art 40 MN 9.

III. Right to Become a Party to the Treaty as Amended (para 3)

Once the amending agreement has been concluded, the question arises as to which States have the right to become a party to the treaty as amended. It was possible to limit this right to the States that were entitled to participate in the amendment procedure. The ILC, however, opted for an **extension of the number of States as compared to those covered by para 2**. According to para 3 "every State entitled to become a party to the treaty" has the right to become a party to the treaty as amended. The wording refers to those States that have participated in the elaboration of the original treaty but have not yet expressed their consent to be bound by it.[43] The idea is that those States do have an interest in the amendment of the treaty and shall, therefore, have the right to become a party to the treaty and to the amending agreement simultaneously.[44] **16**

The rule laid down in para 3 **may be restricted** by the contracting States or by the States Parties. Either the negotiating contracting States agree to formulate the amending agreement in such a way as to exclude non-contracting States,[45] or the States Parties limit the number of possible States Parties to the original treaty by means of a regional or other type of exclusive clause.[46] **17**

IV. States Parties Not Becoming a Party to the Amending Agreement (para 4)

Art 40 para 4 is a logical consequence of the principle visible in para 2 and governs the whole Art 40[47]: the amendment of multilateral treaties **does not require the consent of all States concerned**.[48] The amending agreement only binds those States Parties to the original treaty that sign and ratify the amending agreement. The States Parties are, therefore, free to accept the alterations of the treaty or to reject them, but they cannot prevent other States Parties from becoming a party to the amendment agreement and to bring it into force. According to the ILC, para 4 is no more than an application of the general rule in Art 30 that a treaty only imposes an obligation upon States Parties to it.[49] However, in order to avoid possible misunderstandings as to the legal effects of amending agreements, the ILC decided to include an express provision on the subject. Its aim was to clarify that an **18**

[43]Final Draft, Commentary to Art 36, 233 para 10; *Villiger* Art 40 MN 9; *Aust* 273.

[44]Final Draft, Commentary to Art 36, 233–234 para 10.

[45]Statement of *Waldock* UNCLOT I 204.

[46]*Villiger* Art 40 MN 9.

[47]*RY Jenning* General Course on Principles of International Law (1967) 121 RdC 323, 556.

[48]*K Ardault*/*D Dormoy* in *Corten*/*Klein* Art 40 MN 17.

[49]Final Draft, Commentary to Art 36, 234 para 11; *K Ardault*/*D Dormoy* in *Corten*/*Klein* Art 40 MN 19.

instrument amending a prior treaty does not – by its very nature – have legal effects for all States Parties to the original treaty.[50]

19 The application of this principle leads to the emergence of **two categories of States Parties**: those that have become a party to the amendment agreement and those that have not. In order to regulate the relationship between both groups, para 4 refers to **Art 30 para 4 lit b**. As a consequence, between a States Party to the original treaty and a States Party to the treaty as amended, it is the original treaty that governs their mutual rights and obligations.[51] Thus, **different legal regimes** are created under the same treaty. Fragmentation of contractual obligations increases.[52] The legal consequences of an amendment agreement not being accepted by all States Parties are, in fact, the same as the legal consequences of a modification of the treaty between certain States Parties only.[53]

20 The theoretically clear regulation of para 4, however, might lead to **difficulties in practice**. Art 40 para 4 evidently presupposes that all treaty provisions can be "split into bundles of bilateral rights and obligations".[54] Treaties establishing self-contained legal regimes, like many environmental treaties or most founding treaties of international organizations, however, cannot be applied in a consistent manner if their provisions vary from States Party to States Party. Different decision-making procedures within an international organization, for example,[55] might paralyze its work.

> The problem can be solved by means of specific amendment clauses that take into account the inseparability of treaty provisions. Two models exist: either the amendment clause provides for the acceptance of the amending agreement by all States Parties (like it is the case in the European Union)[56] or, on the contrary, it declares that the amendment enters into force for all States Parties once a certain quorum of them has ratified the amendment agreement (see *eg* the United Nations).[57]

V. State Becoming a Party to the Treaty After the Entry into Force of the Amending Agreement (para 5)

21 The last para of Art 40 deals with **new States Parties**, *ie* with States that become a party to the treaty after the entry into force of the amending agreement. They do not

[50] Final Draft, Commentary to Art 36, 234 para 11.

[51] *Ibid.*

[52] *Jenning* (n 47) 556.

[53] *K Ardault/D Dormoy* in *Corten/Klein* Art 40 MN 19.

[54] *Klabbers* (n 16) MN 8.

[55] *Ibid.*

[56] See Art 48 TEU para 4. The unanimity clause, however, also poses some problems, see *B de Witte* Treaty Revision in the European Union: Constitutional Change through International Law (2004) 35 Netherlands YIL 51 (55 *et seq*, 71 *et seq*).

[57] Art 108 UN Charter, according to which amendments of the Charter enter into force for all UN members when the amendments have been ratified by two thirds of them.

fall under any category enunciated in the prior provisions. New States Parties are free to declare whether they want to be bound to the original or to the amended treaty.[58]

Where they do not specify their intention,[59] para 5 applies. Its lit a decides on the category of parties to which the new States Party shall belong: as a general rule, it will be considered a **party to the treaty as amended**. According to the ILC, this categorization corresponds to the practice of the UN Secretary-General when acting as a depositary.[60] Furthermore, it was presumed that it is very unlikely for States to want to become a party to the original treaty even though treaty practice had shown the need to amend the treaty and, therefore, to adapt it to current developments.[61] **22**

Such a categorization alone, however, does not take into account the rule laid down in para 4 and its reference to Art 30 para 4 lit b, according to which as between a States Party to the treaty as amended and a States Party to the original treaty, it is the latter which governs their relationship (→ MN 19). In order to guarantee coherence between the various provisions of Art 40, and in the desire to bring the maximum number of States Parties into treaty relations,[62] para 5 lit b determines that, **at the same time**, the new States Party is considered a **party to the original treaty** in its relations to any States Party that is not bound to the amending agreement. **23**

Selected Bibliography

J Klabbers Treaties, Amendment and Revision in MPEPIL (2008).
UN Handbook on Final Clauses of Multilateral Treaties (2003).

[58] Final Draft, Commentary to Art 36, 234 para 13.

[59] This situation seems to be quite common, see Final Draft, Commentary to Art 36, 234 para 12.

[60] Final Draft, Commentary to Art 36, 234 para 12; *Aust* 273.

[61] Statement of *Waldock* UNCLOT I 204.

[62] Final Draft, Commentary to Art 36, 234 para 13.

Article 41

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or
(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
(ii) does 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.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Contents

A. Purpose and Function

Due to the conflicting interests prevailing at an international level, amendments of multilateral treaties (→ Art 40), especially amendments of treaties with a large number of parties, prove to be an extremely difficult and cumbersome process; sometimes, an amendment seems even impossible. It may thus happen that some of the **States Parties wish to modify the treaty as between themselves alone**. The reasons for such a step may be manifold:[1] States may share common interests or want to reinforce their mutual relationship. Another reason might be that States aim at ensuring higher standards of treaty obligations and decide to lead the way in this respect. **1**

Such a 'contracting-out',[2] however, creates a special regime under the same treaty and collides with the principle of consensus as well as with the integrity of the **2**

[1] See *Villiger* Art 41 MN 1, 3.

[2] Final Draft, Commentary to Art 37, 235 para 2.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
DOI 10.1007/978-3-642-19291-3_44, © Springer-Verlag Berlin Heidelberg 2012

treaty.[3] Furthermore, it increases the already existing fragmentation caused by the large number of multilateral rights and obligations (→ Art 40 MN 1). Finally, an agreement between certain States Parties only is more likely to be incompatible with the object and purpose of a treaty.[4] Therefore, the ILC deemed it necessary to specify whether and under what circumstances such an *inter se* agreement is admissible. Consequently, Art 41 specifies the **conditions under which modifications may be regarded as permissible**.[5]

3 Art 41 is closely connected with **Art 39** and **Art 40** VCLT.[6] In theory, their respective scope is clearly defined. In practice, however, an overlapping of the cases covered by Art 40 and Art 41 is possible, since the differentiation between those two provisions only refers to the intention of the States but not to the outcome of their actions (→ Art 39 MN 1). Contrary to Art 40, Art 41 does not contain any procedural rules, apart from the obligation to notify in para 2. Its rules are substantive, not procedural in nature. The use of the term "agreement", however, corresponds to the terminology of Art 39 and thus lays down the rule that the modification agreement does not need to be in writing (→ Art 39 MN 10 *et seq*).

4 Of a more complicated nature is the relationship between Art 40 and **Art 30 para 4**.[7] At first glance, the conclusion of a modification agreement between some States Parties only and the application of successive treaties relating to the same subject matter, where the parties to the later treaty do not comprise all the parties to the earlier one, appear to be the same. There are, however, two main differences,[8] the first of which concerns the States Parties. In Art 41, the States Parties to the later treaty are necessarily a sub-group of the States Parties to the earlier treaty. Art 30 para 4 has a larger scope. It also includes cases where the States Parties to conflicting treaties are not completely identical (→ Art 30 MN 24). The second difference refers to the date of conclusion of the treaty with the smaller number of States Parties. Since in Art 41, the States Parties to the later treaty are a sub-group of the States Parties to the earlier treaty, its provisions only apply to cases with a decreasing membership.[9] Art 30 para 4, however, lays down rules for both decreasing and increasing membership of the later treaty (→ Art 30 MN 25, 26). Therefore, not all cases falling under Art 30 para 4 are also covered by Art 41. All cases falling under Art 41, however, theoretically fall within the scope of Art 30 para 4. The question as to which of the two provisions has to be applied is answered

[3] *G Dahm/J Delbrück/R Wolfrum* Völkerrecht Vol I/3 (2nd edn 2002) 668.

[4] Final Draft, Commentary to Art 37, 235 para 1.

[5] *Ibid*.

[6] *Villiger* Art 41 MN 14 *et seq*.

[7] Surprisingly, the ILC did not consider this close relationship. Only a small few number of delegations pointed out the problem, see *Reuter* [1966-I/2] YbILC 97 para 30; *Tunkin* [1966-I/2] YbILC 126 para 65; *Waldock* VI 76 para 4.

[8] *A Rigaux/D Simon* in *Corten/Klein* Art 41 MN 2 *et seq*.

[9] *M Zuleeg* Vertragskonkurrenz im Völkerrecht, Teil I: Verträge zwischen souveränen Staaten (1977) 20 GYIL 246, 261.

by Art 30 para 5: Art 30 para 4 is without prejudice to Art 41, *ie* Art 41 prevails.[10] In other words: the legitimacy of the modification agreement depends on the criteria set out in Art 41. If a modification agreement meets the criteria, Art 30 para 4 is of no relevance.[11] The modification agreement is valid for the States Parties to it, and no international responsibility follows.[12] If the modification agreement does not meet the criteria set out in Art 41 and is thus illegitimate, the customary principles embodied in Art 30 para 4 on the *lex posterior* rule or the *pacta tertiis* rule (→ Art 30 MN 9) apply.[13] In such a case, the illegitimate, but valid[14] modification agreement has priority (Art 30 para 4 lit a) but the States Parties to it are internationally responsible towards the States Parties to the original treaty.[15]

There exists a certain parallelism between Art 41, **Art 58** and **Art 25**.[16] All three provisions regulate cases where a new legal situation evolves between certain States Parties only. Art 41 deals with the modification, Art 58 with the suspension of a treaty and Art 25 with its provisional application. Art 41 and Art 58 both use almost the same wording when referring to an agreement between certain States Parties only. Art 25 does not explicitly mention such a constellation, but it does not preclude that a multilateral treaty may be provisionally applied between certain States Parties only (→ Art 25). **5**

B. Historical Background and Negotiating History

At the Vienna Conference, the modification of multilateral treaties was regarded as a situation "not uncommon in practice".[17] Examples of treaty clauses providing for the possibility of modifications date back to the nineteenth century.[18] There were, **6**

[10]Final Draft, Commentary to Art 26, 217 para 11; *Villiger* Art 41 MN 14; *A Rigaux/D Simon* in *Corten/Klein* Art 41 MN 6.

[11]*JB Mus* Conflicts between Treaties in International Law (1998) NILR 208, 226; *Aust* 274 *et seq*.

[12]*Mus* (n 11) 225.

[13]*Ibid* 226; *A Rigaux/D Simon* in *Corten/Klein* Art 41 MN 7.

[14]PCIJ *Oscar Chinn Case* PCIJ Ser A/B No 63, 65, 80 (1934); *W Karl* Treaties, Conflicts between (2000) 4 EPIL 935, 939; *H von Heinegg* in *K Ipsen* Völkerrecht (2004) 165; *Dahm/Delbrück/Wolfrum* (n 3) 668; *Mus* (n 11) 225; *F Capotorti* L'extinction et la suspension des traités (1971) 134 RdC 417, 509.

[15]Final Draft, Commentary to Art 37, 235 para 1; *Mus* (n 11) 226 *et seq*; *von Heinegg* (n 14) 165; *Dahm/Delbrück/Wolfrum* (n 3) 668; *A Rigaux/D Simon* in *Corten/Klein* Art 41 MN 7; *Capotorti* (n 14) 509.

[16]*Villiger* Art 41 MN 15.

[17]See the statement by the representative of Uruguay UNCLOT I 206.

[18]*J Klabbers* Treaties, Amendment and Revision in MPEPIL (2008) MN 11. See *eg* Art 19 of the 1883 Paris Convention for the Protection of Industrial Property 828 UNTS 305: "It is understood that the countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention."

however, no common rules and almost no jurisprudence on the subject.[19] Due to the few examples and the diversity of cases, the issue of treaty modification was considered an "extremely complex problem".[20] Thus, Art 41 did **not codify an already existing rule of customary law**.[21] Particularly the detailed conditions under which a modification is to be regarded as permissible have to be regarded as innovative at the time.[22]

7 When SR *Waldock* presented the first draft of articles dealing with the amendment of multilateral treaties in 1964[23] (→ Art 39 MN 4), he did not include a provision on modification. Later, he presented a new draft which contained an article (Draft Art 69) regulating the modification of multilateral treaties.[24] This original provision underwent **some minor changes** during the negotiation process, the most important of which concerned the moment of notification. According to the original draft, the other States Parties had to be notified of the conclusion of a modification agreement. Many delegations, however, considered a notification at that stage as being too late.[25] Their doubts were taken into account in the revised draft of 1966.[26] Draft Art 67 established that States Parties seeking to modify a treaty had to notify the other parties of their intention to conclude such an agreement. This version became Draft Art 37 of the Final Draft[27] and was almost identical with today's Art 41. It did not give rise to many comments at the Vienna Conference.[28] Only the proposal according to which the content of para 1 lit b cl iii should be integrated into the wording of para 1 lit b[29] was accepted. The slightly amended version of Draft Art 37 was adopted by 91 votes to none[30] and became today's Art 41.

8 According to one scholar, the content of Art 41 may nowadays be considered as having come to reflect customary law.[31] The argument provided is that the provision has not been called into question by States since the conclusion of the VCLT. However, even though *inter se* agreements in order to modify a treaty have become much more common owing to the increasing number of multilateral treaties,[32] it is

[19] *A Rigaux/D Simon* in *Corten/Klein* Art 41 MN 10.

[20] See the statement by the representative of Czechoslovakia UNCLOT I 205.

[21] *Sinclair* 14.

[22] *Villiger* Art 41 MN 18.

[23] *Waldock* III 47 *et seq*.

[24] *Waldock* [1964-I] YbILC 189.

[25] *Waldock* VI 86 *et seq* (comments of Finland, Israel and the Netherlands), statement of *Waldock* 87 paras 1 and 3.

[26] Revised draft articles [1966-II] YbILC 112, 119.

[27] Final Draft 182.

[28] UNCLOT I 205 *et seq*.

[29] UNCLOT I 205 MN 33 *et seq*. The proposal was introduced by Bulgaria, Romania and Syria.

[30] UNCLOT II 72.

[31] *Villiger* Art 41 MN 18.

[32] *WG Grewe* Treaties, Revision (2000) 4 EPIL 980, 981.

difficult to determine whether Art 41 in its entirety has become part of customary law. The cases where multilateral treaties have been modified even though this was not provided for in the treaty remain exceptional. It is more likely that the **principle embodied in Art 41 reflects customary law**: unless a multilateral treaty so provides or unless the modification does not violate the main contents of the treaty, there is a possibility but not a general right to change its provisions between certain States Parties only.[33]

C. Elements of Article 41

Art 41 regulates two different issues. All in all, however, **three situations** have to be distinguished: if the treaty provides for its modification, such an *inter se* agreement is possible (para 1 lit a). If the treaty does not prohibit its modification, the treaty may be modified if certain conditions are met (para 1 lit b). If the treaty prohibits its modification, the States Parties are not allowed to 'contract out', and Art 41 does not apply (third implicit situation). **9**

The rules laid down in Art 41 are of a **residual character**.[34] This is of special importance for Art 41 para 1 lit b which sets out the conditions which have to be met if the treaty provides no specification concerning the permissibility of a modification. The conditions refer to the content of the original treaty and aim at preserving its functioning. The only procedural requirement, *ie* notification, is laid down in para 2. **10**

I. Modification Provided for by the Treaty (para 1 lit a)

Art 41 para 1 lit a recognizes the obvious possibility to modify a treaty if the treaty itself so provides. There are many examples to be found in State practice.[35] The **most common type** of such modification clauses consists of treaty provisions allowing modifications that enhance the duties laid down in the treaty.[36] **11**

> One example for such a treaty provision is Art 73 para 2 of the 1963 Vienna Convention on Consular Relations[37] according to which "[n]othing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof". Another example is Art 28 para 2 of the 1957 European Convention on Extradition[38]: "The Contracting Parties may conclude between themselves bilateral or multilateral agreements only in order to supplement the provisions of this

[33] Similarly *Dahm/Delbrück/Wolfrum* (n 3) 668.

[34] *Aust* 272; *Klabbers* (n 18) MN 2; *Villiger* Art 41 MN 3.

[35] Further examples are provided by the UN Handbook on Final Clauses of Multilateral Treaties (2003) 107 *et seq; A Rigaux/D Simon* in *Corten/Klein* Art 41 MN 20 *et seq*.

[36] *A Rigaux/D Simon* in *Corten/Klein* Art 41 MN 25.

[37] 1963 Vienna Convention on Consular Relations 596 UNTS 261.

[38] 1957 European Convention on Extradition ETS 24.

Convention or to facilitate the application of the principles contained therein." The TEU also allows for modifications. The instrument used is the so-called 'enhanced cooperation' laid down in Arts 20 *et seq* TEU and Arts 326 *et seq* TFEU. However, the conditions to be met are so strict that this type of modification has not yet been employed.

12 The examples mentioned raise the question of whether **modifications not covered by the respective treaty provision** (in these cases: all modifications reducing the obligations laid down in the treaty) fall under the scope of para 1 lit b. Such a result, however, would not only contradict the treaty in question but also the wording of Art 41. If the treaty in question explicitly allows certain kinds of modifications only, all other modifications shall be deemed to be prohibited; Art 41 does not apply. The wording of Art 41 confirms this result: The term "or" at the end of para 1 lit a and the introductory words of para 2 show that para 1 lit b does not supplement para 1 lit a, but that both paragraphs preclude each other.[39] Either a modification is covered by para 1 lit a or it falls under the scope of para 1 lit b.

II. Modification Not Prohibited by the Treaty (para 1 lit b)

13 Compared to the possibilities of modification provided for by many treaties (→ MN 11), the rules laid down in para 1 lit b remain quite general and provide further opportunities to modify a multilateral treaty.[40] They apply if the modification is not prohibited by the treaty. In some cases, the prohibition to modify a treaty may be explicit. Implicit prohibitions, however, *ie* cases in which a treaty allows certain modifications only and, therefore, implicitly prohibits all other modifications (→ MN 12), are possible as well. Therefore, para 1 lit b is only applicable if the treaty in question **remains silent** on the question of modification.[41]

14 In such a case, a modification is permissible if the two[42] substantive conditions specified in the two paragraphs are met: (i) the modification does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; and (ii) the modification does 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. The **two conditions apply cumulatively**[43] and may overlap.

[39] *Villiger* Art 41 MN 6 n 22.

[40] *A Rigaux/D Simon* in *Corten/Klein* Art 41 MN 29.

[41] *A Rigaux/D Simon* in *Corten/Klein* Art 41 MN 21.

[42] Sometimes, it is indicated that three requirements are to be met (Final Draft, Commentary to Art 37, 235 para 2; *Sinclair* 108 *et seq*). The fact that the modification is not prohibited by the treaty is regarded as one of the three conditions. This view might be due to the fact that Art 37 para 1 lit b Final Draft, which became today's Art 41, contained three subparagraphs. At the Vienna Conference, however, para 1 lit b cl iii was integrated into the introductory words of para 1 lit b (→ MN 7).

[43] *Villiger* Art 41 MN 7; *A Rigaux/D Simon* in *Corten/Klein* Art 41 MN 30; *Dahm/Delbrück/Wolfrum* (n 3) 668; *Aust* 274.

According to the ILC, the **first condition (para 1 lit b cl i)** is met if the modification does not prejudice the rights of the other States Parties and does not add to their obligations.[44] The condition is an application of the principle laid down in Art 34[45]: the modifying treaty does not create either obligations or rights for the other States Parties. The modification thus remains *res inter alios acta* for the others.[46] **15**

The **second condition (para 1 lit b cl ii)** focuses on the object and purpose of the respective treaty. If its object and purpose can no longer be executed effectively, the modification is not allowed. **16**

> In the *Genocide* case of 1951, the ICJ argued quite similarly. It stated that it is "a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention."[47]

The ILC referred to the example of disarmament or a treaty of neutralization. If its main provisions were altered for certain States Parties, its object and purpose could no longer be fulfilled.[48] Modifications of environmental treaties aiming at enforcing higher standards than those required by the original treaty, on the contrary, are usually compatible with the object and purpose of the treaty.[49] It needs to be emphasized, however, that para 1 lit b cl ii explicitly refers to the object and purpose of the treaty "as a whole". Therefore, modifications relating to single and less important aspects of the object and purpose of the treaty are to be considered as permissible.[50] **17**

In order to assess whether a modification meets the two conditions set out in para 1 lit b, it might be helpful to rely on the **distinction between treaties imposing obligations of a reciprocal, an interdependent or an integral nature**.[51] While modifications of interdependent treaties (like disarmament conventions) and of integral treaties (like human rights conventions) most likely affect the rights and obligations of other States Parties and/or are incompatible with the object and purpose of the treaty, modifications of reciprocal treaties (like the 1961 Vienna Convention on Diplomatic Relations or the 1994 WTO Agreement) often comply with the conditions set out in para 1 lit b.[52] **18**

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[44] Final Draft, Commentary to Art 37, 235 para 2.

[45] *A Rigaux/D Simon* in *Corten/Klein* Art 41 MN 31.

[46] *Villiger* Art 41 MN 5.

[47] ICJ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 21.

[48] Final Draft, Commentary to Art 37, 235 para 2.

[49] *Aust* 274.

[50] *A Rigaux/D Simon* in *Corten/Klein* Art 41 MN 32.

[51] *J Pauwelyn* The Role of Public International Law in the WTO: How Far Can We Go? (2001) 95 AJIL 535, 549 with reference to *Fitzmaurice* III 27 *et seq*, 41 *et seq*. Similarly *Capotorti* (n 14) 509.

[52] *Pauwelyn* (n 51); *J Pauwelyn* The Nature of WTO Obligations, Jean Monnet Working Paper 1/02, 26 *et seq*, http://centers.law.nyu.edu/jeanmonnet/papers/02/020101.html.

III. Notification (para 2)

19 The obligation to notify the other States Parties exists in **all cases of modifications**. If the treaty remains silent about the possibility of modifying it (para 1 lit b), the application of para 2 is obvious. If the possibility of modification is provided for by the treaty (para 1 lit a), the intention to conclude an *inter se* agreement has to be notified as well,[53] unless the treaty itself dispenses with such a duty.[54]

20 The formal procedure of notification is regulated by Arts 77 and 78. The States to be notified are the **other States Parties**, *ie* those States that have signed and ratified the original treaty. The obligation of notification laid down in Art 41 para 2 thus has a more limited scope than the similar duty set out by Art 40 para 2. In the case of an amendment, all contracting States, *ie* not only the States Parties but also those States that have signed but not yet ratified the original treaty, have to be notified (→ Art 40 MN 13).

21 The notification has to be made at **the moment** when the negotiation process of the *inter se* agreement has "reached a mature stage",[55] *ie* when the States Parties concerned have reached a consensus on the content of the modification, and no relevant obstacles to the conclusion of the agreement remain.[56] The notification of a modification proposal, at a time when the negotiations are still at an exploratory stage, was considered as "unnecessary and even inadvisable" by the ILC.[57] The notification of the effective conclusion of the modification agreement, on the contrary, was considered as being too late by the delegations at the Vienna Conference (→ MN 7). Hence, the aim of the notification becomes visible: the other States Parties shall be given the opportunity to verify whether the modification is in conformity with the original treaty and shall be protected against a *fait accompli* that might affect their rights.[58]

22 Consequently, the **content of the notification** covers two aspects, namely the intention as such to conclude an *inter se* agreement, and the content of the intended modification. Hence, the other States Parties are given the opportunity to satisfy themselves that the modification does not violate the basic rights, obligations, object or purpose of the treaty. It is not necessary, however, to submit the text of the modification agreement.[59] The principle of giving all other States Parties the opportunity to examine the modification corresponds to the principle of notifying and consulting all contracting States when amending a treaty (→ Art 40 MN 12 *et seq*).

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[53] See *A Rigaux/D Simon* in *Corten/Klein* Art 41 MN 34 with reference to former versions of today's Art 41 para 2 and the history of negotiations.

[54] Final Draft, Commentary to Art 37, 235 para 3.

[55] *Ibid*.

[56] *A Rigaux/Simon* in *Corten/Klein* Art 41 MN 35.

[57] Final Draft, Commentary to Art 37, 235 para 3.

[58] *Villiger* Art 41 MN 10; *A Rigaux/D Simon* in *Corten/Klein* Art 41 MN 35; *S Bastid* Les traités dans la vie internationale (1985) 179.

[59] *Villiger* Art 41 MN 11. For a different view, see *Reuter* MN 209, according to whom the notification of the modification agreement is also necessary.

This general principle of involving all States concerned was considered by the ILC as flowing directly from the obligation to perform a treaty in good faith.[60] Unlike in the case of an amendment, the other States Parties do not have the right to participate in the process of modification. The right to become a party to the modifying agreement depends on the *inter se* agreement.[61]

Selected Bibliography

J Pauwelyn The Role of Public International Law in the WTO: How Far Can We Go? (2001) 95 AJIL 535–578.

[60] Final Draft, Commentary to Art 36, 233 para 9.

[61] *Villiger* Art 41 MN 12.

Part V
Invalidity, Termination and Suspension of the Operation of Treaties

Section 1
General Provisions

Article 42
Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.
2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Contents

A. Purpose and Function

Part V of the VCLT consists of five sections: general provisions (Arts 42–45), Invalidity of Treaties (Arts 45–53), termination and suspension of the operation of treaties (Arts 54–64), procedure (Arts 65–68) and consequences of the invalidity, and termination or suspension of the operation of a treaty (Arts 69–72). Despite its misleading[1] heading ("Invalidity, Termination and Suspension of the Operation of Treaties"), the main purpose of Part V is to provide for the **stability of treaties** under international law. The technique employed to this end is the setting out of an exhaustive list of grounds of invalidity, termination or suspension of a treaty and the establishment of procedural rules to be applied when States Parties invoke one of these grounds.[2] In fact, Part V reaffirms and at the same time sets out the exceptions to the rule of *pacta sunt servanda*.[3] **1**

Art 42 is the first rule of Section 1, containing the general provisions. According to its title "Validity and continuance in force of treaties", **Art 42 presumes the validity of a treaty**.[4] The ILC considered it desirable to begin Section 1 by a **2**

[1] *Sinclair* 162.

[2] *MG Kohen* in *Corten/Klein* Art 42 MN 1.

[3] *SE Nahlik* The Grounds of Invalidity and Termination of Treaties (1971) 65 AJIL 746; *Sinclair* 162; *MG Kohen* in *Corten/Klein* Art 42 MN 1.

[4] *Nahlik* (n 3) 739; *M Schröder* Treaties, Validity in MPEPIL (2006) MN 3; *Villiger* Art 42 MN 5; *Aust* 312; *MG Kohen* in *Corten/Klein* Art 42 MN 2, 16.

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provision highlighting that "the validity and the continuance in force of a treaty is the normal state of things".[5] Hence, a States Party invoking one of the grounds of invalidity, termination or suspension has the burden of proof.[6]

3 Art 42 sets out the rule that a treaty may only be brought to an end through the application of the provisions of the VCLT or the provisions of the respective treaty. The reference to the VCLT comprises all of its provisions.[7] Therefore, Art 42 contains the **rule of the exhaustive application**[8] of the VCLT and of the respective treaty provisions when dealing with the question of bringing a treaty to an end. It is the principle of legality that governs the provision.[9] Art 42 is thus **not a substantive rule with normative quality** but a legislative provision determining how to use the substantive rules of the VCLT and of the respective treaty.[10]

4 The **divergent rules set out in paras 1 and 2** concerning the application of the VCLT only (para 1) and the application of both the VCLT and the treaty provisions (para 2) are due to the differentiation between invalidity of the treaty or the consent to be bound by the treaty on the one hand, and termination, denunciation, withdrawal and suspension on the other hand. Art 2 VCLT does not define the various terms. Nevertheless, a glance at the legal effect of the various notions allows for a differentiation.

5 An **invalid treaty** is void; its provisions do not have any legal force (Art 69 para 1). However, it is not only the treaty that may be invalid. The **consent of a State to be bound by the treaty** may also be invalid (Art 69 para 4). Whether the first or the second situation arises mainly depends on the bilateral or the multilateral nature of the treaty.[11] Both cases, however, are governed by the rules set out in Section 2.[12] The grounds of invalidity arise out of reasons of *ordre public* or out of defects concerning the agreement between the States Parties. In both cases, the invalidity operates *ex tunc* (Art 69).[13] Since treaties usually do not contain provisions relating to their own invalidity,[14] such as provisions on error, fraud or

[5] Final Draft, Commentary to Art 39, 236 para 1.

[6] *MG Kohen* in *Corten/Klein* Art 42 MN 16; *Villiger* Art 42 MN 5; *Aust* 322.

[7] Final Draft, Commentary to Art 39, 237 para 4; *Aust* 277 *et seq*, 322; *Villiger* Art 42 MN 3.

[8] Final Draft, Commentary to Art 39, 237 para 5; *Schröder* (n 4) MN 3; *Villiger* Art 42 MN 7.

[9] *Villiger* Art 42 MN 3; *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/M Vogiatzi* (eds) Time, History and International Law (2007) 141, 142.

[10] *Klabbers* (n 9) 148; *Villiger* Art 42 MN 7.

[11] *Aust* 321; *Sinclair* 160 *et seq*.

[12] *Sinclair* 160 *et seq*.

[13] *E Jiménez de Arechaga* International Law in the Past Third of a Century (1978) 159 RdC 59; *Schröder* (n 4) MN 24; *Nahlik* (n 3) 738; *JM Ruda* Terminación y suspensión de los tratados in *EG Bello/BA Ajibola* (eds) Festschrift Elias Vol I (1992) 93.

[14] *Waldock* [1966-I/1] YbILC 103 para 60.

coercion, para 1 only refers to the VCLT as governing the invalidity of the whole treaty or of a single State's consent to be bound by it.

6 The **termination** of a treaty, in contrast, refers to the future. A termination releases the States Parties from the obligation to perform the treaty further, but it does not affect the rights and obligations existing prior to the termination (Art 70 para 1). The termination, therefore, operates *ex nunc* (Art 70).[15] The **denunciation** and the **withdrawal** of a treaty also constitute a termination. However, they only refer to the contractual obligations of single States Parties (Art 70 para 2).[16] The **suspension** of the operation of a treaty resembles its termination, but it is only of temporary nature (Art 72).[17] The grounds for terminating and suspending a treaty are laid down in Section 3. Most of them refer to the will of the States Parties, to the impossibility to perform the treaty or to fundamental changes of circumstances. Since the majority of modern treaties do contain provisions relating to their termination or suspension in the future,[18] para 2 refers to both the VCLT and the respective treaty provisions when setting out the rules to be applied.

7 Due to its reference to the VCLT as a whole (→ MN 3), Art 42 stands in a **close relationship** to almost all other provisions of the VCLT. The most important articles, however, are the material provisions to be found in Sections 2 and 3 of Part V, as well as the procedural provisions laid down in Section 4 of Part V.[19] Another close relationship exists between Art 42 and Art 26 containing the rule of *pacta sunt servanda*. If a treaty is invalid, the rule of *pacta sunt servanda* is inapplicable. If a treaty is terminated or suspended, the rule ceases to apply.[20] Besides invalidity, termination and suspension, there are, however, other constellations that may lead to the non-application of a treaty[21]: A partial non-application is present in the cases covered by Art 30 paras 3 and 4 (conclusion of a later treaty relating to the same subject matter) as well as by Arts 39–41 (amendment and modification of treaties). However, whereas in the latter cases the non-application of the treaty is the result of a legal act, the grounds listed in Part V, to which Art 42 refers, stem from a fact, *ie* when the treaty itself contains defects, when external facts influence its applicability or when a States Party commits an unlawful act in the execution of the treaty.[22]

[15] *Nahlik* (n 3) 738; *Jiménez de Arechaga* (n 13) 59; *Ruda* (n 13) 93.

[16] *Ruda* (n 13) 93.

[17] *S Bastid* Les traités dans la vie internationale (1985) 193; *I Cameron* Treaties, Suspension in MPEPIL (2007) MN 1.

[18] Final Draft, Commentary to Art 39, 236 para 3; *Aust* 277; *Sinclair* 163.

[19] Final Draft, Commentary to Art 39, 237 para 4; *MG Kohen* in *Corten/Klein* Art 42 MN 17.

[20] *Ago* [1966-I/1] YbILC 6 para 24.

[21] *Sinclair* 159 *et seq*; *Aust* 292 et *seq*; *Reuter* 163 *et seq*.

[22] *P Reuter* Introduction au droit des traités (1975) MN 217 *et seq*; *Reuter* 163 *et seq*.

B. Historical Background and Negotiating History

8 Since Art 42 is not a substantive rule but a legislative provision referring to other articles of the VCLT (→ MN 3), Art 42 was, by its very nature, **not a codification of customary law** at the time the VCLT was developed.[23] The first version of today's Art 42 appeared in the second report of SR *Waldock* in 1963 who presented a Draft Art 2 entitled "The presumption in favour of the validity of a treaty".[24] The provision differentiated between treaties that lack essential validity and treaties that cease to be in force. It led, however, to lengthy debates within the ILC. There were many doubts as to the necessity of such a **presumption of validity**.[25] Finally, the provision was referred to the Drafting Committee for re-drafting. The ILC then had to decide, on the basis of the new draft, whether to keep the provision or not.[26] The reformulated version still contained a strong element of presumption, but no longer explicitly aimed at establishing a primary rule of validity.[27] The ILC adopted it with 16 votes to none, with one abstention.[28]

9 In his fourth report, SR *Waldock* presented a new provision, which was no longer positioned at the beginning of the VCLT but at the **outset of Part V**.[29] Furthermore, it included, for the first time, the suspension of the operation of a treaty. The comments by the government representatives were largely positive; most of them only related to questions of formulation in different languages.[30] Art 39 Final Draft[31] no longer mentioned the word "presumption" and corresponded largely with today's Art 42. There remained, however, two main differences: para 1 did not distinguish between validity of the whole treaty and validity of the consent to be bound to a treaty; and it asserted that an invalid treaty is void.

10 During the final stages of drafting, the **question of exhaustiveness** was the centre of attention during the debate. Concerns as to the aspiration of setting out a comprehensive set of grounds of invalidity, termination and suspension of a treaty were raised.[32] When it finally turned out that the VCLT would not deal with questions arising in cases of State succession, State responsibility and outbreak of hostilities (today's Art 73), it was decided not to incorporate a saving clause in the

[23] *Klabbers* (n 9) 148; *MG Kohen* in *Corten/Klein* Art 42 MN 7.

[24] *Waldock* II 39.

[25] Statements of *Castrén*, *Yasseen*, *Tunkin*, *Briggs* and *de Luna* [1963-I] YbILC 195 paras 70, 73, 74, 80 and 81.

[26] [1963-I] YbILC 196 para 88.

[27] [1963-I] YbILC 296 para 92.

[28] [1963-I] YbILC 297 para 98.

[29] *Waldock* IV 65 *et seq*; [1963-II] YbILC 189.

[30] *Waldock* IV 65.

[31] Final Draft 236.

[32] Statements of *Rosenne*, *Yasseen, de Luna* and *Verdross* [1966-I/1] YbILC 123 *et seq*. paras 25, 26, 31, 37.

provision.[33] At the Vienna Conference, the assertion that an invalid treaty is void was transferred to today's Art 69 para 1.[34] None of the other amendments proposed with regard to Draft Art 39 were adopted.[35] Finally, Draft Art 39, which was to become today's Art 42, was adopted by 90 votes to none, with no abstentions.[36]

The **question of whether Art 42 reflects contemporary customary law** has to be answered in the negative. It would only reflect customary law if invalidity, termination and suspension of treaties, even in those cases where the VCLT does not apply, would be exclusively governed by the VCLT, especially by the grounds established in Part V. There have been some statements in judicial decisions determining that certain grounds of invalidity[37] as well as all,[38] respectively, specific[39] grounds of termination listed in the VCLT reflect customary law. However, since there is no proof that all other grounds as well as all other rules of the VCLT governing the invalidity, termination and suspension of a treaty, including the procedural rules laid down in Section 4 of Part V, have become part of customary law, it is not possible to state that the whole of Art 42 is of a customary nature. **11**

C. Elements of Article 42

I. Validity of a Treaty or of the Consent of a State to Be Bound by a Treaty (para 1)

Art 42 para 1 is based on the assumption that a treaty and/or the consent of a State to be bound by a treaty may be invalid and, therefore, void. Before the adoption of the VCLT, this possibility was not recognised unanimously in international law. Invalidity was rather considered as a phenomenon of well-developed and detailed domestic law dealing with individual persons, which could not easily be transposed into international law.[40] By establishing that international legal acts may be invalid as well, the VCLT in fact introduced **a new aspect into public international law**.[41] **12**

Invalidity may be **absolute or relative**. In case of absolute invalidity, the treaty or the consent of a State is null and void *erga omnes* from the very beginning; it **13**

[33] *Klabbers* (n 9) 151.

[34] UNCLOT I 481 para 68.

[35] *Ibid* UNCLOT I 481 paras 68, 72.

[36] UNCLOT II 73 para 10.

[37] ICJ *Fisheries Jurisdiction (United Kingdom v Iceland)* (Jurisdiction of the Court) [1973] ICJ Rep 3, para 24 (concerning the threat or use of force).

[38] Separate opinion of Judge *de Castro* in ICJ *Fisheries Jurisdiction* (n 37) 75; *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, paras 98 *et seq*.

[39] ECJ (CJ) *Racke GmbH & Co v Hauptzollamt Mainz* Case C-162/96 [1998] ECR I-3655, para 53.

[40] *P Cahier* Les caractéristiques de la nullité en droit international public, tout particulièrement dans la Convention de Vienne sur le droit des traités (1972) 76 RGDIP 646 *et seq*.

[41] *MG Kohen* in *Corten/Klein* Art 42 MN 9.

does not have any legal force.[42] In the case of relative invalidity, in contrast, the ground of invalidity has to be invoked by a States Party in order to take legal effect. Otherwise, the treaty or the consent of the State remains valid. A relatively invalid treaty or State's consent is, therefore, not void but voidable.[43]

14 The invalidity of a treaty or of the consent of a State to be bound by a treaty is, however, **not of great practical importance**.[44] There are scarcely any examples to be found in international legal practice where a treaty has been declared invalid.[45]

II. Application of the Present Convention (para 1)

15 The formulation that invalidity may only be impeached "through the application of the present Convention" refers to all the provisions of the VCLT (→ MN 3). Concerning invalidity, the most important articles are those of Section 2 containing the **grounds of invalidity**. The VCLT recognizes eight of them: consent expressed in violation of a provision of internal law (Art 46), specific restrictions on the authority to express the consent (Art 47), error (Art 48), fraud (Art 49), corruption (Art 50), coercion (Art 51), threat or use of force (Art 52) and the conflict with *ius cogens* (Art 53).[46]

16 Even though the VCLT does not explicitly employ the notions of absolute and relative invalidity, the wording of the individual provisions of Section 2 shows that the differentiation between the two forms of invalidity exists. The grounds of invalidity set out in Arts 51–53 lead to **absolute invalidity**.[47] According to all three provisions, the treaty or the State's consent shall be without any legal effect or be void. The grounds listed in Arts 46–50, in contrast, give the States Party the right to invoke the invalidity of the treaty or of its consent. Therefore, only **relative invalidity** is established.[48]

17 One important objective of the reference to the VCLT was the establishment of an **exhaustive catalogue of grounds of invalidity**.[49] This restrictive approach taken by the ILC led to much criticism. It is to be noted, however, that almost all critical remarks refer to the exhaustiveness of the catalogue of grounds for

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[42] *Jiménez de Arechaga* (n 13) 68; *Sinclair* 160 *et seq*; *Schröder* (n 4) MN 4.

[43] *Schröder* (n 4) MN 4; *Jiménez de Arechaga* (n 13) 68; *Sinclair* 160 *et seq*.

[44] *Cahier* (n 40) 646; *Aust* 312.

[45] *Aust* 312; *Schröder* (n 4) MN 2.

[46] Overviews of the different grounds of invalidity are provided by *TO Elias* Problems Concerning the Validity of Treaties (1971) 134 RdC 350 *et seq*; *Jiménez de Arechaga* (n 13) 60 *et seq*; *Nahlik* (n 3) 740 *et seq*; *Reuter* 173 *et seq*; *A Aust* Treaties, Termination in MPEPIL (2006) MN 4 *et seq*.

[47] *Nahlik* (n 3) 746; *Cahier* (n 40) 672 *et seq*; *Jiménez de Arechaga* (n 13) 68; *Sinclair* 161; *Schröder* (n 4) MN 4.

[48] *Sinclair* 161; *Cahier* (n 40) 679 *et seq*; *Schröder* (n 4) MN 4; *Jiménez de Arechaga* (n 13) 68; *Nahlik* (n 3) 746.

[49] Final Draft, Commentary to Art 39, 237 para 5; *Jiménez de Arechaga* (n 13) 59; *Sinclair* 162; *Villiger* Art 42 MN 9.

termination (→ MN 25), not to the grounds for invalidity.[50] During the Vienna Conference, the exhaustiveness of the grounds for invalidity was scarcely discussed. There were only remarks concerning so-called 'unequal' or 'inequitable' treaties: according to some delegates, treaties concluded under economic or political pressure had to be considered invalid as well.[51] However, this proposal was not accepted. The list of grounds of invalidity set out in Section 2 is, therefore, recognised as being exhaustive in nature.[52]

Another important set of provisions to be applied are the **procedural rules** set out in Section 4 (→ Arts 65–68).[53] As the negotiations at the Vienna Conference show, the inclusion of the procedural rules was considered as so decisive that some delegations proposed to incorporate an explicit reference to Section 4, even though this was not technically necessary.[54] One of the main consequences of the applicability of the procedural rules is that a unilateral assertion of a State concerning the validity of its consent or of the treaty as a whole does not have any legal effect.[55] **18**

III. Termination, Denunciation or Withdrawal (para 2)

The **termination** of a treaty operates *ex nunc* (→ MN 6). It releases States Parties from the obligation to further perform the treaty, but it does not affect the rights and obligations existing prior to the termination (→ Art 70 para 1). Both the denunciation of a treaty and the withdrawal of a treaty refer to the action of individual States Parties with regard to their contractual obligations. Although 'denunciation' and 'withdrawal' are often used synonymously, it is advisable to employ the term 'denunciation' when dealing with a bilateral treaty and the term 'withdrawal' when dealing with a multilateral treaty.[56] The **denunciation** of a bilateral treaty results in its termination, while the **withdrawal** of one States Party from a multilateral treaty usually does not affect the force of the treaty as such, but only the contractual obligations of the respective State.[57] **19**

[50]This distinction is not explicitly made in legal literature. However, an analysis of the arguments put forward shows that all of them exclusively refer to the grounds for termination of treaties.

[51]*Yasseen* [1966-I/1] YbILC 32, 119, 123. See also *Nahlik* (n 3) 744.

[52]*MG Kohen* in *Corten/Klein* Art 42 MN 36.

[53]Final Draft, Commentary to Art 39, 237 para 4; statement of Expert Consultant *Waldock* UNCLOT I 226 para 64; *H Mosler* The International Society as a Legal Community (1980) 102; *Klabbers* (n 9) 148; *Villiger* Art 42 MN 5; *MG Kohen* in *Corten/Klein* Art 42 MN 17.

[54]Statements by the representatives of Peru, Australia and the United Kingdom UNCLOT I 216–218.

[55]Statement by the representative of the United States UNCLOT I 222 para 10; *MG Kohen* in *Corten/Klein* Art 42 MN 18; *Villiger* Art 42 MN 6; *Jiménez de Arechaga* (n 13) 59.

[56]*Aust* 277; *NQ Dinh/P Daillier/A Pellet* Droit international public (2002) MN 192.

[57]*Aust* (n 46) MN 1.

20 In contrast to the invalidity of treaties (→ MN 14), the termination of treaties is of **immense practical importance**.[58] No treaty is intended to last forever and to withstand all circumstances. Therefore, most modern treaties contain provisions with regard to their termination (→ M 21 *et seq*).

IV. Application of the Provisions of the Treaty (para 2)

21 Both Art 42 para 2 and Art 54 subpara a explicitly refer to the provisions of the respective treaty when determining the circumstances according to which a treaty may be terminated. The variety of termination clauses is impressive.[59] Some treaties are concluded for a certain **time period** only.

> The Treaty Establishing the European Coal and Steel Community (ECSC Treaty), for example, was concluded for a period of fifty years from the date of its entry into force.[60] Art XIV Genocide Convention[61] establishes that the treaty shall remain in effect for a period of ten years from the date of its coming into force. Thereafter, it shall remain in force for successive periods of five years for such States Parties that have not denounced it at least six months before the expiry of the current period. The Warsaw Pact[62] contains a similar clause on the automatic extension of its duration[63] and combines it with a clause on its termination at the moment that a certain event occurs.[64]

22 Most modern treaties provide for the possibility of **withdrawal or denunciation**.[65] Some of them specify in detail the conditions to be met and the procedure to be followed.

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[58] *R Plender* The Role of Consent in the Termination of Treaties (1986) 57 BYIL 133 *et seq*; *Aust* (n 46) MN 2.

[59] Many examples are provided by *LR Helfer* Existing Treaties (2005) 91 Virginia LR 1579, 1596 *et seq*; *Dinh/Daillier/Pellet* (n 56) MN 194 *et seq*; *Aust* (n 46) MN 5 *et seq*; Aust 278 *et seq*; *Ruda* (n 13) 94 *et seq*; *Plender* (n 58) 135 *et seq*.

[60] Art 97 ECSC Treaty. Therefore, the ECSC ceased to exist on 23 July 2002.

[61] 1948 Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277.

[62] 1955 Treaty of Friendship, Co-operation and Mutual Assistance Between the People's Republic of Albania, the People's Republic of Bulgaria, the Hungarian's People's Republic, the German Democratic Republic, the Polish People's Republic, the Romanian People's Republic, the Union of Soviet Socialist Republics and the Czechoslovak Republic 219 UNTS 3.

[63] Art 11 para 1: "The present Treaty shall remain in force for twenty years. For Contracting Parties which do not, one year before the expiration of that term, give notice of termination of the Treaty to the Government of the Polish People's Republic, the Treaty shall remain in force for a further ten years."

[64] Art 11 para 2: "In the event of the establishment of a system of collective security in Europe and the conclusion for that purpose of a General European Treaty concerning collective security the present Treaty shall cease to have effect as from the date on which the General European Treaty comes into force."

[65] An interdisciplinary analysis of the various withdrawal and denunciation clauses is provided by *Helfer* (n 59).

According to Art 317 UN Convention on the Law of the Sea,[66] any States Party may, by written notification addressed to the UN Secretary-General, withdraw[67] from the treaty and indicate its reasons. Failure to indicate reasons shall not affect the validity of the withdrawal. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date. Art 58 ECHR[68] provides that a States Party may withdraw[69] from the treaty only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary-General of the Council of Europe, who shall inform the other States Parties.

It is noteworthy that the termination, denunciation or withdrawal clauses do not necessarily have to be included in the original treaty. It is also possible to provide for such a clause in a **subsequent agreement**.[70] **23**

V. Application of the Present Convention (para 2)

If a treaty does not contain any termination, denunciation or withdrawal clauses, the rules of the VCLT apply. The reference made in Art 42 para 2 to the "present Convention" largely corresponds to the identical wording in para 1 concerning the invalidity of treaties (→ MN 15 *et seq*). Therefore, even though reference is made to the VCLT as a whole, the most important provisions are those containing the **grounds of termination, denunciation or withdrawal** as set out in Section 3.[71] The VCLT enumerates eight grounds: explicit treaty provisions or consent of the States Parties (Art 54), implicit right of denunciation or withdrawal (Art 56), conclusion of a later treaty (Art 59), material breach of the treaty by one of the States Parties (Art 60), impossibility of performance (Art 61), fundamental change of circumstances (Art 62), severance of diplomatic or consular relations (Art 63) and the emergence of a new norm of *ius cogens* (Art 64).[72] **24**

Even though the ILC had discussed whether the reference to the VCLT establishes an **exhaustive catalogue of grounds** of termination, denunciation or withdrawal (→ MN 10), the controversy on this point has not come to an end. One matter dealt with in the ILC was the question of whether 'obsolescence' or 'desuetude' would constitute further grounds of termination. The ILC came to the conclusion that both terminate a treaty but are covered by Art 54 lit b since both have their legal basis in the consent of the States Parties.[73] Furthermore, the ILC **25**

[66] 1982 UN Convention on the Law of the Sea 1833 UNTS 3.

[67] Art 317 employs the term "denounce" even though it is a multilateral treaty.

[68] 1950 Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5.

[69] Art 58 employs the term "denounce" even though it is a multilateral treaty.

[70] *Ruda* (n 13) 93; *Villiger* Art 42 MN 11.

[71] *Villiger* Art 42 MN 10.

[72] Overviews of the different grounds of termination, denunciation and withdrawal are provided by *Nahlik* (n 3) 746 *et seq*; *Ruda* (n 13) 94 *et seq*; *Aust* (n 46) MN 4 *et seq*; *C Feist* Kündigung, Rücktritt und Suspendierung von multilateralen Verträgen (2001) 133 *et seq*.

[73] Final Draft, Commentary to Art 39, 237 para 5.

decided to leave all questions relating to State succession, State responsibility and outbreak of hostilities aside since they do not fall under the scope of the VCLT (Art 73).[74] Many authors agree with the exhaustiveness of the catalogue of grounds by stating that the grounds listed did indeed correspond to the state of international law at the time; they did not contain great novelties and were based on established rules of customary international law.[75] Other authors criticise the absence of other possible grounds of termination.[76] Art 42, if taken seriously, would aspire to create a vacuum around the VCLT positing it as a self-contained regime paced at the "apex of international law".[77] One often cited example of a further ground of termination is 'desuetude'.[78] It is argued that it does not have its basis in implied consent but in customary international law.[79] This point of view, however, has been proven to be wrong according to case law and State practice, which show that 'desuetude' is in fact a form of termination of treaties by consent.[80] Thorough analyses of other grounds mentioned, such as complete execution of the treaty or the extinction of the legal personality of a States Party, show similar results: the grounds mentioned are not really different from those listed in Section 3; they are covered by various existing provisions of the VCLT.[81] Furthermore, it should be recalled that Art 42 is not really exhaustive: since the termination of a treaty may also occur under the provisions of the treaty itself (→ MN 21 *et seq*) and since State succession, State responsibility and outbreak of hostilities do not fall under the scope of the VCLT (Art 73), the presumed 'vacuum' created by Art 42 is not really existent.[82]

26 Apart from the grounds of invalidity listed in Section 3, the reference to the VCLT in para 2 also concerns the **procedural rules** set out in Section 4 (Arts 65–68).[83] Therefore, in the case of invalidity (→ MN 18), no States Party has the right to release itself unilaterally from its treaty obligations,[84] except in those cases where a unilateral right to terminate a treaty is provided for in the termination clause of the respective treaty (→ MN 21 *et seq*).

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[74] *Ibid*.

[75] *Nahlik* (n 3) 754.

[76] *F Capotorti* L'extinction et la suspension des traités (1971) 134 RdC 446 *et seq*, *Sinclair* 163 *et seq*; *J Crawford*/*S Olleson* The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility (2000) 21 AYBIL 55.

[77] *Klabbers* (n 9) 152, 153.

[78] *Capotorti* (n 76) 519; *MG Kohen* in *Corten*/*Klein* Art 42 MN 22 *et seq*, 36.

[79] *Capotorti* (n 76) 519.

[80] *Plender* (n 58) 138 *et seq*, 144.

[81] *Aust* 305 *et seq*; *id* (n 46) MN 43 *et seq*; *Ruda* (n 13) 108 *et seq*. According to *MG Kohen* in *Corten*/*Klein* Art 42 MN 19 *et seq*, 36, however, 'obsolescence' and 'desuetude' have to be considered as separate grounds of termination not listed in the VCLT.

[82] *Klabbers* (n 9) 154, 160.

[83] Final Draft, Commentary to Art 39, 237 para 4; *Capotorti* (n 76) 446, 455; *Sinclair* 163; *MG Kohen* in *Corten*/*Klein* Art 42 MN 17; *Ruda* (n 13) 95.

[84] *McNair* 493 *et seq*; *MG Kohen* in *Corten*/*Klein* Art 42 MN 18.

In the *Fisheries Jurisdiction* case, Judge *de Castro* explicitly stated that in "the light of the principles enshrined in Article 42 [VCLT], it is quite clear that Iceland does not have the right to declare unilaterally that the agreement made in 1961 no longer constitutes an obligation for it."[85]

VI. Suspension of the Operation of a Treaty (para 2)

The **term "suspension"** denotes a temporary non-operation of the treaty in whole or in part (→ Art 72 MN 1).[86] According to para 2 cl 2, the same rule as in cl 1 for termination, denunciation or withdrawal applies to the suspension of a treaty. Therefore, a treaty may either be suspended as a result of the application of the provisions of the treaty or of the VCLT. **27**

Only few treaties contain **suspension clauses** referring to the treaty as a whole.[87] Most suspension clauses establish a right to suspend **certain provisions of the treaty** unilaterally. Such clauses are often included in Human Rights conventions or in trade treaties. **28**

According to Art 4 ICCPR[88] and Art 15 ECHR,[89] States Parties may take measures derogating from their obligations under the treaty in time of war or other public emergency threatening the life of the nation; certain human rights, however, are excluded from this possibility of temporary derogation. Art 96 Cotonou Agreement[90] provides that in the case of a failure of one party to fulfill an obligation stemming from respect for human rights, democratic principles and the rule of law, the other party may take appropriate measures, including suspension as a measure of last resort.

Other suspension clauses, especially those to be found in treaties establishing international organisations, provide for the possibility to **suspend the membership** of one States Party. **29**

Art 5 UN Charter, for example, stipulates that the General Assembly may suspend States Parties from the exercise of the rights and privileges of membership if the Security Council has adopted measures against the respective States Party.

When a treaty contains no suspension clauses, the rules of the VCLT, especially the **grounds of suspension** laid down in Section 3, apply. The VCLT recognises six of them: explicit treaty provisions or consent of the States Parties (Art 57), agreement to suspend a multilateral treaty between certain of the States Parties only (Art 58), conclusion of a later treaty (Art 59), material breach of the treaty by one of **30**

[85]Separate opinion of Judge *de Castro* in ICJ *Fisheries Jurisdiction* (n 37) 75.

[86]*Cameron* (n 17) MN 1; *MG Kohen* in *Corten/Klein* Art 42 MN 14; *Ruda* (n 13) 116.

[87]*Dinh/Daillier/Pellet* (n 56) MN 194.

[88]1966 International Covenant on Civil and Political Rights 6 ILM 368.

[89]See n 68.

[90]2000 Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States on the One Side, and the European Community and its Member States, on the Other [2000] OJ L 317, 3.

the States Parties (Art 60), impossibility of performance (Art 61) and fundamental change of circumstances (Art 62).[91]

31 The question of whether this catalogue of grounds is of **exhaustive nature** has not caused much controversy.[92] In fact, most grounds outside of the VCLT that are mentioned in legal literature,[93] either fall under the scope of other provisions of the VCLT or belong to situations that were explicitly left aside by the VCLT according to Art 73.

32 Finally, the **procedural safeguards** laid down in Section 4 apply to the case that the treaty does not contain a suspension clause.[94] As a consequence, any ground of suspension has to be invoked and notified to the other States Parties. A unilateral right to suspend a treaty does not exist.

33 Suspension is a relatively rare phenomenon in international State practice.[95] However, there are examples where a treaty has been suspended by one of the States Parties according to the rules laid down in the VCLT.

> In 2007, Russia suspended the 1990 Treaty on Conventional Armed Forces in Europe (CFE Treaty).[96] Since the treaty did not contain any suspension clause, the rules of the VCLT, to which Russia is a party, had to be applied. However, according to most scholars who analyzed the suspension, Russia acted contrary to international law since none of the six grounds on suspension where given and since Russia did not comply with the procedural rules laid down in Section 4.[97]

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[91] Overviews of the different grounds of suspension are provided by *Cameron* (n 17) MN 6 *et seq*; *Ruda* (n 13) 113 *et seq*; *Sinclair* 181 *et seq*; *Feist* (n 72) 133 *et seq*.

[92] Most controversies refer to the grounds of termination, denunciation and withdrawal (→ MN 25).

[93] See *eg Cameron* (n 17) MN 11.

[94] *Ibid* MN 7; *Aust* (n 46) MN 47.

[95] *Cameron* (n 17) MN 13.

[96] 30 ILM 6.

[97] *A Collicelli* Frozen Obligations: Russia's Suspension of the CFE Treaty as a Potential Violation of International Law (2009) 32 Boston College International & Comparative Law Quarterly 331; *M Shterngel* Bucking Conventional Wisdom: Russia's Unilateral 'Suspension' of the CFE Treaty (2008) 33 Brooklyn JIL 1037.

Article 43

Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Contents

A. Purpose and Function

Art 43 applies when one of the situations referred to in Art 42 arises, *ie* when it turns out that the treaty is invalid or when the treaty has been terminated or suspended. Whereas the consequences of invalidity, termination or suspension concerning treaty obligations are laid down in Section 5 of Part V, the **consequences concerning identical obligations existing independently of the treaty** are to be found in Art 43. Such identical obligations namely derive from customary international law.[1] However, they may also derive from other sources of international law.[2] **1**

Therefore, the **scope of application of Art 43 is wide**[3]: the provision applies in every case when treaty obligations come to an end, regardless of whether the end is due to invalidity, termination, denunciation, withdrawal or suspension, and regardless of whether they are the result of the application of the treaty in question or of the VCLT. Furthermore, Art 43 provides that all identical obligations existing independently of the treaty are not impaired, regardless of when or how these identical rules developed. **2**

[1] *Villiger* Art 43 MN 4.

[2] *Waldock* II 94 para 5; *K Bannelier-Christakis* in *Corten/Klein* Art 43 MN 7.

[3] *K Bannelier-Christakis* in *Corten/Klein* Art 43 MN 7–8.

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3 Art 43 does not embody a rule but a principle[4]: the **principle of parallelism and autonomy of sources of international law**.[5] The principle is reflected in other provisions of the VCLT as well, such as the Preamble para 8, Art 30 and Art 38. Obligations outside the treaty that are not identical with the treaty obligations are not explicitly governed by the VCLT. Nevertheless, the principle of parallelism and autonomy of sources of international law applies to them as well. If identical obligations outside the treaty are not affected, non-identical obligations remain *a fortiori* unaffected.

4 As already mentioned, Art 43 has to be read together with **Section 5 of Part V** (Arts 69–72). Both deal with the consequences of invalidity, termination and suspension of treaties. They complete each other by referring to treaty obligations on the one hand and to identical obligations outside the treaty on the other. Another important provision of the VCLT is **Art 38,**[6] which provides that any treaty rule may develop into a rule of customary law. As a consequence, the identical obligation outside the treaty, to which Art 43 refers, may be a rule of customary law, which developed after the conclusion of the treaty in question.[7]

B. Historical Background and Negotiating History

5 Some treaties existing prior to the adoption of the VCLT contained provisions similar to today's Art 43.[8] Most treaties, however, including those codifying rules of *ius cogens*,[9] lacked such clauses. Therefore, even though the principle of parallelism and autonomy of sources of international law might be self-evident,[10] the ILC considered it as appropriate to **reaffirm the principle** and its validity for all treaties

[4] *Villiger* Art 43 MN 5, 9.

[5] *K Bannelier-Christakis* in *Corten/Klein* Art 43 MN 1. The application of this principle in the relationship between treaties and customary law is explained by *ME Villiger* Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources (1997).

[6] *Villiger* Art 43 MN 5–6; *K Bannelier-Christakis* in *Corten/Klein* Art 43 MN 6.

[7] *K Bannelier-Christakis* in *Corten/Klein* Art 43 MN 6.

[8] See Art 63 para 3 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31; Art 62 para 3 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 75 UNTS 85; Art 142 para 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War 75 UNTS 135; Art 158 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287.

[9] See *eg* the 1948 Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277.

[10] *Waldock* II 94 para 5; *Tunkin* [1963-I] YbILC 235 para 36; [1963-II] YbILC 217 para 5; *Villiger* Art 43 MN 9; *K Bannelier-Christakis* in *Corten/Klein* Art 43 MN 1.

by including a specific provision with regard to the subject.[11] Hence, the ILC wanted to act *ex abundanti cautela*.[12]

6 In his second report 1963, SR *Waldock* supplemented Art 28 dealing with the legal effect of the **termination of a treaty** with a new para 3.[13] It stipulated that the release of a State from any obligation to perform the treaty further should in no way impair its duty to fulfil any obligations embodied in the treaty that were binding upon it under international law independently of the treaty. The provision was discussed and accepted due to its fundamental importance.[14] Only one delegate argued that it was unnecessary to include it in the VCLT since it was self-evident and did not really form part of the law of treaties.[15] Art 28 para 3 became Art 53 para 4 of the ILC Draft 1963.[16]

7 In the Final Draft, the provision became a separate article (Draft Art 40), applicable not only to **termination** but also to **invalidity, denunciation, withdrawal and suspension**.[17] When re-examining the articles, the ILC had come to the conclusion that the principle providing for the termination of treaties should also be applied to every case where a treaty comes to an end.[18] Draft Art 40 was almost identical to today's Art 43. Three amendments were proposed during the Vienna Conference, but none of them was accepted.[19] The provision was adopted by 99 votes to none, with one abstention.[20]

8 The principle laid down in Art 43 providing for parallelism and autonomy of sources of international law forms **part of customary law**.[21] Customary law not only consists of normative rules but also of principles.[22] The fact that today's Art 43 was considered as self-evident by the ILC and adopted *ex abundanti cautela* (→ MN 5) supports this view. Furthermore, provisions corresponding to Art 43 have been included in modern treaties.[23] Finally, even though Art 43 as such has not been the subject of a judicial decision,[24] several judicial decisions have

[11] *Waldock* II 94 para 5; [1963-II] YbILC 217 para 5; Final Draft, Commentary to Art 40, 237 para 1.

[12] *Waldock* II 94 para 5; [1963-II] YbILC 217 para 5.

[13] *Waldock* II 94.

[14] *Ago* [1963-I] YbILC 235 para 30; *Lachs* [1963-I] YbILC 235 para 32.

[15] *Tunkin* [1963-I] YbILC 235 para 36.

[16] [1963-II] YbILC 216.

[17] Final Draft 237.

[18] [1966-I] YbILC 129 para 32; Final Draft 237.

[19] UNCLOT I 227, paras 70 *et seq*; 463 para 3.

[20] UNCLOT II 74 para 19.

[21] *Sinclair* 10; *K Bannelier-Christakis* in *Corten/Klein* Art 43 MN 10.

[22] Nevertheless, *Villiger* Art 43 MN 8 seems to stipulate that for this reason Art 43 does not form part of customary law.

[23] See *eg* Art 317 para 3 of the 1982 UN Convention on the Law of the Sea 1833 UNTS 3.

[24] *K Bannelier-Christakis* in *Corten/Klein* Art 43 MN 12.

affirmed the principle of parallelism and autonomy of the different sources of international law.[25]

C. Elements of Article 43

I. Invalidity, Termination, Denunciation, Withdrawal or Suspension as a Result of the Application of the Present Convention or of the Provisions of the Treaty

9 The enumeration of invalidity, termination, denunciation, withdrawal or suspension (terminology → Art 42), supplemented by the statement that they may be the result of the application of the treaty in question or of the VCLT, shows that Art 43 is applicable to all forms of bringing a treaty to an end.[26] It was the explicit aim of the ILC to reaffirm that the principle of parallelism and autonomy of all sources of international law applies to every case where a treaty obligation ceases to exist (→ MN 7).

II. Shall Not in Any Way Impair the Duty of Any State to Fulfil Any Obligation Embodied in the Treaty

10 The words "shall not in any way impair" reflect the autonomy of the sources of international law. Obligations deriving from different legal sources exist independently from each other. If one obligation ceases to exist, **another obligation is not affected**. Only in the case of where the remaining legal obligation should be explicitly connected to the treaty obligation no longer in existence may it cease to exist as well.

11 The notion that the obligation must be "embodied in the treaty" indicates that **only identical obligations** fall under the scope of Art 43.[27] The provision thus mainly refers to declaratory treaty rules codifying customary law.[28]

> In the *Nicaragua* case, the ICJ stated that there "are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty law and on that of customary international law, these norms retain a separate

[25] ICJ *United States Diplomatic and Consular Staff in Tehran (United States v Iran)* [1980] ICJ Rep 3, para 62; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, paras 178–179; ITLOS *Southern Bluefin Tuna Case* (*Australia and New Zealand v Japan)* (Jurisdiction and Admissibility) 39 ILM 1359, paras 51, 55 (2000).

[26] *Villiger* Art 43 MN 3; *K Bannelier-Christakis in Corten/Klein* Art 43 MN 8.

[27] *Villiger* Art 43 MN 4; *K Bannelier-Christakis* in *Corten/Klein* Art 43 MN 9.

[28] *Villiger* Art 43 MN 4.

existence. This is so from the standpoint of their applicability." Therefore, if one State has the right to terminate or suspend a treaty that contains a rule also existing as a rule of customary law, the termination or suspension of the treaty does not justify the State in declining to apply the customary rule.[29]

12 Surprisingly, Art 43 only refers to obligations but not to rights, whereas the corresponding provisions in Section 5 of Part V refer to both obligations and rights contained in the treaty that comes to an end. The ILC provided no reason for this restriction of the scope of Art 43. However, the fact that **rights are not mentioned** in Art 43 does not mean that they do not fall under the principle of parallelism and autonomy of sources of international law. Since the principle forms part of customary law, rights deriving from other legal sources remain unaffected as well, if an identical right provided for in a treaty ceases to exist.[30]

III. To Which It Would Be Subject Under International Law

13 The draft articles that finally became today's Art 43 (Art 28 para 3 in the second report of SR *Waldock*,[31] Art 53 para 4 ILC Draft 1963[32] and Art 40 Final Draft[33]) used the formulation "which are binding upon it" and "to which it is subject" respectively. The word "would" instead of 'is', which is used in Art 43, indicates that it is not necessary that the identical rule outside the treaty existed already at the time when the treaty was concluded. The identical rule may have developed **either before or after the conclusion of the treaty**.[34] Art 38, according to which any treaty rule may develop into a rule of customary law, supports this interpretation (→ MN 4).

IV. Independently of the Treaty

14 The identical obligation remaining unaffected must derive from a source of international law outside the treaty. Generally, the identical obligation forms part of **customary law**. Indeed, most legal scholars analyse Art 43 and/or the principle of parallelism and autonomy of the sources of international law only or mainly with

[29] ICJ *Nicaragua* (n 25) para 178.

[30] In the *Nicaragua* case, for example, the ICJ did not use the notion "obligation" but the more general notions "norm", "rule" and "law" when referring to the customary law that remains unaffected by the termination of a treaty, ICJ *Nicaragua* (n 25) paras 178–179.

[31] *Waldock* II 94.

[32] [1963-II] YbILC 216.

[33] Final Draft 237.

[34] *K Bannelier-Christakis* in *Corten/Klein* Art 43 MN 9, 14 *et seq*, 33 *et seq*; *Villiger* Art 43 MN 4.

regard to the relationship between treaty law and customary law.[35] This may be due to the fact that most judicial decisions with regard to the principle of parallelism and autonomy of sources of international concern the relationship between treaty law and customary law.[36]

15 The identical obligation may, however, also derive from **another treaty**.[37] When presenting the new provision of Art 28 para 3 in 1963, SR *Waldock* explained that the formulation "independently of the treaty" not only referred to identical customary law but also to identical treaty law.[38] During the discussions at the Vienna Conference, the US delegation submitted an amendment proposal "of a purely drafting character" in order to prevent a misinterpretation of the provision "as referring solely to the rules of customary international law to the exclusion of obligations arising out of another treaty".[39] Finally, the parallelism and autonomy of identical obligations deriving from two different treaties were reaffirmed in judicial decisions.

> In the *Southern Bluefin Tuna Case*, Australia and New Zealand asked for a decision of an arbitral tribunal constituted according to UNCLOS. Japan argued that recourse to the arbitral tribunal was excluded because another convention, to which all three states were parties, provided for a dispute settlement procedure. The arbitral tribunal came to the conclusion that the fact that the other convention applied between the parties did not preclude recourse to the procedures laid down in UNCLOS. [40] Therefore, both treaties established autonomous legal regimes that existed parallel to each other.

16 However, the formulation "independently of the treaty" has to be interpreted in an even wider fashion: it refers to **all sources of international law outside the respective treaty**.[41] The identical obligation might, therefore, derive not only from general principles of international law[42] but also from 'new' legal sources like regulatory acts of international organizations (especially Security Council resolutions) or binding unilateral declarations of States.[43] In this respect, the formulation

[35] *JS Stanford* The Vienna Convention on the Law of Treaties (1970) 20 University of Toronto LJ 18, 37; *S Bastid* Les traités dans la vie internationale (1985) 218; *GM Danilenko* Law-Making in the International Community (1993) 137 *et seq*; *Aust* 303; *Villiger* Art 43 MN 4; *Villiger* (n 5) MN 428.

[36] *K Bannelier-Christakis* in *Corten/Klein* Art 43 MN 12.

[37] *K Bannelier-Christakis* in *Corten/Klein* Art 43 MN 7.

[38] *Waldock* II 94.

[39] UNCLOT I 227.

[40] ITLOS *Southern Bluefin Tuna Case* (n 25) paras 51, 55.

[41] *K Bannelier-Christakis* in *Corten/Klein* Art 43 MN 7.

[42] *Villiger* Art 43 MN 4; *K Bannelier-Christakis* in *Corten/Klein* Art 43 MN 7.

[43] For the 'new' sources of international law, see *K Odendahl* Les sources du droit international public et l'évolution de leurs modes de formation in *Centre d'études de droit du monde arabe (CEDROMA)/Société de législation comparée* (eds) Les sources du droit: aspects contemporains (2007) 163–177; *R Wolfrum/V Röben* (eds) Developments of International law in Treaty Making (2005).

employed in Art 40 Final Draft might have been somewhat clearer: it stated that the end of a treaty did not impair the duty of any State to fulfil any obligation embodied in the treaty to which it is subject under "any other rule of international law".

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Article 44

Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Contents

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
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A. Purpose and Function

1 A treaty is much more than a loose compilation of separate, independent provisions; a treaty is a **coherent legal unit**. Therefore, the integrity of a treaty constitutes one of the key principles of treaty law.[1] As a consequence, in all cases of invalidity, termination or suspension, it is usually the whole treaty which is affected and not only separate provisions. The separability of treaty provisions resulting in the invalidity, termination or suspension of parts of the treaty thus constitutes an exception.[2]

2 Art 44 confirms this attitude. Despite its misleading heading ("separability of treaty provisions"), it is not the separability but the **integrity of the treaty** which is the main point of this article.[3] By clearly defining the exceptions to the rule, *ie* the cases in which the separability of treaty provisions is possible or even mandatory,[4] Art 44 aims primarily at preserving the principle of integrity. Art 44 thus attempts to strike a balance between integrity and separability[5]: the original basis of the treaty shall be respected while at the same time preventing the treaty to come to an end due to the invalidity, termination or suspension of individual provisions which do not constitute the main subject of consent.[6]

3 Art 44 refers to all cases of invalidity, termination or suspension of a treaty (for the relevant terminology → Art 42 MN 5–6). It is one of the most complex provisions of the VCLT.[7] Its **structure**, however, follows a logical pattern: para 1 deals with the right to terminate or suspend a treaty according to the respective treaty or to Art 56 VCLT. Art 44 paras 2–5 refer to all other cases, *ie* to those cases of invalidity, termination or suspension, which fall under the scope of the VCLT. Within these four paragraphs it is para 2 which contains the principle of integrity while para 3 sets forth the exception, *ie* the conditions under which the separability of treaty provisions is mandatory. Art 44 paras 4 and 5 allow for two exceptions to the exception.[8] Both concern certain grounds of invalidity: in the case of fraud or corruption, the State entitled to invoke the ground of invalidity may opt either for integrity or separability (para 4); in the case of coercion or conflict with a norm of *ius cogens*, the integrity of the treaty is mandatory (para 5). The aim of these two exceptions to the exception is to allow for sanctions.[9]

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[1] *DW Greig* Invalidity and the Law of Treaties (2006) 25 *et seq*, 28; *Reuter* 168.

[2] *Reuter* 168.

[3] Final Draft, Commentary to Art 41, 238 para 4; *F Capotorti* L'extinction et la suspension des traités (1971) 134 RdC 417, 461; *S Bastid* Les traités dans la vie internationale (1985) 194; *Reuter* 168.

[4] *M Bedjaoui/T Leidgens* in *Corten/Klein* Art 44 MN 1.

[5] *Villiger* Art 44 MN 4; *M Bedjaoui/T Leidgens* in *Corten/Klein* Art 44 MN 2.

[6] Final Draft, Commentary to Art 41, 238 para 2.

[7] *Villiger* Art 44 MN 23.

[8] *M Bedjaoui/T Leidgens* in *Corten/Klein* Art 44 MN 35 *et seq*; *Villiger* Art 44 MN 20, however, only considers Art 44 para 5 (and not both paras 4 and 5) as an exception to the exception of para 3.

[9] *Reuter* 168.

There is a close **connection** between Art 44 and the other provisions of Part V of the VCLT.[10] No ground of invalidity, termination or suspension may be invoked without taking into account whether it will affect the whole treaty or only parts of it. The tension between integrity and separability, however, does not only concern the ends of a treaty. It also plays an important role in the admissibility of reservations (→ Art 19),[11] *ie* at the moment of signing, ratifying, accepting, approving or acceding to a treaty. Furthermore, the question whether treaty provisions may be regarded separately has an influence on the application of a treaty according to Art 30 para 3, *ie* if a later treaty on the same subject matter has been concluded between the same States Parties (→ Art 30 MN 22). **4**

Apparently, there is no State practice referring explicitly to the application of the rules laid down in Art 44.[12] Therefore, Art 44 is, at the moment, only of **theoretical importance**. Its careful wording and detailed approach, however, make it a decisive provision ensuring the stability of treaties.[13] **5**

B. Historical Background and Negotiating History

Art 44 and its wide approach, *ie* the possibility of separating treaty provisions in all cases of invalidity, termination or suspension, constitutes an **innovation** in the law of treaties.[14] When the ILC started its work on the VCLT, separability of treaty provisions was considered to be only possible if one States Party had the right to terminate a treaty after the breach of the treaty by the other States Party.[15] In two judgments of the ICJ, however, judges in their separate opinions had approved of the separability of treaty provisions in other cases as well, especially in cases of invalidity.[16] Furthermore, according to the authors of the Harvard Draft of **6**

[10]For a detailed analysis of the relationship between Art 44 and the other provisions of Part V, see *Villiger* Art 44 MN 21.

[11]*Reuter* 167 *et seq*; *Sinclair* 166.

[12]*Reuter* 168; *M Bedjaoui/T Leidgens* in *Corten/Klein* Art 44 MN 10. The few judgments to be found do not deal with Art 44 as such but only make a short reference to it or apply it by analogy to state declarations, see EFTA Court *Tore Wilhelmsen AS v Oslo kommune* (Advisory Opinion) Case E-6/96 [1997] EFTA Court Rep 64, para 29; ECtHR *Loizidou v Turkey* (GC) (Preliminary Objections) (dissenting opinion *Gölcüklü/Pettiti*) App No 15318/89, Ser A 310.

[13]*Villiger* Art 44 MN 23.

[14]*Sinclair* 166. For more details on the historical development, see *Greig* (n 1) 25 *et seq*.

[15]Final Draft, Commentary to Art 41, 238 para 1; *Sinclair* 166; *Bastid* (n 3) 194.

[16]Separate opinion of Judge *Lauterpacht* in ICJ *Certain Norwegian Loans (France v Norway)* [1957] ICJ Rep 34, 55–59; separate opinions of Judges *Spender*, *Klaestad* and *Lauterpacht* in *Interhandel Case (Switzerland v United States)* (Preliminary Objections) [1959] ICJ Rep 57, 77–78, 116–117. This view is criticized *inter alia* by *Greig* (n 1) 297 *et seq*.

1935[17] as well as to some scholars,[18] separability of treaty provisions should be possible if certain conditions were fulfilled. In the light of these developments, the ILC decided to consider the issue of separability in a detailed manner.[19]

7 A first proposal was presented by SR *Waldock* in his second report of 1963. He inserted a clause on separability into Draft Art 13 para 3 on *ius cogens* and presented a new Draft Art 26 entitled "severance of treaties".[20] The ensuing debate focused on several aspects, especially on the different cases in which separability should be possible.[21] As a consequence, the ILC Draft of 1963 did not contain one provision on the separability of treaty provisions but inserted **separability clauses in various articles**.[22]

8 In 1966, however, the ILC came back to the original idea of adopting one **single provision** on separability.[23] Art 41 Final Draft[24] was almost identical to today's Art 44. At the Vienna Conference, only the amendment proposal tabled by the United States concerning the introduction of today's para 3 lit c was successful.[25] Draft Art 41 was finally adopted by 96 votes to none with 8 abstentions.[26]

9 Art 44 **does not constitute customary law**.[27] There is not sufficient and no consistent State practice (→ MN 5) which could help the provision to develop into customary law. However, the principle of integrity of treaties together with the principle that treaty provisions may be, exceptionally, considered separately if they do not constitute the main subject of consent has to be classified as a **general principle according to Art 38 para 1 lit c ICJ Statute**.[28] Several judges of the ICJ have confirmed this point of view when dealing with the question of separability.[29]

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[17]Harvard Draft 1134 (Art 30). An analysis of Art 30 Harvard Draft is provided by *M Bedjaoui/T Leidgens* in *Corten/Klein* Art 44 MN 4.

[18]*McNair* 474 *et seq*.

[19]Final Draft, Commentary to Art 41, 238 para 2.

[20]*Waldock* II 52 *et seq*; 90 *et seq*.

[21][1963-I] YbILC 62 *et seq*, 213 *et seq*, 215 *et seq*, 288 *et seq*, 317 and 322.

[22][1963-II] YbILC 211, see also statement of SR *Waldock* [1963-I] YbILC 288 para 8.

[23]Statements of SR *Waldock* [1966-I/1] YbILC 15 para 57, 59 para 17, 75 para 50, 87 para 29.

[24]Final Draft 237–238.

[25]UNCLOT I 389 para 37.

[26]UNCLOT II 77 para 56.

[27]*M Bedjaoui/T Leidgens* in *Corten/Klein* Art 44 MN 13. According to *Villiger* Art 44 MN 22, however, Art 44 may be considered as "crystallising into customary law" since it has been invoked by governments and judges in single cases before European courts.

[28]*M Bedjaoui/T Leidgens* in *Corten/Klein* Art 44 MN 14.

[29]ICJ *Certain Norwegian Loans* (separate opinion *Lauterpacht*) (n 16) 55–59; ICJ *Aerial Incident of 10 August 1999 (Pakistan v India)* (dissenting opinon *Al-Khasawneh*) [2000] ICJ Rep 12, para 22 *et seq*.

C. Elements of Article 44

I. Principle of Integrity in the Case of Termination or Suspension According to the Treaty or to Art 56 (para 1)

If a **treaty provides for a right** of States Parties to terminate or to suspend the treaty (for termination and suspension clauses → Art 42 MN 21 *et seq*, 28 *et seq*), this right may, as a presumption, only be exercised with respect to the treaty as a whole. Therefore, the principle of integrity prevails. Only if the treaty otherwise provides or if the parties otherwise agree may the right to terminate or to suspend a treaty be exercised with respect to individual treaty clauses. The idea is that it is for the States Parties to specify the conditions for exercising the right to terminate or to suspend a treaty.[30] **10**

If the treaty does not contain any right to terminate it, a States Party may nevertheless have a right to withdraw from or denunciate a treaty **according to Art 56**. In such a case, the principle of integrity applies as well.[31] The reference to Art 56 was not uncontested at the Vienna Conference. The proposal to delete it, however, failed to muster the necessary two-thirds majority vote.[32] **11**

II. Principle of Integrity in the Case of Invalidity, Termination or Suspension According to the VCLT (para 2)

Art 44 para 2 refers to all cases of invalidity, termination or suspension that are not laid down in the respective treaty but are **recognized by the VCLT**. As a "primary rule",[33] the grounds mentioned in Part V may only be invoked with respect to the whole treaty. There are, however, two exceptions to the principle of integrity: the first one is laid down in Art 60, the second one in paras 3–5. **12**

According to Art 60, a States Party is entitled to terminate or suspend a treaty – in whole or in part – in the case of a material breach of a treaty by the other States Party. The conditions set forth in paras 3–5 do not have to be met.[34] The right to terminate or suspend a particular clause in case of a material breach is thus an independent right. The reason for this special regime might be that separability of treaty provisions in the case of a material breach was already accepted before the VCLT was adopted (→ MN 6). Furthermore, it was recognized that the principle *inadimplenti non est adimplendum* and "the principle of reprisals **13**

[30] Final Draft, Commentary to Art 41, 238 para 3; *Reuter* 169.

[31] *Capotorti* (n 3) 463 *et seq*.

[32] UNCLOT II 74 *et seq*.

[33] Final Draft, Commentary to Art 41, 238 para 4.

[34] *Jiménez de Arechaga* [1966-I/2] YbILC 318 para 65; *Villiger* Art 44 MN 11; *M Bedjaoui/T Leidgens* in *Corten/Klein* Art 44 MN 47.

produced a situation which conferred the right to suspend the treaty either in whole or in part".[35]

14 The second exception refers to the "**following paragraphs**", *ie* to paras 3–5. According to para 2, they apply if one of the States Parties invokes one of the grounds of invalidity, termination or suspension recognized by the VCLT. The use of the word "invoke", however, is misleading. It might lead to the conclusion that paras 3–5 only refer to cases of relative invalidity, termination or suspension, *ie* when the ground has to be invoked by a States Party in order to take legal effect (→ Art 42 MN 13). Art 44 para 5, however, refers to Arts 51–53, which lead to absolute invalidity (→ Art 42 MN 16). Therefore, the exceptions laid down in paras 3–5 apply to all cases of invalidity, termination or suspension mentioned in Part V.

III. Compulsory Separability in the Case of Invalidity, Termination or Suspension According to the VCLT (para 3)

15 Art 44 para 3 contains the exception to the principle of integrity set forth in para 2. Therefore, it neither applies to para 1 (→ MN 10) nor to Art 60, being the exception provided for in para 2 (→ MN 13). Since para 3 thus, in principle, refers to all grounds of invalidity, termination or suspension recognized in Part V of the VCLT, it is the most important provision within Art 44.[36] The provision lays down four conditions[37] that have to be met: the ground relates solely to particular clauses (opening sentence); these clauses are separable (lit a); the acceptance of the clauses was not an essential basis of the consent (lit b), and continued performance of the treaty would not be unjust (lit c). If all four conditions are fulfilled cumulatively,[38] the **separability of treaty provisions is compulsory**.[39] Therefore, the ground may only be invoked with respect to individual treaty provisions. The rest of the treaty remains in force.

16 The first condition refers to the ground of invalidity, termination or suspension. The **ground must relate solely to particular clauses of the treaty** (opening sentence). The word "clauses" does not correspond to the more common notion

[35]Statement of SR *Waldock* [1963-I] YbILC 245 para 94.

[36]*Villiger* Art 44 MN 3.

[37]*Capotorti* (n 3) 462 *et seq*; *M Bedjaoui*/*T Leidgens* in *Corten*/*Klein* Art 44 MN 27 *et seq*. Interestingly, some authors only mention three conditions, see *Sinclair* 166; *Aust* 304; *A Aust* Treaties, Termination in MPEPIL (2006) MN 50. This might be due to the fact that the first condition is incorporated in the opening sentence of para 3 or that the last condition was not yet incorporated into the Final Draft. *Villiger* Art 44 MN 12–13 also mentions three conditions but then refers to an "additional qualification".

[38]*Sinclair* 166; *Villiger* Art 44 MN 12.

[39]Final Draft, Commentary to Art 41, 238 para 5; *M Bedjaoui*/*T Leidgens* in *Corten*/*Klein* Art 44 MN 25, 34.

of "provisions" employed in the title of Art 44. The reason[40] for choosing a different term was the intention to provide for a more elegant mode of expression[41] and flexibility.[42] A clause may comprise single provisions of an article, an article or a group of articles.

> The question whether a ground of invalidity, termination or suspension relates to the whole treaty or only to a particular clause cannot be answered generally. An error (→ Art 48), for example, may relate to the overall circumstances leading to the conclusion of a treaty or only to a specific fact that builds the basis of an individual article.[43] Even in the case of a conflict with *ius cogens* only individual provisions of a treaty might be affected.[44]

17 The **separability of the clauses** from the remainder of the treaty **with regard to their application** (para 3 lit a) constitutes the second condition. It is fulfilled if the clauses in question constitute a self-contained regime that could be applied independently of the other treaty provisions.[45] At the same time, the remaining parts of the treaty must remain applicable despite the invalidity, termination or suspension of the clauses.[46] Examples for such a "material separability"[47] may especially be found in treaties consisting of different parts dealing with heterogeneous subject matter which could theoretically have been regulated in separate treaties.[48]

18 The third condition, denominated as "intentional separability",[49] requires that the **acceptance of the clauses in question was not an essential basis of the consent** of the States Parties (para 3 lit b). This subjective element[50] can only be ascertained by interpretation (→ Arts 31 *et seq*).[51] According to the ILC, a reference "to the subject-matter of the clauses, their relation to the other clauses, to the *travaux préparatoires* and to the circumstances of the conclusion of the

[40] *Villiger* Art 44 MN 14.

[41] Statement of SR *Waldock* [1966-I/2] YbILC 331 para 61.

[42] *Bartoš* [1966-I/2] YbILC 331 para 63; statement of SR *Waldock* UNCLOT I 236 para 38.

[43] Statement of SR *Waldock* [1963-I] YbILC 227 para 20.

[44] *Lachs* [1963-I] YbILC 227 para 21.

[45] *Villiger* Art 44 MN 15. See also the wording of Art 26 para 3 lit a cl i proposed by *Waldock* II 90: "if the provisions of that part are, in their operation, self-contained and wholly independent of the remainder of the treaty (general provisions and final clauses excepted)".

[46] *Capotorti* (n 3) 463; *Reuter* 169; *M Bedjaoui*/*T Leidgens* in *Corten*/*Klein* Art 44 MN 29; *Greig* (n 1) 31.

[47] *Reuter* 169.

[48] Waldock II 93 para 13; *Villiger* Art 44 MN 15; *M Bedjaoui*/*T Leidgens* in *Corten*/*Klein* Art 44 MN 29.

[49] *Reuter* 169.

[50] The subjectivity of para 3 lit b has led to much criticism, see *eg* statement by the delegation of the Netherlands [1966-II] YbILC 7; statement by the delegation of the United Kingdom UNCLOT I 229 para 14; *Greig* (n 1) 93 *et seq*.

[51] *Sinclair* 167; *Villiger* Art 44 MN 16.

treaty" is necessary.[52] Thus, the decision whether the third condition is met will be difficult to make.[53]

> As a negative example *SR Waldock* presented the case that one States Party made a concession on the condition that the other party agreed to make a specified concession in return.[54] In such a case each of the concessions formed an essential basis of the consent. As a consequence, the condition laid down in para 3 lit b would not be fulfilled, and the invalidity, termination or suspension of one of the concessions would affect the whole treaty.

19 The fourth and last condition requires that **continued performance of the treaty would not be unjust** (para 3 lit c). This condition, adopted at the Vienna Conference on the basis of a proposal by the United States (→ MN 8), constitutes the only provision of the ILC dealing with justness.[55] The US delegation argued that the significance of particular treaty provisions may change over time in a way not foreseen during the negotiations. Therefore, in order to maintain a proper balance between the interests of the parties, it would be necessary to analyze in a last step whether the continued performance would not seem inequitable or unfair on one or more of the States Parties.[56] The condition set forth in para 3 lit c has been criticized for being too subjective and more or less useless.[57] This criticism, however, does not take into account that para 3 lit c adds important dimensions to the question of separability. First, it allows States Parties to invoke their own position, whereas para 3 lit b exclusively looks at their mutual consent.[58] Second, it allows taking into consideration the factor of time and the evolution of interests.[59] Therefore, it constitutes a kind of safety clause.[60]

20 One remaining problem concerns the **States Parties affected by the partial invalidity, termination or suspension of a multilateral treaty**: do the third and fourth condition, *ie* the two subjective conditions, only affect the relationship between the invoking State and the States Parties concerned or between the invoking State and all States Parties?[61] If, for example, State A invokes an error according to Art 48 with respect to a particular clause of a multilateral treaty concluded between States A, B, C, D and E, and the continued performance of

[52] Final Draft, Commentary to Art 41, 238 para 5.

[53] *M Bedjaoui/T Leidgens* in *Corten/Klein* Art 44 MN 30.

[54] Statement of SR *Waldock* [1963-I] YbILC 215 para 94.

[55] *Reuter* 169. Other authors interpret para 3 lit c as dealing with proportionality, see *JS Stanford* The Vienna Convention on the Law of Treaties (1970) 20 University of Toronto Law Journal 18, 37 *et seq*.

[56] UNCLOT I 230 para 17.

[57] *Capotorti* (n 3) 463; *Sinclair* 167. Criticism on the subjectivity is also expressed by *M Bedjaoui/T Leidgens* in *Corten/Klein* Art 44 MN 33. *Greig* (n 1) 105, however, characterizes para 3 lit c as being objective in nature.

[58] *Greig* (n 1) 105.

[59] *Aust* 304; *Sinclair* 167.

[60] *M Bedjaoui/T Leidgens* in *Corten/Klein* Art 44 MN 32.

[61] *Greig* (n 1) 102 *et seq*, 105.

the treaty would only be unjust for State B but not for States C, D and E, does the treaty become partially invalid between States A, C, D and E (since para 3 lit b is fulfilled), and completely invalid between States A and B (since para 3 lit b is not fulfilled)? According to one author, such an individual approach corresponds to the subjective nature of the two conditions and resembles the situation envisaged by reservations.[62] This view, however, neglects the fact that reservations are made in writing and thus provide for legal certainty while the question whether the two subjective conditions of para 3 lit b and c are met remains vague and unpredictable. Furthermore, para 3 is silent about such a 'division' of the States Parties due to an individual application of para 3 lit b and c. Finally, not only bilateral, but also multilateral treaties are based on a balance between the interests of all States Parties. Therefore, even if unjustness only affects one States Party, the balance between the States Parties no longer exists, and the whole treaty is affected by complete or partial invalidity, termination or suspension.

21 Art 44 paras 4 and 5 provide for two exceptions to para 3, *ie* they refer to cases in which the separability of treaty provisions is not compulsory. Both exceptions deal with specific grounds of invalidity (Arts 49–50 and Arts 51–53 respectively). As a consequence, the **scope of para 3** is limited: It refers to all grounds for termination and suspension, but only to three of the eight (→ Arts 42 MN 15) grounds for invalidity.

IV. Facultative Separability in the Case of Invalidity Due to Fraud or Corruption (para 4)

22 Art 44 para 4 refers to two grounds of invalidity (fraud and corruption according to Arts 49 and 50), which do not lead to a compulsory but to a **facultative separability** of treaty provisions.[63] The States Party whose representative has been induced to conclude a treaty by the fraudulent conduct of or through corruption by another negotiating State[64] has the option to invoke the invalidity of its consent either with respect to the whole treaty or with respect to particular clauses alone. The paragraph thus gives the States Party, which was the victim of fraud or corruption,[65] the possibility to choose between two different options.[66] The provision is based on the

[62] *Greig* (n 1) 105 *et seq*.

[63] *M Bedjaoui*/*T Leidgens* in *Corten*/*Klein* Art 44 MN 36 *et seq*.

[64] Fraud or corruption committed by a third State or by non-State agents do not fall under the scope of Arts 49 and 50, see *Greig* (n 1) 109 *et seq*.

[65] The other States Parties are, of course, not entitled to invoke the fraud or corruption, see Final Draft, Commentary to Art 41, 238 para 6; *Sinclair* 167; *Villiger* Art 44 MN 19.

[66] Final Draft, Commentary to Art 41, 238 para 6; *M Bedjaoui*/*T Leidgens* in *Corten*/*Klein* Art 44 MN 37; *Greig* (n 1) 70.

idea of favouring the injured States Party and sanctioning the States Party, which is held responsible for the fraud or corruption.[67]

23 The **option of separability remains subject to para 3**. The State entitled to invoke Art 49 or 50 may, therefore, only do so with respect to those clauses which are affected by the fraud or corruption if all four conditions set forth in para 3 are met.[68] This reference to para 3, however, might in fact render the option of separability obsolete[69]: it is hard to think of any example where State A commits an act of fraud or corruption in order to induce the representative of State B to accept a clause that is not essential for State A. As a consequence, even if State B wants to invalidate that clause alone and enforce the remainder of the treaty, the condition established in para 3 lit b will not be fulfilled.

V. Compulsory Integrity in the Case of Invalidity Due to Coercion or Conflict with *ius cogens* (para 5)

24 In case of coercion or conflict with a norm of *ius cogens*, para 5 provides for another exception to para 3. In all cases falling under Arts 51–53, *ie* in all cases of absolute invalidity (→ Art 42 MN 16), no separability of treaty provisions is possible; the **integrity of the treaty is compulsory**. Thus, if a State or its representative was coerced to accept a treaty (Arts 51 and 52) or if the treaty violates a rule of *ius cogens* (Art 53), the invalidity will always affect the treaty as a whole. The provision provides for a "sanction in the interest of international society as a whole".[70]

25 According to the ILC, in the case of **coercion** according to Arts 51 and 52, only the whole nullity of the treaty would provide the State victim with full freedom in its future treaty relations with the State which had coerced it.[71] This rigidity led to some criticism: compulsory invalidity of the whole treaty does not take into account the interests of the injured State, which might have an interest in enforcing the parts of the treaty which were not concluded due to coercion.[72]

26 Concerning the violation of *ius cogens,* the ILC argued that the fundamental character of the conflict had to render the treaty invalid in its entirety, even if only particular clauses were affected.[73] It is to be noted, however, that the invalidity of the whole treaty only arises if the treaty or some of its clauses violate an **existing**

[67] *Reuter* 170; *M Bedjaoui/T Leidgens* in *Corten/Klein* Art 44 MN 38.

[68] Final Draft, Commentary to Art 41, 238 para 6.

[69] *Greig* (n 1) 76 *et seq*.

[70] *Reuter* 170. Similarly *Sinclair* 167; *Capotorti* (n 3) 464 n 27; *M Bedjaoui/T Leidgens* in *Corten/Klein* Art 44 MN 43.

[71] Final Draft, Commentary to Art 41, 238–239 para 7.

[72] *M Bedjaoui/T Leidgens* in *Corten/Klein* Art 44 MN 44.

[73] Final Draft, Commentary to Art 41, 239 para 8. The first proposal of SR *Waldock* in 1963 (*Waldock* II 52, Art 13 para 3) provided for separability in case of a conflict with *ius cogens*.

norm of *ius cogens*. If the treaty conflicts with an emerging rule of *ius cogens* later, separability remains possible and subject to para 3.[74] The non-application of para 5 results from the missing reference to Art 64 in para 5.[75]

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[74] *Capotorti* (n 3) 464; *M Bedjaoui*/*T Leidgens* in *Corten*/*Klein* Art 44 MN 42; *Villiger* Art 44 MN 20.

[75] *Sinclair* 167; *M Bedjaoui*/*T Leidgens* in *Corten*/*Klein* Art 44 MN 42.

Article 45

Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or
(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

Contents

A. Purpose and Function

Art 45 prohibits a States Party from invoking a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty if it has agreed – expressly or implicitly – to the validity or the continuation in force of the treaty after becoming aware of the relevant facts. Its main purpose is thus to **prevent a State from benefitting from its own inconsistent behaviour**.[1] The provision embodies the principle of acquiescence,[2] which is based on good faith and equity,[3] and is closely linked to the principle of *estoppel*.[4] According to the ICJ, the difference between the two principles results from their legal reasoning: While the principle of *estoppel* is based on the idea of a procedural preclusion, the principle of **1**

[1] Final Draft, Commentary to Art 42, 239 para 1.

[2] *Sinclair* 168; *A Aust* Treaties, Termination in MPEPIL (2006) MN 51.

[3] ICJ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States)* [1984] ICJ Rep 246, para 130.

[4] *Villiger* Art 45 MN 1.

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acquiescence refers to a unilateral conduct, which is interpreted as a tacit recognition by other States.[5]

2 Another purpose of Art 45 is to provide for the **stability of treaties**.[6] All grounds of invalidity, termination, withdrawal or suspension listed in Art 45 may no longer be invoked by States, which have given the impression of validating the respective treaty. Certain 'defects' of a treaty may thus be 'healed' by the behaviour of the States Party, which would have the right to invoke them.[7]

3 There was no unanimity within the ILC whether Art 45 constituted a procedural or a substantive rule.[8] Classifying it as a procedural rule results in the loss of the right to invalidate, terminate, withdraw from or suspend a treaty. Art 45 as a substantive rule, in contrast, guarantees the continuing existence of a treaty despite the existence of a right to invalidate, terminate, suspend or withdraw from it. Since one of the main purposes of Art 45 is to provide for the stability of treaties (→ MN 2) and since Art 45 is to be found in Section 1 containing the general provisions and not in Section 4 where the procedure is defined, Art 45 has to be considered as a **substantive rule**.[9]

4 All grounds of invalidity, termination, withdrawal or suspension listed in Arts 46–50, 60 and 62 have to be **read together with** Art 45. They no longer take legal effect once the conditions of Art 45 are met. The same is true for all other provisions of the VCLT relating to the right to invoke the grounds mentioned. Some provisions, like Art 65 para 5, acknowledge the priority of Art 45 explicitly; other provisions, like Art 44, do not.[10] However, even in such cases it is clear that once the grounds may no longer be invoked, all provisions relating to them may not be applied either.

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[5] ICJ *Gulf of Maine* (n 3) para 130. See also *Sinclair* 168; *DW Bowett* Estoppel Before International Tribunals and its Relation to Acquiescence (1957) 33 BYIL 176, 197 *et seq; H Das* L'estoppel et l'acquiescement: assimilations pragmatiques et divergences conceptuelles (1997) RBDI 607, 625 *et seq*; *CW Chan* Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited (2004) Chinese JIL 421, 424 *et seq*. The ILC did not make such a differentiation at the time of drafting the VCLT. It rather stated that the principle of *estoppel* was a municipal law term with strict procedural requirements which could not easily be transferred as such to international law. Therefore, it avoided the use of the notion of *estoppel*, see Final Draft, Commentary to Art 42, 239 para 4; *S Bastid* Les traités dans la vie internationale (1985) 195. Today, *estoppel* is recognized as a principle of international law, see *MG Kohen* in *Corten/Klein* Art 45 MN 6 *et seq,* 43.

[6] *MG Kohen* in *Corten/Klein* Art 45 MN 1, 3. According to him, this is in fact the main purpose of Art 45. See also *Sinclair* 168.

[7] *Bastid* (n 5) 195.

[8] *Waldock* II 40 para 2; *Elias* [1963-I] YbILC 186 para 57.

[9] *MG Kohen* in *Corten/Klein* Art 45 MN 21 *et seq*. Already in 1962, *Fitzmaurice* classified the principle that a State is bound by its previous acts or attitude as a substantive rule, see separate opinion of Judge *Fitzmaurice* in ICJ *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 52, 62.

[10] Statement of *Bartoš* [1963-I] YbILC 187 para 70; *Villiger* Art 45 MN 11.

B. Historical Background and Negotiating History

The principle that a State is bound by its – express or implicit – declarations and behaviour was **recognized by the ICJ** in two cases in 1960[11] and 1962.[12] Even though the judgments did not deal with the recognition of the validity of treaties,[13] the ILC decided to include a specific provision on the subject due to the particular significance of the principle[14] for the law of treaties.[15] The **first proposal** was presented by SR *Waldock* in his second report in 1963. Draft Art 4 stated that the right to avoid or denounce a treaty should not be exercisable if, after becoming aware of the fact creating such a right, the State concerned had waived the right, accepted benefits or enforced obligations under the treaty, or had otherwise, by its own acts or omissions precluded itself from invoking the grounds.[16] The ensuing debate focused on the employment of the term "precluded".[17] Even though Draft Art 4 was generally accepted, many delegates suggested a redrafting of the provision.[18] The result, Art 47 of the ILC Draft 1963, was a rather detailed and, therefore, complicated provision, especially with regard to its lit b.[19] **5**

The **Final Draft** reverted to a rather generally formulated provision. Draft Art 42 contained, for the first time, an explicit reference to the various articles of the VCLT to which it applied. It corresponded almost entirely to today's Art 45. The debate in the ILC confirmed again a general approval of the provision.[20] At the **Vienna Conference**, however, several amendment proposals were tabled. Eight States[21] proposed deleting lit b. According to them the provision was especially dangerous for newly independent States, which would be bound by treaties they had supposedly acquiesced before attaining their independence.[22] Other States suggested deleting or adding grounds for invalidating, terminating, withdrawing from or suspending the operation of a treaty, which could get lost after express or implicit **6**

[11] ICJ *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v Nicaragua)* [1960] ICJ Rep 192, 213 *et seq*.

[12] ICJ *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, 21 *et seq*.

[13] The judgments dealt with an express recognition of the validity of an arbitral award and with an implicit recognition of the validity of maps attached to a treaty.

[14] Separate opinion of Judge *Alfaro* in ICJ *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 39; separate opinion of Judge *Fitzmaurice* (n 9) 62.

[15] Final Draft, Commentary to Art 42, 239 para 1.

[16] *Waldock* II 39 *et seq* (Draft Art 4).

[17] See the statements by *Waldock*, *de Luna*, *Tsuruoka*, *Briggs*, *Rosenne*, *Ago*, *Elias*, *Tunkin* and *Bartoš* [1963-I] YbILC 183–189.

[18] As a result, the provision was referred to the Drafting Committee; see *Waldock* [1963-I] YbILC 189 para 94.

[19] [1963-II] YbILC 212.

[20] [1966-I] YbILC 106 *et seq*.

[21] Bolivia, the Byelorussian SSR, Colombia, Congo, the Dominican Republic, Guatemala, the USSR and Venezuela.

[22] See *eg* statement by the representative of Venezuela UNCLOT I 391 para 52.

behaviour of the State in question.[23] Despite the large number of amendment proposals, Draft Art 42 was finally adopted by 84 votes to 17, with 6 abstentions.[24]

7 According to some authors, Art 45 does not constitute customary law.[25] Such a statement, however, is too general. The ICJ has recognized the principle that a State may be bound by its express or implicit declarations and behaviour (→ MN 5). Art 45 confirms this principle and applies it to the validity and the maintenance in force of treaties. The resistance, which lit b, *ie* the possibility of losing a right by reason of conduct, encountered at the Vienna Conference (→ MN 6), does not prevent the principle from being generally accepted.[26] It is to be noted, however, that only **the principle of acquiescence, not Art 45 as such, is of customary nature**. There is almost no State practice explicitly invoking Art 45.[27] Furthermore, the reference within Art 45 to specific grounds for invalidating, terminating, withdrawing from or suspending the operation of a treaty is too detailed to be characterized as generally accepted.

C. Elements of Article 45

I. Loss of a Right Under Articles 46–50, 60 and 62

8 Art 45 has a restricted scope of application. Concerning the right to invoke a ground of **invalidity**, a State may only lose the rights listed in Arts 46–50. Art 45 thus applies exclusively to cases of relative invalidity (→ Art 42 MN 16),[28] in which the grounds have to be invoked by the State in question. In all cases of absolute invalidity, *ie* those listed in Arts 51–53 (→ Art 42 MN 16), the loss of a right may never occur.[29] The respective treaty will be null and void *erga omnes* from the

[23] See the analysis of *MG Kohen* in *Corten/Klein* Art 45 MN 27 *et seq*.

[24] UNCLOT II 83. As a consequence, Venezuela and Bolivia did not become parties to the VCLT, while Argentina, the Byelorussian SSR, the Ukrainian SSR and the USSR made reservations to Art 45.

[25] *A Haratsch/S Schmahl* Die Anwendung ratione temporis der Wiener Konvention über das Recht der Verträge (2003) 58 ZÖR 105, 108. The opposite opinion is expressed by *G Ress* Verfassung und völkerrechtliches Vertragsrecht in *K Hailbronner/G Ress/T Stein* (eds) Festschrift Doehring (1989) 803, 822.

[26] *Villiger* Art 45 MN 12; *MG Kohen* in *Corten/Klein* Art 45 MN 19. There are also several judgments of other courts, which have recognized the principle; see the analysis of *MG Kohen* in *Corten/Klein* Art 45 MN 12 *et seq*.

[27] There are only few examples to be found where Art 45 is invoked as a model for other regulations, see the continuing responsibility of the United Kingdom in Southern Rhodesia (1979) 50 BYIL 50, 380 concerning the question whether consent given in advance may deprive an act of wrongfulness.

[28] According to *E Jiménez de Aréchaga* International Law in the Past Third of a Century (1978) 159 RdC 69, Art 45 thus confirms relative invalidity.

[29] *MG Kohen* in *Corten/Klein* Art 45 MN 26. This exclusion of Arts 51–53 has led to some criticism, see *DW Greig* Invalidity and the Law of Treaties (2006) 113 *et seq*, 134 *et seq*, 210.

very beginning. The grounds to which Art 45 will most likely apply are those set forth in Art 48 (error), Art 49 (fraud) and Art 50 (corruption).[30]

The right to **terminate or withdraw from a treaty** as well as the right to **suspend** it may only fall away in two cases: if the right results from a material breach of the treaty (Art 60) or from a fundamental change of circumstances (Art 62). Thus, only two of the eight grounds for terminating or withdrawing from a treaty (→ Art 42 MN 24) as well as two of the six grounds for suspending a treaty (→ Art 42 MN 30) are affected. In all other cases, the right to withdraw from a treaty, to terminate it or to suspend it cannot get lost. **9**

According to the ILC, the **reason for not applying Art 45 in all cases** was the governing principle of good faith. A right should only be lost if the State in question is in a position to be aware of the facts giving rise to the right and if it was able to freely exercise its right. Therefore, the principle of acquiescence should not be applicable in the case of coercion (Arts 51 and 52) and in all cases of a conflict with existing or emerging *ius cogens* (Arts 53 and 64). Furthermore, the provision should, by its very nature, not apply to rights conferred by the treaty or by agreement (Arts 54–59).[31] Interestingly enough, the Final Draft of 1966 applied Art 45 to the impossibility of performance of a treaty (today's Art 61) as well.[32] This reference, however, was not included in the final version of the VCLT. An amendment proposal tabled by Finland and Czechoslovakia at the Vienna Conference, arguing that if a treaty becomes impossible nothing further could be done, was successful.[33] **10**

II. After Becoming Aware of the Facts

An explicit declaration or implicit behaviour may only result in the loss of the right to invoke a ground of invalidity, termination or suspension if the State in question has become aware of the facts giving rise to this right. This condition, however, contains two uncertainties. The first uncertainty concerns **the date** by which the State received the relevant information.[34] Such a question of fact will always depend on the evidence available.[35] In any case, it is crucial that the State organs whose conduct and intent could be attributable to the State[36] become aware of the facts. **11**

[30] *Greig* (n 29) 85.

[31] Final Draft, Commentary to Art 42, 239 para 5.

[32] Art 42 Final Draft: "articles 57 to 59 inclusive".

[33] UNCLOT I 176 *et seq*, 424, 437.

[34] *F Capotorti* L'extinction et la suspension des traités (1971) 134 RdC 547; *MG Kohen* in *Corten/Klein* Art 45 MN 34; *Villiger* Art 45 MN 6.

[35] *MG Kohen* in *Corten/Klein* Art 45 MN 35.

[36] *P Cahier* Le comportement des États comme source de droits et d'obligations in *Institut universitaire de hautes études internationales* (ed) Festschrift Guggenheim (1968) 237, 242 *et seq*.

12 The second uncertainty relates to a question of law: is there a **time limit** for invoking the respective ground? The question is of utmost importance in the case of implied acquiescence.[37] Art 45 is silent on this point. At the Vienna Conference, proposals to include time limits failed to muster the necessary two-thirds majority vote.[38] SR *Waldock* considered it difficult to lay down time limits due to the variety and the great differences between the several grounds of invalidity, termination or suspension.[39] Therefore, the principle of good faith has to be applied.[40] Depending on each case and on each ground, the moment when the State may no longer invoke a ground may vary.

III. Express Agreement (lit a)

13 If a State, after becoming aware of the relevant facts, expressly agrees to the validity of the treaty, its maintenance in force or its continuation in operation, the loss of the right to invoke the ground for ending the treaty is obvious.[41] There is **no specific form of express agreement** required. Therefore, the agreement may consist of a unilateral declaration (either notified to the other States Parties or the depositary, or even a unilateral declaration within the respective State without any notification) or of a bi- or multilateral agreement between the States Parties (a second treaty, an amendment of or a protocol to the original treaty) affirming the validity of the treaty, for example.[42]

> In the *Land and Maritime Boundary (Cameroon v Nigeria)* case, the ICJ examined such a case and declared, although without explicitly referring to Art 45, that "in July 1975 the two Parties inserted a correction in the Maroua Declaration, that in so acting the treated the Declaration as valid and applicable, and that Nigeria does not claim to have contested its validity or applicability prior to 1977."[43]

IV. Implied Acquiescence (lit b)

14 It is much more difficult to assess whether the State, by its conduct, has implicitly acquiesced in the validity, the maintenance in force or in operation of the treaty.

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[37] *Capotorti* (n 34) 547.

[38] The proposed time limits ranged from one to ten years, see UNCLOT I 163 *et seq*.

[39] Statement of SR *Waldock* [1966-II] YbILC 6 para 5.

[40] *Villiger* Art 45 MN 13.

[41] Final Draft, Commentary to Art 42, 239 para 3.

[42] *MG Kohen* in *Corten/Klein* Art 45 MN 36. Some examples of explicit declarations of States leading to the loss of rights outside treaty relations are provided by *Cahier* (n 36) 247 *et seq*.

[43] ICJ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening)* [2002] ICJ Rep 303, para 267.

The decisive question is whether the State has been behaving in a way that its conduct must be considered by the other States Parties as acquiescence.[44] For this assessment many factors have to be taken into account. The first one is that the conduct may consist of **active or passive behaviour**.[45] If a State accepts benefits or enforces obligations under the treaty in question,[46] for example, this active behaviour may be interpreted as acquiescence.

There is **no presumption** that conduct, especially passive conduct, constitutes acquiescence.[47] At the Vienna Conference, some States interpreted lit b in this way.[48] Such a conclusion, however, is neither in conformity with the spirit nor the wording of Art 45.[49] The VCLT does contain presumptions, like the one concerning reservations in Art 20 para 5. Such a presumption, however, was not intended for Art 45. Therefore, in every single case, acquiescence by conduct has to be proven.[50] **15**

This demand for evidence may prove to be difficult.[51] There are, however, many **general conditions** that have to be met before considering conduct as acquiescence.[52] Outlining them in the following might be helpful. First, the situation must require an action by the State that might otherwise lose its right. If, for example, a States Party applies the treaty in question, the States Party that has the right to invoke its invalidity is expected to react.[53] Second, the conduct of the State must be coherent; a single action is not sufficient, the whole behaviour of the State has to be **16**

[44]Final Draft, Commentary to Art 42, 239 para 4.

[45]The first proposal of SR *Waldock* in 1963 (*Waldock* II 39 *et seq*) was very clear on this point. Draft Art 4 stipulated that a State might lose its right if it had, by its own acts or omissions, precluded itself from asserting the right (lit c). See also *MG Kohen* in *Corten/Klein* Art 45 MN 38, 60. *Villiger* Art 45 MN 8 employs the terms "negative" and "positive" conduct. A general analysis of the consequences of active and passive conduct of a State is provided by *Cahier* (n 36) 247 *et seq,* 250 *et seq.* The principle of acquiescence, however, is usually only applied to inaction or silence, *ie* only to passive conduct, see *eg Das* (n 5) 618 *et seq; Bowett* (n 5) 197 *et seq*; *NS Marques Antunes* Acquiescence in MPEPIL (2006) MN 2.

[46]See Art 4 lit b of the first proposal of SR *Waldock* of 1963 (*Waldock* II 39 *et seq*).

[47]See, in general, *Cahier* (n 36) 254 *et seq*.

[48]See the statements by the representatives of Cuba and Hungary UNCLOT II 84, 433.

[49]*MG Kohen* in *Corten/Klein* Art 45 MN 37 *et seq*.

[50]*Ibid* MN 39.

[51]*Villiger* Art 45 MN 8.

[52]*MG Kohen* in *Corten/Klein* Art 45 MN 45 *et seq* mentions these conditions. All of them are listed here, but in a different order.

[53]There are some examples to be found outside treaty law. In the *Dubai–Sharjah Border Arbitration* 91 ILR 543, para 153 (1993) the tribunal had to decide, *inter alia*, the question of whether a certain boundary had been implicitly accepted by Sharjah. It stated: "The Court observes that there is a substantial body of case law which indicates that, when one State engages in activity, by means of which it seeks to acquire a right or to change an existing situation, a lack of reaction by another State at whose expenses such activity is carried out, will result in the latter forfeiting the rights which it could have claimed". See also ICJ *Temple of Preah Vihear* (n 12) 30.

taken into account.[54] Third, the State must be able to freely exercise its conduct.[55] As a principle, all declarations and other acts of States which arose out of force are null and void. And fourth, the conduct must be accompanied by the intention of the State to confirm the validity, the maintenance in force or in operation of the treaty.

17 All facts mentioned, however, have to be interpreted by taking into account the **appreciation of the conduct by the other States Parties**. Therefore, it is not the subjective view of the State having the right to invoke the end of a treaty, but the view of the other States Parties, which is decisive. The intention to waive a right, for example, does not need to correspond with the real intention of the State; it has to correspond with the expressed intention.[56]

[54]ICJ *Temple of Preah Vihear* (n 12) 29 *et seq*; *North Sea Continental Shelf (Germany v Denmark, Germany v Netherlands)* [1969] ICJ Rep 3, paras 28, 30; *Gulf of Maine* (n 3) paras 138 *et seq*; *Continental Shelf (Libya v Malta)* [1985] ICJ Rep 13, para 25; *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240, para 13; *Cameroon v Nigeria* (n 43) para 57.

[55]ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, para 80.

[56]*MG Kohen* in *Corten/Klein* Art 45 MN 46.

Section 2
Invalidity of Treaties

Article 46

Provisions of internal law regarding competence to conclude treaties

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

Contents

A. Purpose and Function

Art 46 addresses the question of the extent to which the validity of a treaty may be affected if it has been concluded in violation of the internal law of one of the parties. The problem underlying Art 46 is characterized by a fundamental **tension between State sovereignty and the security of treaties** (→ MN 3). On the one hand, each-State, by virtue of its sovereignty, has the right to determine the organs and procedures by which its will to be bound by treaties is formed and expressed (→ MN 8). On the other hand, the security of treaties would be seriously undermined if the authority of a **1**

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State's representative depended solely on the complex and diverse internal law governing the competence to conclude treaties (→ MN 9, 25).

2 Art 46 is the result of long and intensive debates in the ILC and at the Vienna Conference (→ MN 13–20). Deep doctrinal divisions had to be overcome (→ MN 7–11) whilst the scant and inconsistent State practice (→ MN 12) offered little guidance. Consequently, the compromise eventually hammered out at the Vienna Conference on the basis of the proposal put forward by the ILC may indeed be regarded as one of the most important achievements attained by the VCLT.[1]

3 Art 46, read in conjunction with Arts 7 and 27, resolves the tension between State sovereignty and the security of treaties in favour of the latter. It reaffirms the principles of ostensible authority (→ Art 7) and the irrelevance of internal law on the international plane (→ Art 27) while allowing only a narrowly tailored exception based on the rationale of good faith (→ MN 26–27).

B. Historical Background and Negotiating History

I. Historical Background

4 Until the end of the eighteenth century the treaty-making power rested exclusively with the head of State. The absolutist monarch, who was considered the personification of the State, possessed the ***ius representationis omnimodae***.[2]

5 Since the American and French revolutions, the treaty-making power of the executive has increasingly become subject to **constitutional restraints**.[3]

> Art II § 2 cl 2 US Constitution of 1787 made the authority of the President to conclude treaties contingent on the advice and consent of two thirds of the Senate. The involvement of the Senate (at the time not elected by direct popular vote) in the treaty-making process was primarily aimed at compensating the constituent States for having been excluded from external affairs.[4] It was only in the aftermath of the French revolution that the call to rein in of the treaty-making power of the executive was directly linked to the ideas of representative democracy and popular sovereignty. In response to these calls the French Constitution of 1791 (ch III sec 1 Art 3) made the power of the King to conclude treaties subject to "ratification" by the legislature. In a similar vein, Art 68 Belgian Constitution of 1831, which in turn served as a model for many other constitutions,[5] subjected the royal treaty-making power to the requirement of prior parliamentary consent.

6 As a general rule, however, the constitutional **power to represent the State** in its external affairs remained vested in the head of State, although in practice the exercise

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[1] See *Castren* [1963-I] YbILC 4; *Waldock* [1963-I] YbILC 204 ("one of the most important provisions of the whole draft").

[2] See *H Blix* Treaty-Making Power (1960) 3; *WK Geck* Die völkerrechtlichen Wirkungen verfassungswidriger Verträge (1963) 60; *T Meron* The Authority to Make Treaties in the Late Middle Ages (1995) 89 AJIL 1; *L Wildhaber* Treaty-Making Power and Constitution (1971) 9.

[3] *Geck* (n 2) 92–186; *Wildhaber* (n 2) 9–13.

[4] See *Wildhaber* (n 2) 10.

[5] See *ibid* 13.

of the *ius representationis omnimodae* was often delegated to the head of government and the foreign minister.[6] In view of the restraints imposed by an increasing number of national constitutions on the treaty-making power of the executive, the question arose as to what extent the validity of an international agreement was affected by a State representative's **lack of authority under its constitutional law**. Throughout the nineteenth century and much of the twentieth century, both legal doctrine and international practice remained deeply divided on the issue.

7 By the first half of the twentieth century the majority of writers appeared to support the view that treaties concluded in contravention of constitutional limitations on a State representative's treaty-making power were void or at least voidable ('theory of international relevance' or '**constitutionalist approach**').[7] This theory was based on the assumption that international law determines the authority of State organs to bind the State on the international plane by virtue of a *renvoi* to municipal law. Accordingly, the constitutional limits imposed on the treaty-making power of the executive were at the same time considered part of international law. Any consent to a treaty given in disregard of municipal constitutional law was thus deemed void or at least voidable. As a consequence, other States were not thought to be able to rely on the apparent authority of the head of State, head of government or foreign minister. The constitutionalist theory presupposed rather that States possess knowledge of the constitutional constraints imposed on the treaty-making power of the other contracting party's agent. A State was thus considered to be required to satisfy itself in each individual case that the conclusion of a given treaty did not infringe the constitution of the other party in order to exclude the risk of the treaty being void or voidable under international law.

8 Various reasons were put forward in support of this theory.[8] Some writers relied on the sovereignty of States, which was said to include the right to freely determine the organs and procedures by which the will of a State to be bound by a treaty is formed and expressed. Others maintained that the consent to a treaty must be given by the State as a whole and that accordingly, consent expressed by the executive on the international plane without the constitutionally required assent of the legislative could not be considered 'real' consent. Last but not least it was argued that international law ought to support the principles of democracy and modern representative government by protecting the participatory rights, which national constitutions grant the legislative in the treaty-making process.[9]

[6] *Geck* (n 2) 67–76; *Wildhaber* (n 2) 17–24.

[7] See *eg W Schücking* La portée des règles de droit constitutionnel pour la conclusion et la ratification des traités internationaux (1930) 1 Annuaire de l'Institut international de droit public 225; *K Strupp* Eléments du droit international public universel, européen et américain (1927) 182. For further references see the detailed overview in *Blix* (n 2) 371–388; *Geck* (n 2) 32–48; *Lauterpacht* I 142; *Waldock* II 41–42; *Wildhaber* (n 2) 149–152.

[8] *Cf* the survey in *Geck* (n 2) 32–40; *Lauterpacht* I 142; *Waldock* II 41–42; *Wildhaber* (n 2) 149–152.

[9] This argument was made in particular by SR *Lauterpacht*, see *Lauterpacht* I 142–143.

9 A number of writers advocated, however, that the principles of good faith and estoppel, as well as the need to preserve the security of international transactions required certain **qualifications of the constitutionalist theory**.[10] Some writers therefore assumed that a State could only contest the validity of the consent given to a treaty by an agent acting *ultra vires* if the constitutional provision violated was 'notorious' or could easily have been ascertained by the other State Party.[11] A State was also considered to be estopped from repudiating the validity of a treaty if it had previously treated the international agreement as binding or if it had failed to invoke the unconstitutionality for a prolonged period of time.[12] Others maintained that whereas a State was not bound by a treaty concluded in disregard of constitutional restraints on the treaty-making power of its agent, it would, however, be responsible "for any injury resulting to another State from reasonable reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty."[13]

10 In contrast, proponents of an '**internationalist approach**' ('theory of international irrelevance') considered international law itself to endow the head of State with the *ius representationis omnimodae* and to lay down the conditions under which other State agents are recognized as representing the State for the purposes of concluding a treaty.[14] Whereas the formation of the will to conclude a treaty was deemed to be left exclusively to municipal law, the competence to express the will of a State in its external relations was thought to be also regulated by international law. In the interest of the security of international treaty relations, the head of State, the head of government and the foreign minister were, as a matter of international law, considered competent to commit the State on the international plane. Thus, according to the internationalist approach, the disregard of constitutional limitations to the treaty-making power did not affect the validity of the consent expressed on the international plane as long as the head of State or any other agent representing the State acted within the scope of his or her authority under international law. The proponents of the international irrelevance of constitutional law pointed to the difficulty of reconciling the constitutionalist approach with the principle of the supremacy of international law over domestic law.[15] Although it was recognized that this logical obstacle could be overcome by the assumption of a *renvoi* to municipal law, it was thought that international law would "thereby in some sense be denying itself".[16] The main reason put forward in support of the

[10]For detailed references, see *Geck* (n 2) 40–48; *Waldock* II 42; *Wildhaber* (n 2) 150–152.

[11]In particular, see *McNair* 77.

[12]*Ibid*.

[13]Harvard Draft 992 (Draft Art 21).

[14]See *eg D Anzilotti* Cours de droit international (1929) 364–367; *Blix* (n 2) 389–397; *G Fitzmaurice* Do Treaties Need Ratification? (1934) 15 BYIL 113, 129–135; *G Scelle* Précis de droit des gens Vol 2 (1934) 455. For further references see the detailed overview in *Geck* (n 2) 25–32; *Lauterpacht* I 142; *Waldock* II 43; *Wildhaber* (n 2) 147–149.

[15]For detailed references with regard to the reasons put forward in support of the 'internationalist approach', see *Geck* (n 2) 25–32; *Lauterpacht* I 142; *Waldock* II 43; *Wildhaber* (n 2) 147–149.

[16]*Fitzmaurice* III 34.

internationalist approach was, however, the security of international transactions, which would, it was argued, be seriously undermined if the often complex and uncertain constitutional provisions were to govern the authority of a State's agent to commit a State on the international plane. States could not be expected to verify the authority of an agent under the other contracting State's constitutional law. It was maintained that any closer questioning of the constitutionality of the agent's authority would indeed constitute an inadmissible interference in the State's internal affairs.

Some writers considered the presumption according to which certain State representatives possessed 'ostensible' or 'apparent' authority under international law to be rebuttable. According to this '**qualified internationalist approach**' it would be contrary to the principle of good faith for a State to claim to have relied on 'ostensible authority' if the lack of constitutional authority was manifest.[17] **11**

International practice during the 19th and the first half of the 20th century was scarce and inconclusive,[18] although by the mid-20th century arbitral and judicial pronouncements, as well as State practice appeared to lend more support to the internationalist approach.[19] **12**

While the arbitrators in the *Cleveland* award (1888)[20] and the *Georges Pinson* case (1928)[21] favoured the theory of international relevance, the awards rendered in the *Franco-Swiss Customs* (1912)[22] and the *Rio Martin* (1925)[23] arbitrations declined to take account of constitutional law in ascertaining the international validity of treaty commitments. The PCIJ in the *Free Zones* (1932)[24] and *Eastern Greenland* (1933)[25] cases was equally reluctant to consider constitutional limitations on the treaty-making power of State agents on the international plane.

State practice up until the middle of the twentieth century, whilst not following a clear pattern, appeared to point towards the theory of international irrelevance.[26] Significantly, the League of Nations in three separate incidents, which concerned the accession of

[17]See *eg J Basdevant* La conclusion et la rédaction des traités et des instruments diplomatiques (1926) 15 RdC 535, 581; *A Verdross* Völkerrecht (5th edn 1964) 163.

[18]See *Blix* (n 2) 302–370; *Geck* (n 2) 281–372; *Lauterpacht* I 143–144; *Waldock* II 43–44; *Wildhaber* (n 2) 154–163.

[19]*Wildhaber* (n 2) 172–175. See also *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* 83 ILR 1, para 55 (1989) suggesting that in 1960 the rule laid down in today's Art 46 VCLT was already recognized as customary international law.

[20]'*Cleveland Award' (Validity of the Treaty of Limits Between Costa Rica and Nicaragua of 15 July 1858) (Costa Rica v Nicaragua)* 28 RIAA 189, 203 (1888).

[21]*Georges Pinson (France) v Mexico* 5 RIAA 327, 393–394 (1928).

[22]*Interpretation of a Regulation of the Commercial Convention and Report Signed at Berne, October 20, 1906 (Switzerland v France)* (1912) 6 AJIL 995, 1000.

[23]*British Property in Spanish Morocco (Spain v United Kingdom)* 2 RIAA 615, 724 (1925).

[24]PCIJ *Free Zones of Upper Savoy and the District of Gex* PCIJ Ser A/B No 46, 169–170 (1932).

[25]PCIJ *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53, 71 (1933).

[26]See Final Draft, Commentary to Art 43, para 7; *Blix* (n 2) 302–355; *Geck* (n 2) 281–338; *Wildhaber* (n 2) 157–163.

Argentina[27] and Luxembourg[28] to the League and the validity of an agreement concluded by the League with the Greek government,[29] considered in each of these cases the fact that parliament had not given the constitutionally required assent to have had no effect on the international validity of the agreements in question.

II. Negotiating History

13 The **four rapporteurs** on the law of treaties successively appointed by the ILC **each adopted an entirely different approach** to the question of the validity of treaties concluded in excess of constitutional authority.[30] SR *Brierly* favoured the strict constitutionalist view according to which a treaty would only become binding if the will of the State was expressed "in accordance with its constitutional law and practice through an organ competent for that purpose".[31] Whilst SR *Lauterpacht* agreed in principle with the constitutionalist approach, he advocated a number of important qualifications. According to *Lauterpacht*'s draft a treaty entered into in disregard of constitutional law was not void *per se* but only voidable. Further, the right of the State concerned to invoke the invalidity was considered to be limited by considerations of good faith and the security of international transactions.[32] SR *Fitzmaurice*, in contrast, followed a strict internationalist approach, which denied any relevance to domestic constitutional law with regard to the validity of consent expressed on the international plane.[33]

14 SR *Waldock* shared the concerns of the proponents of the **internationalist theory** and hence took as the **starting point** of his proposal the principle that constitutional limitations may not invalidate consent expressed by the representative of a State within the scope of his or her ostensible authority under international law.[34] He allowed, however, for an **exception** "if the other interested State or States [...] were in fact aware at the time that the representative lacked constitutional

[27] See *MO Hudson* The Argentine Republic and the League of Nations (1934) 28 AJIL 125; *cf* also *Blix* (n 2) 333–338; *Geck* (n 2) 305–309; *Wildhaber* (n 2) 157–158.

[28] *A Wehrer* Le Statut international du Luxembourg et la Société des Nations (1924) 31 RGDIP 169; *cf* also *Blix* (n 2) 324–328; *Geck* (n 2) 309–316; *Wildhaber* (n 2) 158–159.

[29] Proposal Relating to the Protection of Bulgarian Minorities in Greece, 29 September 1924, 29 LNTS 123. On the dispute as to the validity of the agreement, see *Blix* (n 2) 320–322; *Geck* (n 2) 318–322; *Wildhaber* (n 2) 159.

[30] *Cf El-Erian* [1963-I] YbILC 16 commenting that "he could not help being struck by the fact that the four successive special rapporteurs on the law of treaties, although representing one and the same legal system, had adopted four different approaches to the question of constitutional limitations on the treaty-making power."

[31] *Brierly* III 51–53 (Draft Art 4 and respective commentary).

[32] *Lauterpacht* I 141–147 (Draft Art 11 and respective commentary).

[33] *Fitzmaurice* III 33–35 (Draft Art 10 and respective commentary).

[34] *Waldock* II 41 (Draft Art 5 para 2), 44–45.

authority to establish his State's consent to be bound by the treaty, or if his lack of constitutional authority to bind his State was in the particular circumstance manifest to any representative of a foreign State dealing with the matter in good faith."[35] According to *Waldock*'s very elaborate first draft, this exception applied to both procedural and substantive limitations on the treaty-making power[36] as well as to constitutional provisions which only concerned the validity of treaties under internal law.[37] *Waldock* also proposed a rule *de lege ferenda* according to which an unconstitutional expression of consent could be retracted so long as the treaty was not yet in force.[38]

15 In the **discussion during the ILC's 15th session,** the majority of the Commission members agreed with *Waldock*'s internationalist starting point.[39] Many Commission members were, however, opposed to allowing any exceptions to the rule of the irrelevance of constitutional law on the international plane.[40] Nevertheless, the Commission eventually decided to retain the possibility of invoking a manifest disregard of constitutional law. It was felt that allowing such an exception would accommodate those within the ILC who felt uneasy about the internationalist approach, without, however, compromising the basic principle of the international irrelevance of internal law.[41] At the conclusion of the 15th session, the Commission adopted **provisional draft article 31,** which read:

> "When the consent of a State to be bound by a treaty has been expressed by a representative considered under the provisions of article 4[42] to be furnished with the necessary authority, the fact that a provision of the internal law of the State regarding competence to enter into treaties has not been complied with shall not invalidate the consent expressed by its representative, unless the violation of its internal law was manifest. Except in the latter case, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree."[43]

16 The majority of **governments** who followed the invitation to comment on the ILC draft expressed support for the proposed rule.[44] Some governments, however,

[35] *Waldock* II 41 (Draft Art 5 para 4 lit a), 45–46.

[36] *Waldock* II 41 (Draft Art 5 para 1 lit a and b).

[37] *Waldock* II 41 (Draft Art 5 para 1 lit a), 45.

[38] *Waldock* II 41 (Draft Art 5 para 3 lit b), 45.

[39] See the discussions in [1963-I] YbILC 3–21, 203–207, 288–289.

[40] See *eg Briggs* [1963-I] YbILC 9; *Gros* [1963-I] YbILC 10; *de Luna* [1963-I] YbILC 41; *Ago* [1963-I] YbILC 13; *Yasseen* [1963-I] YbILC 18.

[41] *Cf Waldock* IV 70: "The rule formulated in 1962 therefore constituted a middle view which obtained the support of the majority." See also *Waldock* [1966-I] YbILC 10 ("the best compromise possible on a difficult problem").

[42] Draft Art 4 corresponds to today's Art 7 on full powers.

[43] [1963-II] YbILC 190.

[44] *Waldock* IV 67–70.

were critical as to certain formulations.[45] With the exception of the deletion of the cross reference to the article on full powers,[46] the modifications of the provisionally adopted draft article suggested by SR *Waldock* in response to this criticism[47] were eventually rejected by the Commission.[48]

17 The **final draft** adopted by the ILC read:

> "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation of its internal law was manifest."[49]

18 The article formulated by the ILC was intensely debated at the **Vienna Conference**.[50] It soon became apparent that a considerable number of States still favoured a strict internationalist approach. Whilst a proposed amendment which would have completely abolished the possibility of invoking violations of internal law[51] was rejected by the Committee of the Whole, it had managed to muster the support of almost a third of the delegates.[52]

19 The concerns of the 'internationalists' were, however, eventually largely assuaged by **two amendments** adopted by the Vienna Conference, the stated aim of which was to further restrict the ambit of the ILC draft. The first amendment proposed by Peru and the Ukrainian SSR introduced the qualification that a violation of a State's internal law could only be invoked to vitiate consent to be bound by a treaty if the legal rule in question was of fundamental importance.[53] The second amendment[54] was aimed at clarifying the notion of a 'manifest'

[45] See, in particular, the comments made by Denmark, Luxembourg, the Netherlands and Panama, *Waldock* IV 67–69.

[46] See n 42.

[47] *Waldock* IV 71.

[48] See the draft article proposed by the Drafting Committee [1966-I/1] YbILC 124 and the discussions of the full Commission [1966-I/1] YbILC 9–11, 124–125.

[49] [1966-II] YbILC 240.

[50] See the discussions in the Committee of the Whole UNCLOT I 238–246, 463–464, and the plenary discussions UNCLOT II 84–88.

[51] Amendment submitted by Japan and Pakistan UNCLOT III 165 (UN Doc A/CONF.39/C.1/L.184 and Add.1) proposing the deletion of the phrase "unless that violation of its internal law was manifest" from Art 43 Final Draft.

[52] The proposed amendment was rejected by 56 votes to 25, with 7 abstentions, see UNCLOT I 246.

[53] UNCLOT III 165 (UN Doc A/CONF.39/C.1/L.228 and Add.1). The amendment was adopted by the Committee of the Whole by 45 votes to 15, with 30 abstentions, see UNCLOT I 246. As to later linguistic adjustments made to the original proposal, see UNCLOT I 463–464. A motion introduced by Cameroon with a view to dropping the requirement that the violated internal law must be of "fundamental importance" was defeated by 43 votes to 7, with 47 abstentions, see UNCLOT II 86, 88.

[54] Amendment submitted by the United Kingdom UNCLOT III 166 (UN Doc A/CONF.39/C.1/L.274). The amendment was adopted by the Committee of the Whole by 41 votes to 13, with 39 abstentions, see UNCLOT I 246.

violation.[55] Apart from minor linguistic adjustments,[56] the proposal tabled by the United Kingdom corresponded to today's Art 46 para 2.[57]

The modifications to the ILC draft introduced by the two amendments eventually facilitated the **adoption** of today's Art 46 by the plenary of the Vienna Conference by 94 votes to none, with 3 abstentions.[58] **20**

C. Elements of Article 46

I. Violations of Internal Law May Not Be Invoked

Rather than affirmatively stating the conditions under which the non-observance of internal law may be relied on as a ground for invalidating a State's consent to be bound by a treaty, Art 46 is **couched in negative form**: a State *may not* invoke the violation of internal law *unless* certain conditions are met. **21**

This negative formulation, which is in marked contrast to Arts 48–50, emphasizes the **exceptional character** of the ground for invalidating consent set forth in Art 46.[59] At the same time, it **reaffirms the principle laid down in Art 27** that, as a general rule, the non-observance of internal law does not affect the binding character of a treaty.[60] Conversely, Art 27 cl 2 explicitly exempts Art 46 from the application of the principle stated in Art 27 cl 1. **22**

Art 46 also **underlines** the **principle of "apparent"**[61] or **"ostensible"**[62] **authority** underlying Art 7.[63] By virtue of this principle, a person "is considered as representing a State" if the conditions spelled out in Art 7 are met. Accordingly, the non-observance of internal law does not affect the validity of the consent given by the person acting on behalf of his or her State so long as the agent, as a matter of international law, is deemed competent to express such consent.[64] This presumption of competence may only be rebutted under the conditions set forth in Arts 46 and 47. **23**

Read in conjunction with Arts 7 and 27, Art 46 thus gives **precedence to the security of treaties** and the **good faith** of the other contracting parties over **24**

[55] See the statement by the representative of the United Kingdom UNCLOT I 239.

[56] See UNCLOT I 464.

[57] The proposed amendment (n 54) read in its original wording: "A violation is manifest if it would be objectively evident to any State dealing with the matter normally and in good faith."

[58] See UNCLOT II 88.

[59] Final Draft, Commentary to Art 43, para 12; statements by the representatives of Australia, Senegal, Sweden and the Ukrainian SSR UNCLOT I 239, 241–242.

[60] Final Draft, Commentary to Art 43, para 10.

[61] *Blix* (n 2) 124; *Villiger* Art 46 MN 1.

[62] *Waldock* II 45.

[63] *Ibid.*

[64] Final Draft, Commentary to Art 43, para 10.

countervailing considerations supporting the international relevance of internal law, in particular the sovereignty of the State concerned (→ MN 1, 8).

25 The decision to extend the supremacy of international law, in principle, to the competence to conclude treaties is based on the consideration that "the complexity and uncertain application" of the pertinent internal provisions would create "too large a risk to the security of treaties".[65] At the same time, the general principle set forth in Art 46 is intended to exclude the need for the negotiating parties to closely scrutinize each other's authority under their respective internal law.[66] Such scrutiny could, depending on the specific circumstances, amount to an inadmissible **interference in** the other party's **internal affairs**.[67]

II. Exception: Manifest Violation of Internal Law of Fundamental Importance Regarding Competence to Conclude Treaties

26 A State may only invoke (→ MN 54) the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law (→ MN 28–32) as invalidating its consent if the violation was manifest (→ MN 42–53) and concerned a rule of fundamental importance (→ MN 37–41) regarding the competence to conclude treaties (→ MN 33–36).

27 This exception is primarily based on the assumption that **good faith** not only provides the justification for (→ MN 23–24), but also marks the limits of the basic principle of 'ostensible authority' (→ MN 23) set forth in Art 46 in conjunction with Arts 7 and 27. If the violation of internal law was manifest, the other party knew or ought to have known that the State's representative acted *ultra vires* (→ MN 45). The other contracting State may thus not claim in good faith to have relied on the representative's proper authority.[68] However, the additional reference to the fundamental importance (→ MN 37–41) of the domestic rule at issue also introduces an element of **substantive balancing**. Even if the violation of a State's internal law was manifest, the *ultra vires* nature of the consent given may only be invoked if the violated rule was of such weight or importance so as to justify an exception to the principle of the security of international agreements.

[65] *Ibid.*

[66] *Ibid.*

[67] Final Draft, Commentary to Art 43, para 8.

[68] Final Draft, Commentary to Art 43, paras 5, 10; *Waldock* II 43, 46; *Waldock* IV 67–70. See also *Arbitral Award Maritime Delimitation Case* (n 19) para 55.

1. Internal Law

Internal law, the violation of which may be invoked under Art 46, in principle encompasses **the entire body of law in force** in that country at the time of the alleged violation.[69] **28**

> During the drafting process the ILC decided to substitute the reference to the "constitution" of the State concerned in SR *Waldock*'s first draft[70] by the broader notion of "internal law"[71] in order to clarify that not only written constitutional law but also constitutional practice and other provisions of public law were covered.[72]

Internal law hence covers all rules governing the competence of the State's representative to conclude treaties regardless of its status in the hierarchy of the domestic legal order and regardless of whether such rules are written or unwritten. Thus, **not only constitutional law** (written and unwritten),[73] but also acts of parliament[74] and administrative provisions[75] may in principle be invoked under Art 46, so long as they satisfy the test of "fundamental importance" (→ MN 37–41) and their violation may be considered "manifest" (→ MN 42–53). The **primary and secondary law of international or supranational organizations** constitute an integral part of the internal law of a State so long as it has been duly transformed or incorporated into that State's legal order.[76] **29**

Only "**effective**"[77] internal law is internationally relevant, *ie* the "**law as actually interpreted and applied** by the organs of the State, including its judicial and administrative organs."[78] **30**

Thus, in States in which the limitations on the treaty-making power are codified, it is not merely the text of the applicable legal norm, but also the **practice** in **31**

[69] *Arbitral Award Maritime Delimitation Case* (n 19) para 56: "The question whether a treaty has been concluded in conformity with the internal law of a State must be examined in the light of the law in force in that country". Note that the arbitral tribunal did not apply Art 46 directly but relied on customary international law as it stood in 1960 (→ MN 12). The Tribunal came, however, to the conclusion that State practice at the time supported a rule corresponding to Art 46 according to which "only a grave and manifest violation of internal law could justify a treaty being declared null and void" (para 55).

[70] *Waldock* II 41 (Draft Art 5 paras 2 and 4).

[71] [1963-II] YbILC 190 (Draft Art 31).

[72] *Rosenne* [1963-I] YbILC 14. See also *de Luna* [1963-I] YbILC 4, *Ago* [1963-I] YbILC 12, *Pal* [1963-I] YbILC 13.

[73] See the references in n 72 and the statement by the representative of Sweden UNCLOT I 241.

[74] *Pal* [1963-I] YbILC 13; *Rosenne* [1963-I] YbILC 14 para 6.

[75] See the statement by the representative of Peru UNCLOT I 239.

[76] *Aust* 314. As to the possible implications of these rules being at the same time based on an international treaty, see Art 27 MN 10.

[77] See *de Luna* [1963-I] YbILC 4.

[78] *Arbitral Award Maritime Delimitation Case* (n 19) para 56.

applying that provision, which has to be taken into account when considering whether internal law has been violated.[79]

> A pertinent example for a significant divergence between written law and actual practice is provided by the Constitution of the United States according to which the conclusion of all treaties requires the advice and consent of the Senate.[80] The constitutional text, however, has been superseded to a significant extent by the practice of qualifying certain treaties as "executive agreements" which do not require the involvement of the Senate.[81]

32 Considerations of effectiveness rather than legitimacy also apply with regard to States dominated by an authoritarian regime in which the constitution and other written law have become largely "semantic"[82] and in which no separation of powers exists. In such cases, the **'real' rather than the 'semantic' internal law** becomes the relevant point of reference.[83] In the light of the controlling principle of good faith, an authoritarian government which routinely disregards limitations laid down in the domestic written law must be considered estopped from later invoking such limitations.

> In this sense the arbitral tribunal in the *Maritime Delimitation Case (Guinea-Bissau v Senegal)* held that a State could legitimately rely on the domestic lawfulness of the treaty-making practice of an authoritarian regime although it was inconsistent with the written constitution.[84] At issue was the validity of an agreement concluded between Portugal and France in 1960. The validity of the treaty was challenged by Guinea-Bissau on the ground that according to the Portuguese Constitution in force at the time, the conclusion of the agreement would have required the approval of the National Assembly. The arbitral tribunal held that the limitations imposed on the treaty-making power of the executive by the written constitution were irrelevant, resting its argument, *inter alia*, on the authoritarian nature of the governing regime: "If account is taken [. . .] of the fact that the Agreement was signed by Dr. Antonio Oliveira Salazar, undisputed head of the authoritarian régime which existed at the time in Portugal, it may be concluded that the French Government had good reason to believe in all good faith that the treaty which had been signed was valid."[85]

2. Regarding Competence to Conclude Treaties

33 Only internal law **regarding competence to conclude treaties** may be invoked as a ground for vitiating consent to be bound by a treaty. This qualification **excludes**

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[79] *Ago* [1963-I] YbILC 12; statement by the representative of Sweden UNCLOT I 241; *de Luna* [1963-I] YbILC 4; *Pal* [1963-I] YbILC 13; *Rosenne* [1963-I] YbILC 14.

[80] Art II § 2 cl 2 US Constitution.

[81] See *L Henkin* Foreign Affairs and the United States Constitution (2nd edn 1996) 219–224.

[82] As to the notion of "semantic constitutions", see *K Loewenstein* Political Power and Governmental Process (1965) 149–153.

[83] In a similar vein, see *GH Fox* Constitutional Violations and the Validity of Treaties: Will Iraq Give Lawful Consent to a Status of Forces Agreement? (2008) Wayne State University Law School Research Paper No 08–25, 25–26.

[84] *Arbitral Award Maritime Delimitation Case* (n 19) paras 56–59.

[85] *Ibid* para 59.

provisions solely relating to the **implementation** and **validity of treaties under domestic law**.[86]

The notion of "competence to conclude treaties" must be read broadly as encompassing **both procedural and substantive limitations of the treaty-making power**.[87] **34**

The *travaux préparatoires* provide strong support for this contention. Whereas SR *Waldock* in his initial proposal advocated such a broad understanding,[88] the ILC in its preliminary draft adopted during the fifteenth session restricted the ambit of the relevant internal law to the "law of the State regarding the procedures for entering into treaties".[89] The reference to "procedures for entering into treaties" was, however, later substituted by "competence to enter into treaties" in order to clarify that the relevant internal law also extended to substantive limitations on the treaty-making power.[90] In commenting on the Commission's draft as it stood at the time, two governments nevertheless contended that "competence to enter into treaties" should be read restrictively as only referring to the competence *of the organ*, thus leaving unaffected other constitutional provisions which do not specifically relate to that organ but rather to the State as a whole.[91]

While insisting that the unqualified reference to the "competence to enter into treaties" had always been understood by the Commission to cover both procedural and substantive forms of restriction on competence,[92] SR *Waldock*, in order to remove any possible doubts, proposed dropping this phrase altogether and simply referring to the violation of internal law without any qualification.[93] The ILC, however, decided to maintain the phrase "regarding competence to conclude treaties". Given that this clause had previously been unanimously read by the ILC members as encompassing both procedural and substantive restrictions, it can hardly be argued that by virtue of its reintroduction, it would suddenly have changed its meaning.

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[86] *Villiger* Art 46 MN 8. A provision in SR *Waldock*'s first draft which would have included such provisions was dropped by the ILC, see text accompanying n 37.

[87] *JP Müller* Vertrauensschutz im Völkerrecht (1971) 206–208; *A Verdross*/*B Simma* Universelles Völkerrecht: Theorie und Praxis (3rd edn 1984) 446–447; *Villiger* Art 46 MN 8. For the view that the relevant internal law is restricted to procedural limitations *WK Geck* The Conclusion of Treaties in Violation of the Internal Law of a Party: Comments on Arts 6 and 43 of the ILC's 1966 Draft Articles on the Law of Treaties (1967) 27 ZaöRV 429, 438; *Wildhaber* (n 2) 348–349.

[88] See n 36.

[89] [1963-I] YbILC 203, 207.

[90] See, in particular, the exchange between *Yasseen* and *SR Waldock* [1963-I] YbILC 289: "Mr *Yasseen* asked why the provision referred only to internal law regarding procedure. Was it intended to exclude the substantive rules on treaty making? Sir Humphrey *Waldock*, Special Rapporteur, replied that the point raised by Mr Yasseen could be met by replacing the words 'procedures for entering' [. . .] by the words 'competence to enter'." The amendment suggested by SR *Waldock* was adopted unanimously by the ILC, [1963-I] YbILC 289. *Cf* also *Waldock* IV 71.

[91] Comments made by Luxembourg and Panama, [1965-II] YbILC 67, 69.

[92] *Waldock* IV 71: "The Commission was fully aware that constitutional restrictions upon the competence of the executive to conclude treaties are not limited to procedural provisions regarding the exercise of the treaty-making power but may also result from provisions of substantive law entrenched in the constitution. It is also the understanding of the Special Rapporteur that the Commission intended the words '. . .internal law . . . regarding competence to enter into treaties. . .' to cover both forms of restrictions."

[93] *Ibid.*

> The broad reading of "competence to conclude treaties" is also supported by the fact that the Commission endorsed SR *Waldock*'s proposal to omit the cross-reference to the article on full powers (today's Art 7) from the 1963 draft[94] in order to "minimize the possibility of an interpretation limiting the operation of the article to provisions of internal law regarding distribution of the treaty-making power amongst State organs".[95]

35 Neither the discussions at the Vienna Conference (→ MN 18–20) nor **subsequent practice** indicate that the contracting States intended to restrict the clause to procedural rules. The **object and purpose** of Art 46 also militate in favour of including substantive limitations within the ambit of internationally relevant law.[96] Art 46 attempts to strike a delicate balance between the security of international agreements, on the one hand, and respect for the internal regulation of the treaty-making power as an expression of a State's sovereignty, on the other (→ MN 1, 24). Substantive restrictions of the treaty-making power (such as fundamental rights) will in many cases be of equal or even more "fundamental importance" (→ MN 37–41) to the State concerned and its sovereignty than procedural restraints. Concerns that the ensuing expansion of the internationally relevant law would jeopardize the security of international agreements[97] appear to be unfounded since such law may only be invoked if it is of "fundamental importance" and "manifestly" violated.

36 Thus, "internal law regarding competence to conclude treaties" not only refers to the **distribution of powers amongst various State organs** with regard to the **formation** and **declaration** of the will to be bound by a treaty (*eg* legislative approval, ministerial countersignature, treaty referendum)[98] but also to substantive limitations of **the treaty-making power of the State as a whole**. Such limitations may in particular be imposed by fundamental rights[99] and by the distribution of powers between the federation and its constitutive units in federal States[100] or between a supranational organization (such as the European Union) and its Member States.[101]

3. Fundamental Importance

37 The internal legal rules, which may be invoked as invalidating consent to be bound by a treaty, must be **of fundamental importance**.

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[94] See n 43.

[95] *Waldock* IV 71.

[96] See also *Verdross/Simma* (n 87) 447.

[97] *Geck* (n 87) 438; *Wildhaber* (n 2) 348.

[98] See *Wildhaber* (n 2) 348.

[99] *Verdross/Simma* (n 87) 447. See also European Commission for Democracy through Law (Venice Commission), Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, 17/18 March 2006, CDL-AD(2006)009, paras 40–41.

[100] *M Bothe* in *Corten/Klein* Art 46 MN 12.

[101] *Aust* 314.

This additional qualification was **introduced at the Vienna Conference**[102] with a view to "strengthen[ing] the exceptional nature of cases in which the violation of a provision of internal law might be invoked as a ground for invalidity".[103] The intention of this amendment was to exclude "minor legal and even administrative provisions"[104] and to restrict the relevant internal law to "fundamental **constitutional rules**".[105] **38**

At first sight, this insistence on the constitutional nature of the rule at issue appears to be at odds with the previous decision of the ILC to abandon the restriction to "constitutional law" in favour of a general reference to "internal law". This apparent contradiction is resolved, however, if two different notions of constitutional law are distinguished. The ILC had initially referred to constitutional law in the formal sense (→ MN 28); while the delegates at the Vienna Conference, by insisting on the fundamental importance of the rule in question, espoused a **substantive notion of constitutional law**.[106] Thus the fundamental importance of a rule does not depend on its formal qualification as "constitutional" (either with reference to its generation by the *pouvoir constituant* or *pouvoir constituant constitué*, respectively or with reference to its superior position in the hierarchy of norms). It is rather the **importance for the institutional and political structure of the State and for the relationship between State and citizens** which renders a rule "constitutional" in the substantive sense and hence of "fundamental" importance within the meaning of Art 46.[107] Only in this substantive sense may rules of fundamental importance be equated with constitutional law. **39**

The ICJ in the case of the *Land and Maritime Boundary between Cameroon and Nigeria* held that "[t]he rules concerning the authority to sign treaties for a State are constitutional rules of fundamental importance."[108] This statement is somewhat ambiguous. It could at first sight be understood as suggesting that each and every provision regarding the authority or competence to conclude treaties is of fundamental importance. Such a reading would,

[102]See n 53.

[103]See the statements of the representatives of the Ukrainian SSR UNCLOT I 242, and also of the United Kingdom and Cyprus *ibid* 240, 243.

[104]See the statement of the representative of Peru UNCLOT I 239, and also of the USSR UNCLOT II 87–88.

[105]See the statements of the representatives of Peru and Colombia UNCLOT I 239, 243.

[106]See also Iran–United States Claims Tribunal *Phillips Petroleum Co v Iran* (dissenting opinion *Shafeiei*) Case No 30, Award No ITL 11-30-2 and *Amoco Iran Co v Iran* (dissenting opinion *Shafeiei*) Case No 55, Award No ITL 12-55-2, 78 ILR 637, 648 (1983). As to the distinction between formal and substantive constitutional law, see *B Fassbender* The United Nations Charter as the Constitution of the International Community (2009) 13–26, with further references.

[107]For a narrower definition of "fundamental importance", see *Villiger*, Art 46 MN 16: "The rule is fundamental if it directly relates to, and provides an essential condition for, the competence to conclude a treaty." This definition is too narrow since it would *eg* exclude human rights and most other non-procedural rules of internal law (→ MN 36) from the ambit of the exception set forth in Art 46.

[108]ICJ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening)* [2002] ICJ Rep 303, para 265.

however, render the requirement of fundamental importance moot as a limiting principle.[109] In the specific context of the judgment, the Court's statement must rather be read as basing the fundamental importance on the "constitutional" nature of the rule at issue. The rule which was invoked by Nigeria concerned the right of the government to be involved in the conclusion of treaties by the head of State. Since it was directly related to the distribution of power in the conduct of foreign relations, it qualified as a "constitutional rule" in the substantive sense[110] and was for this reason of "fundamental importance".[111]

40 Whether a given rule is of fundamental importance can only be judged with reference to the **constitutional structure of the specific State at issue**. Hence *eg* in federal States, rules on the distribution of treaty-making power between the federation and the constituent States must be considered of fundamental importance.[112] In democracies, the provisions on the participation of parliament in the conclusion of treaties will qualify as fundamentally important.[113]

41 **International law standards**, to the extent that they are concerned with the internal structure of a State, may provide an additional indication as to the importance of a given rule of internal law. This applies, in particular, to **fundamental rights**. In the light of the universally accepted human rights standards as laid down in the Universal Declaration of Human Rights[114] and the two International Covenants,[115] domestic guarantees of fundamental rights must be considered of fundamental importance regardless of the constitutional idiosyncrasies of the internal legal order at issue.[116] Whereas the "**right to democratic governance**"[117] emerging at international level does not, as such, demand legislative approval of treaties,[118] it underpins the fundamental importance of participatory rights of the legislative branch actually existing in a given State.[119]

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[109] *Fox* (n 83) 23.

[110] Note that the Court presupposes that such substantive constitutional rules are not necessarily laid down in a constitutional instrument (in the formal sense) but may also be found in ordinary acts of legislation. With regard to Nigeria's contention that Cameroon ought to have known that the head of State of Nigeria had no power to bind Nigeria legally without consulting the Nigerian government, the ICJ stated that "there is no general legal obligation for States to keep themselves informed of *legislative and* constitutional developments in other States", see ICJ *Cameroon v Nigeria* (n 108) para 266 (emphasis added).

[111] For a similar reading of the Court's *dictum Fox* (n 83) 24.

[112] *M Bothe* in *Corten/Klein* Art 46 MN 12.

[113] *M Bothe* in *Corten/Klein* Art 46 MN 11.

[114] Universal Declaration of Human Rights, UNGA Res 217 A (III), 10 December 1948, UN Doc A/RES/217 (III).

[115] International Covenant on Civil and Political Rights 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights 993 UNTS 3.

[116] *Müller* (n 87) 208.

[117] *TM Franck* The Emerging Right to Democratic Governance (1992) 86 AJIL 46. See also *GH Fox/B Roth* (eds) Democratic Governance and International Law (2000).

[118] *Fox* (n 83) 36. The example of the United Kingdom demonstrates that the participation of Parliament in the conclusion of treaties cannot be regarded as a necessary element of democratic governance.

[119] *Fox* (n 83) 36; *CB Fulda* Demokratie und pacta sunt servanda (2003) 195. Note, however, that the 'fundamental importance' of the requirement of consent by the Senate to treaties concluded by

4. Manifest Violation

The State's consent to be bound by a treaty must have been expressed in **manifest violation** of the pertinent rules of its internal law. **42**

Since the ground for invalidity set forth in Art 46 is not concerned with State responsibility but rather with the principle of good faith (→ MN 24, 27), only the **objective non-compliance** with internal law is required in order to establish a **violation** of internal law.[120] Questions of intent or negligence on the part of the State invoking the violation are hence immaterial.[121] **43**

According to **para 2**, a violation is **manifest** "if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith." This definition highlights the fact that good faith provides the ultimate rationale for allowing a State to invoke manifest violations of its internal law: good faith precludes the other contracting State from claiming to have relied upon the authority of the representative if that State knew or ought to have known that such authority did not in fact exist under internal law.[122] **44**

The violation must thus be manifest **to the other party** to the treaty.[123] This is the case if the other State Party had **actual knowledge**, *eg* by virtue of a specific warning,[124] or was **negligently ignorant** of the representative's lack of authority.[125] **45**

Whether a State was **negligently ignorant**, *ie* whether it ought to have known of the violation of internal law, depends on the applicable **standard of care**. Art 46 para 2 defines this standard **objectively** with reference to the principle of good faith and to the normal practice followed in such a situation by an average or reasonable State. Despite its objective character, the required standard of care thus largely depends on the **particular circumstances** of the case.[126] **46**

In order to establish the required standard of care, it is important to bear in mind that Art 46 is based on the **presumption** that the representative, under the conditions set forth in Art 7, possesses the **requisite authority under internal law** (→ MN 23). This presumption is particularly strong in the case of State representatives, such as heads of State, heads of government or foreign ministers, who, in accordance with Art 7 para 2, merely by virtue of their functions and without having **47**

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the President (Art II § 2 cl 2 US Constitution) has been questioned in the light of the superseding practice of concluding executive agreements without the participation of the Senate, see *Henkin* (n 81) 500: "[T]he power of the President to make many agreements without the Senate casts some doubt on the 'fundamental importance' of Senate consent." For earlier pronouncements on the "democracy-promotion rationale" (*Fox*) of today's Art 46, see text accompanying n 9.

[120] *Pal* [1963-I] YbILC 14.

[121] *Ibid*; *Villiger* Art 46 MN 9.

[122] *Waldock* IV 70.

[123] *Ibid*.

[124] See ICJ *Cameroon v Nigeria* (n 108) para 266.

[125] *Waldock* IV 70 para 3.

[126] Final Draft, Commentary to Art 43, para 11; *Waldock* IV 70.

to produce full powers are considered as representing their State.[127] In the light of this presumption and in keeping with normal practice,[128] a State **cannot** therefore **be expected to question the authority** of the other State's representative by interrogating that representative or by making further investigations into the constitutionality of his or her conduct.[129] The preclusion of the need for negotiating States to investigate each other's internal constitutional situation was considered one of the chief merits of the approach chosen by the ILC[130] and the Vienna Conference.[131]

48 Hence, as a general rule, violations of internal law can only be considered manifest if the limitation of the representative's authority could have been established by any State **without further investigation**[132] or if it was "**easily ascertainable**".[133] This would be the case if the restriction imposed by internal law on the representative's authority had been "a matter of common knowledge",[134] *eg* if it had been discussed in the media.[135]

49 There is **no general legal obligation** for a State **to keep itself informed of legislative and constitutional developments in other States**, even if they are neighbouring States or for other reasons important for the international relations of that State.[136] Consequently, a violation of internal law would only be manifest if the limitation of the representative's authority could have been ascertained by simply reading the foreign State's internal law,[137] provided the pertinent legal instruments were "properly publicized"[138] and easily accessible.[139] This will,

[127]ICJ *Cameroon v Nigeria* (n 108) para 265; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595, para 44; *Loan Agreement between Italy and Costa Rica (Italy v Costa Rica)* 25 RIAA 23, para 18 (1998).

[128]See Final Draft, Commentary to Art 43, para 7; see also the statement of the representative of Sweden UNCLOT I 241.

[129]See the statements of the representatives of Sweden, France and Switzerland UNCLOT I 241, 243, 245; Final Draft, Commentary to Art 43, paras 7–8.

[130]See *Waldock* II 46: "[T]he chief merit of the 'ostensible' authority doctrine is to exclude the need for negotiating States to investigate each other's internal constitutional situation, and it is essential to avoid any qualification of the doctrine that would reintroduce the need for such investigations."

[131]See the statement of the representative of France UNCLOT I 243.

[132]*Waldock* II 46.

[133]*Rosenne* [1963-I] YbILC 207. See also *Paredes* [1963-I] YBILC 206 and the statement of the representative of Ceylon UNCLOT II 85 ("some inquiry demanded by ordinary prudence").

[134]*Rosenne* [1963-I] YBILC 207.

[135]*Waldock* II 46.

[136]ICJ *Cameroon v Nigeria* (n 108) paras 258, 266.

[137]See the statement of the representative of Sweden UNCLOT I 241.

[138]ICJ *Cameroon v Nigeria* (n 108) para 265.

[139]See n 133.

however, only rarely be the case since, typically, the applicable provisions of internal law are difficult to interpret or superseded by subsequent practice.[140]

> The Swiss Federal Court held that the failure of the Swiss government to obtain parliamentary assent before concluding an agreement with the Austrian government did not constitute a manifest violation of Swiss law. In the case at issue the question as to whether the approval by parliament was required was highly disputed with regard to the specific subject matter of the agreement and had not yet been authoritatively settled by the Swiss Federal Court.[141] Similarly, the Israeli Supreme Court maintained that the lack of ratification by the Knesset to an extradition agreement concluded by the Israeli government with Switzerland did not amount to a manifest violation "if only because of the fact that there is a general view that there is no clear and explicit provision in the law of Israel which vests in the Knesset the exclusive power to ratify treaties."[142]

Special circumstances may, however, establish a **higher standard of care** on the part of the non-violating State. The subject matter of the treaty may suggest the need for special constitutional authority. If a State, by virtue of the **subject matter of the treaty**, is put on notice of the fact that the other State's representative may lack the required constitutional authority, a higher burden of verification of the representative's authority may apply.[143] **50**

It has been argued that **cessions and other treaties involving disposition over territory** belong to this category.[144] Due to their repercussions on the affected population, such treaties are typically subject to plebiscites or other special **51**

[140]Final Draft, Commentary to Art 43, para 10 ("complexity and uncertain application of provisions of internal law"); statement of the representative of Sweden UNCLOT I 241; *Wildhaber* (n 2) 176. See also *T Meron* Article 46 of the Vienna Convention on the Law of Treaties (*Ultra Vires* Treaties): Some Recent Cases (1978) 49 BYIL 175, 178–82, 191–192 arguing that the failure of the US government to obtain consent from the Senate to the 1975 Sinai II Agreements could not be regarded a "manifest violation" of the US Constitution (see n 80) due to the uncertainty surrounding the distinction between "treaties" requiring consent and "executive agreements" concluded without participation of the Senate (see also n 119).

[141]Federal Court (Switzerland) *v Regierungsrat des Kantons St Gallen* ATF 120 Ib 360, 365–366 (1994).

[142]Supreme Court (Israel) *Attorney General of Israel v Kamiar* 44 ILR 197, 268 (1967). In a similar vein, before the adoption of the VCLT, Federal Constitutional Court (Germany) 43 ILR 246, 251 (1963).

[143]See *Waldock* II 45–46. It is, however, questionable whether, as argued by *Waldock*, the subject matter of the treaty will ever render the representative's lack of constitutional authority "self-evident", since constitutional practice is not uniform on such issues.

[144]ICJ *Cameroon v Nigeria* (n 108) (declaration by Judge *Rezek*) 489, 490–491; Supreme Court (Bangladesh) *Kazi Mukhlesur Rahman v Bangladesh* 70 ILR 37, paras 31–39 (1974); see also Supreme Court (India) *In re The Berubari Union and Exchange of Enclaves* 53 ILR 181, 203–204 (1960); *M Fitzmaurice/O Elias* The Bakassi Peninsula Case and Article 46 of the Vienna Convention on the Law of Treaties in *M Fitzmaurice/O Elias* (eds) Contemporary Issues in the Law of Treaties (2005) 372, 384–385; *R Jennings/A Watts* (eds) Oppenheim's International Law Vol 1 (9th edn 1992) 684; *Meron* (n 140) 182–191, 192–193 (with regard to the disputed validity of the 1977 Panama Canal Treaties).

constitutional procedures.[145] From the point of view of international law, these constitutional safeguards may be seen "as a device for securing compliance with the principle of self-determination".[146] In the light of constitutional practice[147] and the importance attached to the principle of self-determination in the international legal order,[148] a good case can be made for imposing a higher burden on the non-violating State to verify the constitutional authority of the other State's representative, if such a treaty is intended to be concluded in simplified form.[149]

> In the *Loan Agreement between Italy and Costa Rica* case, Costa Rica argued that Italy could not have legitimately relied on the validity of a finance agreement concluded without the assent of the Costa Rican parliament since according to international practice, loan agreements typically require parliamentary consent within the debtor state. The arbitral tribunal rejected this argument, maintaining that such practice could not as such change the rule of the irrelevance of internal law set forth in Art 46 and that it had not been sufficiently shown that the conclusion of the finance agreement constituted a manifest violation of a rule of Costa Rican law of fundamental importance.[150]

52 Similarly, it has been suggested that in **treaty relations amongst pluralistic democracies**, the violation of a constitutional requirement of legislative approval "may more readily be considered manifest".[151] The lowering of the threshold for assuming a manifest violation has also been based on the "right to democratic governance", which is emerging within the international legal order.[152] However, given the very different approaches followed with regard to the necessity of parliamentary assent,[153] even amongst pluralistic democracies, it cannot be considered "objectively evident" that the conclusion of a certain treaty requires the participation of the legislature.[154]

53 Conversely, certain circumstances may **buttress a State's legitimate expectation** that the other State's representative is duly authorized under internal law. If a State, in answer to a specific inquiry by the other State, affirms the constitutional authority of its representative, a violation of that State's internal law can no longer be considered manifest even if, prior to the official confirmation, it had been

[145]ICJ *Cameroon and Nigeria* (n 108) (declaration by Judge *Rezek*) 489, 490–491; *Jennings/Watts* (n 144) 684.

[146]*Jennings/Watts* (n 144) 684. See also *Tunkin* [1963-I] YbILC 4.

[147]See n 145.

[148]See ICJ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 88, 155–156, 159.

[149]See references in n 144. The majority opinion of the ICJ in *Cameroon v Nigeria* (n 108) did not address this issue.

[150]*Loan Agreement between Italy and Costa Rica* (n 127) paras 27, 44–45.

[151]*Wildhaber* (n 2) 181.

[152]*Fox* (n 83) 32–43.

[153]See *Geck* (n 2) 92–186; *Wildhaber* (n 2) 26–146.

[154]*Fulda* (n 119) 195. The goal of promoting democracy can be pursued by other avenues, see *Waldock* II 44; *Wildhaber* (n 2) 179.

objectively evident.[155] The expectation that a State representative possesses the requisite authority under domestic law to conclude a given treaty may also be based on a corresponding pattern of previous practice.

In the *Land and Maritime Boundary between Cameroon and Nigeria* case the ICJ dismissed Nigeria's argument that it was manifest to Cameroon that two boundary agreements concluded by Nigeria's head of State with his Cameroon counterpart required the assent of the Nigerian government and were thus invalid under Art 46 VCLT. In response to Nigeria's contention, the Court in particular pointed to the fact that the boundary agreements formed part of "a pattern which marked the Parties' boundary negotiations between 1970 and 1975, in which the two Heads of State took the initiative of resolving difficulties in those negotiations through person-to-person agreements."[156]

The Supreme Court of Israel held that Israel was estopped from claiming that a treaty was invalid without the assent of the Knesset since the ratification of the agreement in question was at variance with the constitutional practice set out in a memorandum published in the UN Legislative Series.[157]

In the *Maritime Delimination Case (Guinea-Bissau v Senegal)*, Guinea-Bissau argued that a boundary agreement concluded between Portugal and France was invalid due to the lack of approval by the Portuguese parliament. The arbitral tribunal held that the French government was entitled to believe in good faith that consent to the treaty was validly given. The arbitrators assumed that, "[w]hen two countries conclude by exchange of letters an agreement which, for constitutional reasons, requires the approval of Parliament of one of them, it is customary to mention that fact in the text or during the negotiations."[158] If this were not done, the State in question would not be allowed to invoke the violation of its domestic law.[159] However, even if such a practice could not be shown to exist, the other State would still be able to rely on the "ostensible authority" (→ MN 23) of the State representative, so long as his or her lack of authority under domestic law was not manifest.

III. Invocation as a Ground for Invalidating Consent

54 Consent to be bound by a treaty which has been expressed in manifest violation of a fundamental rule of internal law concerning competence to conclude treaties is not *ipso facto* void but **only voidable** in accordance with the procedure set forth in Arts 65–68. A State may only invoke the violation of **its own internal law** as

[155] *Wildhaber* (n 2) 182.

[156] ICJ *Cameroon v Nigeria* (n 108) para 266.

[157] Israeli Supreme Court *Attorney General v Kamiar* (n 142) 262–263. See also *S Rosenne* Problems of Treaty-Making Competence: Reflections on the Vienna Convention of 1969 and the Kamiar Case in *S Rosenne* An International Law Miscellany (1993) 307, 324–325.

[158] *Arbitral Award Maritime Delimitation Case* (n 19) para 58.

[159] *Ibid* paras 58–59.

a ground for invalidating its consent.[160] The right to invoke the violation of internal law **may be lost** pursuant to Art 45, in particular if the State delays too long before claiming the invalidity[161] or if it treats the agreement as valid.[162]

D. 1986 Convention

I. Extension of Art 46 to Treaties Concluded by International Organizations

55 In the VCLT II, the rule and exception laid down in Art 46 VCLT are extended to treaties concluded by international organizations with only **two modifications**: the reference to "internal law" is substituted by the "rules of the organization" (Art 46 para 2 VCLT II, → MN 60–61) and in determining whether a violation is manifest, the "normal practice" relates to practice "of States and, where appropriate, of international organizations" (Art 46 para 3 VCLT II, → MN 68–69).

56 As opposed to States, **international organizations cannot rely on** the concept of **sovereignty** (→ MN 1) in support of their interest in protecting the integrity of their rules regarding competence to conclude treaties. However, given that the "rules of the organization" are either contained in or derived from the **constituent instrument** (seeArt 2 para 1 lit j VCLT II, which is itself a **treaty governed by international law**, the interest of the international legal order in preserving the sanctity of these rules may be considered even more immediate than in the case of a State's internal law.[163] On the other hand, as a treaty, the constituent instrument would, if at all, only be opposable to Member States.[164] Non-member States entering into treaty relations with an international organization would be protected by the *pacta tertiis* rule (→ Art 34).

57 Treaties concluded *ultra vires* by an international organization will invariably have repercussions on the **sovereignty of its Member States**. This is obvious if the subject matter of the treaty exceeds the powers of the organization.[165] Equally, the non-observance of the distribution of treaty-making power within the international organization will typically affect the vested interests of at least some member

[160] *Reuter* VIII 132. This is also recognized under customary international law, see *Arbitral Award Maritime Delimitation Case* (n 19) para 60. See also *Wildhaber* (n 2) 173.

[161] ICJ *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Preliminary Objections) [2007] ICJ Rep 832, para 79; *Loan Agreement between Italy and Costa Rica* (n 127) para 8.

[162] ICJ *Cameroon v Nigeria* (n 108) para 267; *Nicaragua v Colombia* (n 161) para 79; *Loan Agreement between Italy and Costa Rica* (n 127) paras 8, 29, 49.

[163] *Cf* the statements of the representatives of the United Nations and Chile UNCLOTIO I 131, 138.

[164] As to the extent to which Member States can be considered 'third States' in treaty relations with the international organization, see *Reuter* VIII 135. *Cf* also *T Rensmann* International Organizations or Institutions, External Relations and Co-operation in MPEPIL (2009) MN 18.

[165] *Reuter* VIII 134.

States, since the members are, as a general rule, unequally represented in the different organs involved.[166]

Some even argue that the legal foundations of international organizations are in greater need of protection since, unlike States, international organizations are not built on "solid **sociological realities**" but primarily on law.[167] **58**

Notwithstanding these considerations, it is not only in the interest of the other contracting parties but also of the international organizations themselves to grant adequate protection to **the security of treaties**. If international organizations were allowed to invoke the violation of their rules under more lenient conditions than States, their treaty commitments would be of lesser value from the perspective of the other contracting parties.[168] Since many international organizations are dependent on being perceived as **reliable partners in treaty relations**, in order to effectively discharge their mandate, it is ultimately also in their interest that the external relevance of their rules is restricted along the lines of the compromise formulated in the 1969 Convention.[169] **59**

II. Application of the Elements of Art 46 to International Organizations

1. Rules of the Organization

The fact that Art 46 para 2 VCLT II refers to the "rules" rather than the "internal law" of the international organization reflects the **ambivalent nature** of these rules. At least in relation to the members of an international organization, the "rules of the organization" are not "truly internal",[170] since, being either contained in or derived from the organization's constituent instrument (Art 2 para 1 lit j VCLT II, → Art 6 MN 26–29), they constitute at the same time internationally binding treaty commitments. **60**

Most of the issues disputed in relation to the ambit of the relevant internal law under the 1969 Convention (→ MN 28–32) have been resolved with regard to international organizations by Art 2 para 1 lit j VCLT II (→ Art 2 MN 50–53, → Art 6 MN 26–29). By virtue of the definition of the "rules of the organization" contained in that provision, it is authoritatively established that international organizations may not only invoke the violation of their **constituent instrument** but also **secondary law** (decisions and resolutions adopted in accordance with the constituent instrument) and **established practice**. **61**

[166] *Ibid*.
[167] *Ibid*.
[168] *Ibid* 133–134.
[169] *Ibid* 134.
[170] Statement of the representative of the United Nations UNCLOTIO I 131.

2. Regarding Competence to Conclude Treaties

62 In keeping with the principles governing States under the 1969 Convention (→ MN 33–36), the "competence to conclude treaties" in Art 46 para 2 VCLT II relates both to the **competence of the organ** or agent expressing consent and to the **competence of the organization**.[171]

63 This broad understanding of the competence to conclude treaties is supported by the general intention of the 1986 Vienna Conference to bring the regime applying to consent of an international organization expressed in violation of the organization's rules as closely as possible into line with Art 46 of the 1969 Convention.[172] The *travaux préparatoires* do not contain any indication to the effect that the competence to conclude treaties was intended to be understood in a narrow 'procedural' sense (→ MN 34) limited to the distribution of treaty-making power between the various organs of the organization.

64 The extension of the ambit of Art 46 to consent which exceeds the competence of the organization poses certain conceptual problems with regard to international organizations. Unlike States, international organizations do not possess a general competence to conclude treaties but are rather governed by the 'principle of speciality'.[173] The treaty-making capacity of an international organization is accordingly as a general rule limited to those powers with which the organization has been endowed by its members (→ Art 6 MN 26–27). However, if the other contracting party legitimately relied on the validity of the organization's consent, the international organization remains bound by the treaty despite the fact that it exceeded the limits imposed on its treaty-making capacity by the rules of the organization. The principle of **good faith** hence **overrides** the '**principle of speciality**'.[174] In this sense, Art 46 para 2 VCLT II may be regarded as *lex specialis* to Art 6 VCLT II.

3. Fundamental Importance

65 In accordance with the prevailing view under the 1969 Convention (→ MN 39), it is **the substantive importance** of a rule rather than its formal quality of being

[171] *Reuter* VIII 134; *M Bothe* in *Corten/Klein* Art 46 VCLT II MN 4; *contra*: *A Peters* Treaty-Making Power in MPEPIL (2009) MN 129 who, however, advocates an approach which would accommodate the conflicting interests of the international organization, its Member States and other contracting parties along the lines of Art 26 VCLT II (*ibid* MN 133). As to the distinction between acts exceeding the competence of the organ on the one hand, and the competence of the organization on the other, see ICJ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 162.

[172] *Al-Khasawneh* UNCLOTIO I 16.

[173] See ICJ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, para 25.

[174] *E Klein/M Pechstein* Das Vertragsrecht internationaler Organisationen (1985) 25–27; *Rensmann* (n 164) MN 16.

incorporated into the constituent instrument which defines the fundamental nature of the violated rule. Thus, rules of fundamental importance may also be found outside the constituent instrument in the other sources mentioned in Art 2 para 1 lit j VCLT II.[175]

The ILC, in its draft adopted on first reading, had initially decided to drop the requirement that the violated rule had to be of fundamental importance.[176] It was argued that all the rules of an international organization which concerned the conclusion of treaties were of fundamental importance and that international organizations needed to be better protected than States against their violation.[177] In its final draft, however, the ILC reinstated the "fundamental importance" requirement as a precondition for the international relevance of the rules of the organization, since "there was no reason to establish different regimes for international organizations and for States".[178] At the Vienna Conference there was also general agreement that the restriction of the relevant rules of the organization to those of fundamental importance should be retained.[179]

The fact that the **constituent instrument** is a treaty governed by international law does not mean that all of its provisions are necessarily of fundamental importance.[180] Different considerations apply, however, to the **UN Charter,** which by virtue of Art 103 enjoys precedence over all other treaties.[181] **66**

An amendment proposed at the Vienna Conference which had the stated intention of ensuring that every provision of an international organization's constituent instrument would *ipso facto* be considered of fundamental importance[182] did not meet with sufficient support.[183]

4. Manifest Violation

The establishment of the **manifest** character of a violation (→ MN 42–53) raises particular problems both with regard to international organizations as the party invoking the violation and in relation to international organizations as the non-violating party. **67**

If an international organization is the **non-violating party**, special considerations apply to establishing the standard of care (→ MN 46), which determines whether the violation was "objectively evident" or not. According to **Art 46 para 3** VCLT II, a **68**

[175]See the statements of the representatives of the USSR, Nigeria, Austria and the United Nations UNCLOTIO I 133, 136–137, 139.

[176][1979-II/2] YbILC 152 (Draft Art 46).

[177]ILC Commentary [1979-II/2] YbILC 152 para 3.

[178]Final Draft 1982, Commentary to Art 46, para 3.

[179]See the discussions in the Committee of the Whole UNCLOTIO I 129–139.

[180]See the statements of the representatives of the Netherlands, Australia, Germany, Portugal, Austria, Hungary and the United Kingdom UNCLOTIO I 132, 135–138.

[181]See the statement of the representative of the United Nations UNCLOTIO I 131.

[182]See the amendment proposed by the IAEA, the IMO, the IMF and the United Nations UNCLOTIO II 73 (UN Doc A/CONF.129/C.1/L.55).

[183]See the statement of the representative of the United Nations UNCLOTIO I 138–139.

"violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the **normal practice of States and, where appropriate, of international organizations** and in good faith."

This formulation was the result of intense and controversial discussions within the ILC and at the 1986 Vienna Conference. The draft proposed by the ILC deviated significantly from the 1969 Convention.[184] A manifest violation was defined differently, depending on whether *ultra vires* consent was given by a State or by an international organization. In the case of a State invoking the breach of its internal law, the ILC draft article read: "[A] violation is manifest if it would be objectively evident to any State or any international organization referring in good faith to normal practice of States in the matter."[185] The manifest or objectively evident nature of the violation would thus have been exclusively determined by reference to the "normal practice of States", regardless of whether the other party to the treaty was a State or an international organization.[186] The ILC proposal would have also meant a significant shift in perspective. Whereas in the 1969 Convention "normal practice" referred to the conduct of the non-violating party (→ MN 44), the ILC in its 1982 draft related "normal practice" to the conduct of the State or international organization, which had violated its internal law or rules.[187] In the case of an international organization invoking the violation of its rules, the ILC abandoned the formula of the 1969 Convention altogether. Instead, the ILC draft article provided: "[A] violation is manifest if it is or ought to be within the knowledge of any contracting State or any contracting organization."[188] Although this formulation would have been in keeping with the good faith rationale underlying the corresponding provision of the 1969 Convention, the exclusive reference to the "contracting" States or international organizations and the omission of the requirement of "objective evidence" appeared to introduce a more subjective approach. After a controversial debate, the 1986 Vienna Conference[189] eventually decided to revert to the wording of the 1969 Convention and follow a unified approach applicable to both States and international organizations.[190] Several delegates, however, expressed doubts as to whether a "normal practice" of international organizations could be said to exist.[191] Others emphasized that such practice might well develop in the future and that the Convention should not preclude such developments.[192] In order to accommodate these concerns,[193] the final draft adopted by the 1986 Vienna Conference specified that the relevant practice is the "normal practice of States and, where appropriate, of international organizations".

69 The "appropriateness" of the reference to the **practice of other international organizations** accordingly depends on whether such practice can, in fact, be

[184] Art 46 Final Draft 1982.

[185] Art 46 para 2 Final Draft 1982.

[186] Final Draft 1982, Commentary to Art 46, para 5.

[187] See Final Draft 1982, Commentary to Art 46, paras 5–6.

[188] Art 46 para 4 Final Draft 1982.

[189] See the discussions in the Committee of the Whole UNCLOTIO I 129–139.

[190] *Al-Khasawneh* UNCLOTIO I 16.

[191] See the statements of the representatives of Egypt, Tunisia, Iraq, Switzerland, Bulgaria and Czechoslovakia UNCLOTIO I 130, 133, 134, 137.

[192] See the statements of the representatives of Austria, the IMF and the EEC UNCLOTIO I 130, 135, 136.

[193] See *Al-Khasawneh* UNCLOTIO I 16.

established. The wording of Art 46 para 3 VCLT II, which refers cumulatively to the "normal practice of States *and*, where appropriate, of international organizations", suggests that the **practice of States** will always have to be taken into account regardless of whether sufficient practice of international organizations can be said to exist or not. There is indeed scarcely any reason to assume that the required standard of care in ascertaining a potential limitation of a representative's authority would be significantly different, depending on whether a State or an international organization were at issue.

An example of a case involving Art 46 in which the international organization was the non-violating party is provided by *European Molecular Biology Laboratory v Germany*.[194] The award is, however, inconclusive as to the applicable standard of care since the arbitral tribunal held that Germany had failed to sufficiently identify a domestic rule of fundamental importance on the competence to conclude treaties.[195]

If the **party invoking the violation** is an international organization, the particular nature of international organizations will also have to be taken into account when considering whether the violation was manifest. **70**

In principle, the **presumption** of an international organization's representative being duly authorized, which is established by **Art 7 para 3** in conjunction with Art 46 para 2 VCLT II, cannot be more easily rebutted than under the 1969 Convention. As opposed to the 1969 Convention (Art 7 para 2, → MN 23), the 1986 Convention does not, however, recognize certain representatives of international organizations as enjoying a heightened level of legitimate trust by virtue of their office (see Art 7 para 3 VCLT II). **71**

In ascertaining whether the other parties to a treaty **ought to have known** (→ MN 46) that the international organization's representative exceeded his or her authority, different considerations apply, depending on whether members of the organization or third parties are involved. **72**

For **non-members,** the rules of an international organization are, in principle, not more easily ascertainable than the internal law of a State. Just as States or international organizations do not have a general legal obligation to keep themselves informed of legal developments in other States (→ MN 49), they also cannot be expected to have familiarized themselves with the constituent instrument, secondary law or relevant practice (→ Art 2 para 1 lit j VCLT II) of an international organization to which they do not belong. **73**

The European Court of Justice has dealt in a number of instances with the effect of the violation of EU law on the validity of international agreements concluded by the European Union with non-member States. In this context the ECJ and the Advocates General referred to Art 46 VCLT II as a reflection of customary international law.[196] In *France v Commission*,

[194] *European Molecular Biology Laboratory v Germany* 105 ILR 1 (1990).

[195] *Ibid* 30.

[196] ECJ *France v Commission* C-327/91 [1994] ECR I-364, para 25; opinion of AG *Tesauro ibid* para 12; opinion of AG *Lenz* in *Commission v Council* 165/87 [1988] ECR 5545, para 35; opinion

the Court considered that the fact that an agreement with the United States was concluded by the Commission in violation of the internal division of powers between the Community institutions did not affect the validity of the agreement under international law.[197] In a case involving the agreement on the transfer of passenger name records concluded by the Community with the United States, the Court assumed that the conclusion of the treaty was wrongly based on Art 95 EC Treaty (now Art 114 TFEU).[198] The Court held that the ensuing lack of competence of the Community did not touch upon the validity of the treaty under international law. Since the agreement allowed for termination taking effect within 90 days on the basis of Art 231 para 2 EC Treaty (now Art 264 para 2 TFEU), the Court ordered that the agreement should remain temporarily applicable as a matter of Community law in order to allow the Community to terminate the agreement properly.[199] In both instances the Court apparently did not deem the violations of Community law to be manifest within the meaning of Art 46 para 3 VCLT II.[200]

74 **Members of the international organization**, by contrast, must be presumed to have knowledge of the pertinent limitations imposed on the competence to conclude treaties by the rules of the organization.[201] This stands to reason if the restriction of the representative's authority follows unambiguously from the constituent treaty to which each member is a party. Bearing in mind that the violated rules of the international organization must be of fundamental importance (→ MN 37–41, 65–66), this presumption must also hold true with regard to limitations on the competence to conclude treaties flowing from secondary law or from established practice (→ Art 2 para 1 lit j VCLT II), since members will typically have participated in the adoption of such rules and practices through their representatives.

75 **Mixed agreements** pose particular problems with regard to Art 46.[202] If the subject matter of a treaty relates to the competences of both the international organization and its members, the full and effective discharge of the obligations under the agreement may require it to be jointly concluded by the organization and its members. Since the allocation of competences between the organization and its members is, as a general rule, not "objectively evident" to third parties, neither the

of AG *Alber* in *France v Commission* C-233/02 [2004] ECR I-2759, para 50; opinion of AG *Kokott* in *Commission v Council* C-13/07, 26 March 2009, para 173 n 109.

[197] *France v Commission* C-327/91 (n 197) para 25.

[198] ECJ *Parliament v Council and Commission* C-317/04, C-318/04 [2006] ECR I-4721, para 73.

[199] As to a similar situation, see the opinion of AG *Kokott* in *Commission v Council* C-13/07 (n 196) para 173.

[200] See also the opinion of AG *Lenz* in *Commission v Council* 165/87 (n 196) para 35; and the opinion of AG *Alber* in *France v Commission* C-233/02 (n 196) para 50. In both cases, the ECJ eventually did not take up the argument of validity of the respective treaties under international law.

[201] *Reuter* VIII 135; statement of the representative of the United Nations UNCLOTIO I 131.

[202] See *P Olson* Mixity from Outside: The Perspective of a Treaty Partner in *C Hillion/P Koutrakos* (eds) Mixed Agreements Revisited: The EU and its Member States in the World (2010) 331, 333–336; *Rensmann* (n 164) MN 23; *E Steinberger* The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Members States' Membership of the WTO (2006) 17 EJIL 837, 844–848, 855–856.

organization nor its members would be able to invoke their limited competences *vis-à-vis* the other parties to the treaty as a ground for invalidating their consent. In relation to the other contracting parties, the international organization and its members are thus jointly and severally responsible for the performance of the obligations under the treaty.

Different considerations only apply if the international organization and its members, when concluding or acceding to the treaty, **declare the extent of their respective competences** with regard to the matters governed by the treaty. Such a 'declaration of competence' is explicitly required by certain multilateral conventions as a precondition for the participation of international organizations.[203] **76**

E. Customary International Law Status

At the time of the 1969 Vienna Conference, international practice with regard to the international relevance of a violation of internal law was so scant and inconsistent[204] (→ MN 12) that the principles set forth in Art 46 initially constituted a progressive development of international law.[205] Art 46 and its counterpart in the VCLT II were adopted without any dissenting votes by the two Vienna Conferences.[206] International practice since the adoption of the Convention has consistently applied the strict conditions for the invocation of the internal law of States and the rules of an international organization as laid down in Art 46 of the two Vienna Conventions.[207] Therefore, Art 46 today can be considered to **77**

[203]See *eg* Annex IX Arts 5–6 United Nations Convention on the Law of the Sea 1833 UNTS 396. As to 'declarations of competence' issued by the European Union and its Member States, see *F Hoffmeister* Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States in *C Hillion/P Koutrakos* (eds) Mixed Agreements Revisited: The EU and its Member States in the World (2010) 249, 259–260; *Olson* (n 202) 335–337.

[204]*Wildhaber* (n 2) 173: "The picture which emerges from international practice is that of a 'crazy quilt'".

[205]See the statement of the representatives of Sweden and Colombia UNCLOT I 241, 243. See, however, *Arbitral Award Maritime Delimitation Case* (n 19) para 55, suggesting that the rule laid down in today's Art 46 had already been recognized as customary international law in 1960.

[206]See n 58 and UNCLOTIO I 16.

[207]With regard to the VCLT, see, in particular, the cases in which the States at issue were not parties to the Convention: Israeli Supreme Court *Attorney General v Kamiar* (n 142); *Kazi Mukhlesur Rahman v Bangladesh* (n 144); *Phillips v Iran* (n 106) 486; *Amoco v Iran* (n 106) 493. Art 46 VCLT has also been invoked by the US Senate and the State Department with regard to the 1975 Sinai II Agreements and the 1977 Panama Canal Treaty, despite the fact that the United States has not yet ratified the Convention, *cf Meron* (n 140). As to the VCLT II, see the cases cited in n 196 and *European Molecular Biology Laboratory v Germany* (n 194) 30.

reflect customary international law with regard to both States[208] and international organizations.[209]

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[208]ICJ *Cameroon v Nigeria* (n 108) para 263; *Arbitral Award Maritime Delimitation Case* (n 19) para 55; *M Bothe* in *Corten*/*Klein* Art 46 MN 6; *Villiger* Art 46 MN 19.

[209]See the references in n 196 and *European Molecular Biology Laboratory v Germany* (n 194) 30; *M Bothe* in *Corten*/*Klein* Art 46 VCLT II MN 3.

Article 47

Specific restrictions on authority to express the consent of a State

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.

Contents

A. Purpose and Function

Art 47 deals with **a particular instance of consent to be bound by a treaty being expressed in violation of internal law**. As opposed to Art 46, which addresses general limitations imposed by internal law on the competence to conclude treaties, Art 47 concerns specific restrictions of authority with regard to a particular treaty (→ MN 16–19). 1

In essence, Art 47 therefore concerns the **same conflict of interest as Art 46**. Both provisions envisage the situation in which a State's representative possesses 'ostensible authority' by virtue of Art 7 (→ Art 7 MN 9–13), while in fact his or her authority is limited by internal law. For the State whose representative has exceeded his or her authority, its **sovereignty** is at stake because consent to be bound by the treaty was expressed against its 'real' will (see also → Art 46 MN 1, 8). If the other party to the treaty, however, relied *bona fide* on the representative's 'ostensible authority', the principle of **good faith** and the **security of treaties** militate in favour of upholding the validity of the consent expressed *ultra vires*. 2

In keeping with Arts 7, 27 and 46, the tension between State sovereignty on the one hand, and the security of treaties on the other, is resolved in favour of the latter. 3

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Compared to Art 46, however, the **conditions under which the non-observance of the restriction** imposed on the representative's authority **may be invoked are considerably stricter**. While under Art 46, the violation of internal law of fundamental importance may be invoked as long as the other parties knew or should have known of the representative's restricted authority (→ Art 46 MN 45), Art 47 requires the restriction to have been formally notified to the other negotiating States.

4 The main object and purpose of Art 47 is hence to provide **additional protection for the security of treaties**.[1] Whereas limitations on the treaty-making power set forth in a State's constitution or other acts of legislation are, as a general rule, in the public domain, specific restrictions imposed upon the representative with regard to a particular treaty are typically confidential. It would seriously undermine the security of treaties if a State could later use such secret instructions in order to challenge the validity of consent expressed by its representative on its behalf.

5 States will, as a general rule, be reluctant to formally notify the other negotiating States of the instructions issued to their representatives since this would compromise their negotiating position.[2] The **legitimate interest of the contracting States to protect themselves against misrepresentation**[3] may, however, be met by other means. The risk of misrepresentation can be significantly reduced by making the conclusion of the treaty subject to ratification, acceptance or approval (→ MN 7, 21). Additional safeguards may be provided under domestic law, in particular by stipulating disciplinary action or penalties for the failure to observe specific instructions.[4]

B. Historical Background and Negotiating History

I. Historical Background

6 During the **seventeenth and eighteenth centuries,** treaties negotiated by a representative on behalf of the monarch were not considered binding until ratified by the latter.[5] In issuing full powers to his representative, the sovereign was, however,

[1] Final Draft, Commentary to Art 44, para 3; *Fujisaki* (Japan) UNCLOT I 247; *Cuendet* (Switzerland) *ibid* 248.

[2] See *Bartoš* [1963-I] YbILC 25; *de Luna* [1963-I] YbILC 25.

[3] *Jiménez de Aréchaga* [1963-I] YbILC 24 para 34.

[4] *H Blix* Treaty-Making Power (1960) 85.

[5] See *E de Vattel* The Law of Nations book II ch XII § 156 (*J Chitty/E Ingraham* [eds] 1856) 193: "At present, in order to avoid all danger and difficulty, princes reserve to themselves the power of ratifying what has been concluded upon in their name by their ministers[.] [. . .] [A]s princes cannot otherwise than by force of arms be compelled to fulfil their engagements, it is customary to place no dependence on their treaties, till they have agreed to and ratified them. Thus, as every agreement made by the minister remains invalid till sanctioned by the prince's ratification, there is less danger in vesting him with unlimited powers."

considered to have promised to ratify the treaty negotiated by the representative.[6] The **sovereign could only legitimately refuse ratification if the representative had exceeded his authority** by disregarding instructions issued by the sovereign.[7] Due to poor means of communication, the non-observance of instructions frequently occurred.[8] As such instructions were, as a general rule, not previously disclosed to the other negotiating parties, excess of authority provided the sovereign with a convenient escape from the obligation to ratify.[9]

7 With the **advent of modern constitutionalism,** it became increasingly difficult for States to promise ratification when issuing full powers. In particular, the requirement of parliamentary assent, which was introduced into many constitutions from the late eighteenth century onwards (→ Art 46 MN 5), made it impossible for the executive representing the State in its external affairs to predict whether a treaty would eventually be ratified or not.[10] In response to these fundamental changes, **ratification** gradually began to be considered as being **within the discretion of each State**.[11] Accordingly, the need to justify the failure to ratify a treaty on the basis of the State representative having overstepped the limits of his or her authority waned.[12] At the same time the possibility of refusing ratification provided sufficient protection against the danger of the State being misrepresented by its agent (→ MN 21).

8 The **problem** of a State representative exceeding his or her authority **did not**, however, **entirely lose its practical significance**. If the conclusion of a treaty is subject to ratification (Art 14), the final act of making a treaty binding under international law, *eg* by the exchange of instruments of ratification (Art 16 lit a), is not usually undertaken by the organ possessing the *ius representationis omnimodae* (→ Art 46 MN 4), but rather by a representative acting on its behalf.[13] Even at this late stage, the representative may still disregard instructions, which may *eg* relate to the timing of ratification.[14]

9 More importantly, the steadily increasing practice of **treaties being concluded in simplified form** (→ Art 12 MN 16–23), has given renewed currency to the problem of a representative exceeding his or her authority by disregarding specific

[6] *Blix* (n 4) 5; *JM Jones* Full Powers and Ratification (1946) 3.

[7] *De Vattel* (n 5) 193: "But, before a prince can honourably refuse to ratify a compact made in virtue of such plenipotentiary commission, he should be able to allege strong and substantial reasons, and, in particular, to prove that his minster has deviated from his instructions." See also *Blix* (n 4) 5; *JE Harley* The Obligation to Ratify Treaties (1919) 13 AJIL 389; *Jones* (n 6) 6; *AP Sereni* La représentation en droit international (1948) 73 RdC 69.

[8] *Blix* (n 4) 6.

[9] *Ibid* 5–6; *Jones* (n 6) 39.

[10] *Blix* (n 4) 6.

[11] *Ibid* 6; *Jones* (n 6) 39.

[12] *Blix* (n 4) 6; *Jones* (n 6) 39.

[13] *Blix* (n 4) 13.

[14] [1963-II] YbILC 194.

instructions.[15] If a treaty enters into force upon signature, the parties to the treaty lose the protection against misrepresentation otherwise provided by the subsequent procedure of ratification.

10 Despite the increasing number of treaties concluded in simplified form, there has **scarcely** been **any practice** in which States disavowed a representative for having exceeded specific instructions. Possible reasons for this paucity of practice include improved means of communication[16] and the embarrassment potentially caused to the State by disclosing the non-observance of secret instructions.[17]

> The only recorded instance in which such a claim appears to have been made before 1969 concerned negotiations under the auspices of the League of Nations between representatives of Hungary and Romania regarding the expropriation of land owned by Hungarian nationals in Romania.[18] The results of the negotiations were recorded in a report which was included in a draft resolution of the Council of the League.[19] This resolution was initialled by the Hungarian representative who had led the previous negotiations with Romania.[20] The Hungarian government sought to claim that its representative could not have validly initialled the resolution since he had only been instructed to negotiate directly with the Romanian government.[21] It was, however, not quite clear whether the Hungarian government relied on the limited scope of the full powers or on the non-observance of specific instructions limiting their exercise. Be this as it may, the Council of the League clearly insisted that a State may not disavow the acts of a representative who acted within the scope of the apparent authority with which he was endowed by virtue of his full powers.[22]

11 **Doctrine** before 1969 considered a representative's violation of his or her secret instructions not to affect the validity of consent to be bound by a treaty unless the other party had or ought to have had notice of such instructions.[23]

II. Negotiating History

12 In line with a proposal submitted by SR Waldock,[24] the **ILC in its first draft** combined in a single article two different instances of a representative purporting

[15] *Blix* (n 4) 13–15.

[16] *Liu* [1963-I] YbILC 208. See, however, *Waldock* [1963-I] YbILC 27 suggesting that modern communication would increase the possibility of misunderstandings since instructions, once given, were often subsequently cancelled and altered.

[17] *Blix* (n 4) 15–16.

[18] See (1923) 4 Official Journal of the League of Nations 1009–1014; *F Deak* The Hungarian–Rumanian Land Dispute (1928) 170–175.

[19] (1923) 4 Official Journal of the League of Nations 1011.

[20] *Ibid.*

[21] *Deak* (n 18) 39, 170–171.

[22] *Deak* (n 18) 173–175. See also [1963-II] YbILC 194; *Blix* (n 4) 87–88.

[23] *Blix* (n 4) 83, 90; *A McNair* Constitutional Limitations upon Treaty-Making Power in *R Arnold* (ed) Treaty-Making Procedure (1933) 1, 2–3; and, somewhat ambiguous in this respect, *Jones* (n 6) 157.

[24] See *Waldock* II 46 (Draft Art 6).

to bind a State while lacking the requisite authority[25]: para 1 addressed the situation in which the representative does not possess 'ostensible authority' within the meaning of today's Art 7; para 2 dealt with a representative who, while possessing 'ostensible authority', is subject to specific restrictions.

On its **second reading,** the article was split into two separate provisions[26]: para 1 was thought to be more appropriately placed in the context of the rules on representation[27] and eventually became today's Art 8; para 2 was retained in the section on the invalidity of treaties in the ILC's Final Draft.[28] **13**

Throughout the drafting process, a number of ILC members expressed **considerable doubts** as to whether a provision on specific restrictions on a representative's authority should be included in the draft.[29] Some Commission members pointed to the lack of practical relevance[30] while others considered specific restrictions to be covered by today's Art 46.[31] **14**

The **Vienna Conference** endorsed the substance of the ILC's draft article,[32] introducing however the additional requirement of formal notification.[33] Art 47 was unanimously adopted at the eighteenth plenary meeting.[34] **15**

C. Elements of Article 47

I. A Representative's Omission to Observe a Specific Restriction on Authority to Express Consent to Be Bound May Not Be Invoked

1. Specific Restriction Relating to a Particular Treaty

Art 47 is only applicable to **specific restrictions** imposed on the representative's authority. It exclusively addresses instructions (conditions, reservations or **16**

[25][1963-II] YbILC 193 (provisionally adopted Draft Art 32).

[26]Arts 8 and 44 Final Draft.

[27]See Final Draft, Commentary to Art 7, 193 para 1.

[28]Art 44 Final Draft ("Specific restrictions on authority to express the consent of the State") reads: "If the authority of a representative to express the consent of his 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 a consent expressed by him unless the restriction was brought to the knowledge of the other negotiating States prior to his expressing such consent."

[29]See, in particular, the discussions in [1963-I] YbILC 22–27, 207–208; [1966-I/1] YbILC 11–14.

[30]See *eg Briggs* [1963-I] YbILC 22; *id* [1966-I/1] YbILC 12, 14; *Amado* [1963-I] YbILC 24; *Liu* [1963-I] YbILC 208.

[31]*Tsuruoka* [1963-I] YbILC 23.

[32]See the discussions in UNCLOT I 246–249, 464 and UNCLOT II 88.

[33]See the amendments submitted by Japan and Spain UN Doc A/CONF.39/C.1/L.269 and A/CONF.39/C.1/L.288, reprinted in UNCLOT III 167. The requirement of notification was adopted by the Committee of the Whole by 30 votes to 23, with 35 abstentions, see UNCLOT I 249.

[34]UNCLOT II 88 (by 101 votes to none).

limitations) issued to the representative in an individual case.[35] General restrictions provided for in the internal law of the represented State may in principle only be invoked under the conditions set forth in Art 46.[36]

17 The specific nature of the restrictions envisaged by Art 47 is reinforced by the proviso that such instructions must **relate to a particular treaty**.[37]

18 There may be some **overlap between Arts 47 and Art 46** where a specific restriction on a representative's authority directly derives from a rule of internal law.[38] If such a restriction is notified to the other negotiating parties in accordance with Art 47, the misrepresented State may invoke that restriction regardless of whether the rule from which it derived was fundamental within the meaning of Art 46 (→ Art 46 MN 37–41) or not. Without notification, however, such a restriction would only be opposable to the other contracting parties if the conditions laid down in Art 46 were fulfilled.[39]

19 The **nature and source** of the restriction are not further specified in Art 47 and are accordingly **immaterial** from an international law perspective. An amendment introduced at the Vienna Conference by the Ukrainian SSR, which would have stipulated that the restriction on the representative's authority had to emanate from "instructions from his Government",[40] was rejected. The majority of the delegates wished to retain the original wording in order to include restrictions other than those imposed by the Government.[41] Thus, specific restrictions may not only derive from administrative action but also from rules of internal law.[42]

2. Restriction on Authority to Express Consent of a State to Be Bound by a Treaty

20 Art 47 is only concerned with restrictions on the representative's authority to express the **consent** of a State **to be bound** by a treaty. Accordingly, any excess

[35] Final Draft, Commentary to Art 44, para 2.

[36] *Ago* [1966-I/1] YbILC 14 para 40; *Waldock ibid* 13 para 32.

[37] This phrase was added during the deliberations at the ILC by the Drafting Committee (see Draft Art 32 [1966-I/1] YbILC 115) in response to an intervention by *Ago*, who insisted that the draft article "should state clearly that the restriction mentioned was one that applied to a particular case and not a general restriction", which would be covered by today's Art 46, see [1966-I/1] YbILC 14 para 40; *cf* also *Ago ibid* 12.

[38] *Waldock* UNCLOT I 248–249; *Rattray* (Jamaica) *ibid* 247; *J Hostert* Droit international et droit interne dans la Convention de Vienne sur le droit des traités du 23 mai 1969 [1969] AFDI 94, 107. *Contra*: *TO Elias* Problems Concerning the Validity of Treaties (1971) 134 RdC 333, 361; *P Martin-Bidou* in *Corten/Klein* Art 47 MN 14. Note that an informal proposal put forward by the Jamaican delegation to introduce an amendment to the effect of making Arts 43 and 44 "mutually exclusive" (UNCLOT I 247) was not taken up by any other delegation at the Vienna Conference.

[39] *Waldock* UNCLOT I 248–249.

[40] UN Doc A/CONF.39/C.1/L.287, UNCLOT III 167.

[41] *Rattray* (Jamaica) UNCLOT I 247; *Small* (New Zealand) *ibid* 248; *Waldock ibid* 249.

[42] *Rattray* (Jamaica) UNCLOT I 247; *Waldock ibid* 248–249.

of authority during the negotiations[43] or relating to the adoption or authentication of the text (Arts 9–10) does not fall within the ambit of Art 47.

The defect of authority must relate to the execution of an act by which a representative purports to **finally** establish his or her State's consent to be bound.[44] Art 47 will hence typically apply to a representative exceeding his or her authority when concluding a **treaty in simplified form** which becomes binding by the signature of the State Party's representatives (Art 12).[45] It is, however, also conceivable that Art 47 comes into play if the negotiating parties agree that a treaty will only become binding upon ratification, acceptance or approval (Arts 14, 16). The representative acting on behalf of the State might *eg* disregard instructions as to the specific time at which, or certain conditions under which, the **instruments of ratification**, acceptance or approval were intended to be **exchanged** (Arts 14, 16).[46] **21**

If a treaty only becomes binding by **ratification, acceptance or approval** (Arts 14, 16), any omission by the representative to observe the restrictions of his or her authority in establishing the text of the treaty may be remedied at the subsequent stage of ratification. The State, on behalf of which the representative acted, may simply repudiate the text.[47] If, however, the State chooses to ratify, accept or approve the treaty, it will be held to have endorsed the originally unauthorised act of its representative.[48] **22**

Art 47 refers to the authority of a representative to express consent of "**a State**" rather than his or her State. This wording was intentionally chosen in order to cover the eventuality that the representative acting on behalf of the State does not possess the **nationality** of that State.[49] **23**

3. Omission to Observe Restriction May Not Be Invoked

Art 47 replicates the **negative formulation** of Art 46 in order to emphasize that a representative's failure to observe specific restrictions on his or her authority to express consent to be bound may not in principle be invoked to invalidate such consent (→ Art 46 MN 21–22).[50] **24**

The negative wording reinforces the **presumption** that, as a matter of international law, a representative is considered **properly authorized** so long as the conditions set forth in Art 7 are met. At the same time it reaffirms the principle **25**

[43] *Yasseen* [1963-I] YbILC 26; *Waldock ibid* 27; *Wershof* (Canada) UNCLOT I 248; *Waldock ibid* 249.

[44] Final Draft, Commentary to Art 44, 243 para 2.

[45] [1963-II] YbILC 194.

[46] *Ibid.*

[47] Final Draft, Commentary to Art 44, 243 para 2.

[48] *Ibid.*

[49] *Yasseen* UNCLOT II 84.

[50] Final Draft, Commentary to Art 44, 243 para 3.

underlying Arts 27 and 46 that, as a general rule, the non-observance of internal law does not affect the validity of treaty commitments (→ Art 46 MN 22).

II. Exception: Notification of the Restriction to the Other Negotiating States Prior to the Representative Expressing Consent

26 The failure of a representative to observe specific restrictions on his or her authority may only be invoked as invalidating consent to be bound by a treaty if the restriction was notified (→ MN 27–29) to the other negotiating States (Art 2 para 1 lit e) prior to his or her expressing such consent (→ MN 30).

27 As opposed to Art 46, it is not sufficient that the other negotiating States know or ought to have known of the restriction. In order to provide the security of international transactions with additional protection,[51] Art 47 requires the restriction to have been formally **notified** by the State in question to the other negotiating parties.

28 According to Art 78 lit a, notification must either be transmitted directly **to the other negotiating States or to the depositary** if such has already been designated (→ Art 76 MN 9–14, Art 24 MN 27). Notification is only completed upon its receipt by the negotiating States, or the depository respectively (Art 78 lit b).

29 If the notification is transmitted to the depository, it is only considered as having been received by the **negotiating States** if they have been **informed** of it **by the depositary** (Art 78 lit c, Art 77 para 1 lit e).

30 The notification must have been completed **prior to** the representative **expressing consent** on behalf of the State in question.[52]

In *Phillips v Iran*[53] and *Amoco Iran Co v Iran*[54] the Government of Iran relied on Art 47 when arguing before the Iran-United States Claims Tribunal that the consent given by its representative to the treaty establishing the jurisdiction of the Tribunal was invalid. Iran maintained that when agreeing to the treaty its representative had acted contrary to specific restrictions on his authority set forth in an Iranian statute, the Single Article Act of 1980. The Claims Tribunal rejected the Iranian argument. It held that Iran could not rely on Art 47 given that the restriction on the Iranian representative's authority had not been notified to the United States. In his dissenting opinion the Iranian arbitrator *Shafeiei* argued that the restriction on the authority of the Iranian representative "should be considered as notified" because of the notoriety of the provisions of Iranian internal law containing

[51] *Fujisaki* (Japan) UNCLOT I 247; *Tena Ibarra* (Spain) *ibid*. For the Japanese and Spanish amendment introducing this requirement at the Vienna Conference, see n 33.

[52] This requirement would have already followed from the good faith rationale of Art 47 (→ MN 2). It was nevertheless explicitly spelled out in the ILC Draft at the behest of the governments of Israel and the United States "by way of underlining what already appears to be the sense of the [article]", [1965-II] YbILC 71–72.

[53] Iran–United States Claims Tribunal *Phillips Petroleum Co v Iran Case* No 39, Award No ITL 11-39-2, 70 ILR 483, 486 (1982).

[54] *Amoco Iran Co v Iran* Case No 55, Award No ITL 12-55-2, 70 ILR 490, 492 (1982).

these restriction.[55] As correctly pointed out by the majority opinion, this reasoning is, however, clearly incompatible with the strict requirement of formal notification set forth in Art 47 in conjunction with Art 78.

III. Invocation as a Ground for Invalidating Consent

If the representative of a State fails to observe a specific restriction on his or her authority, which has been previously notified to the other negotiating parties, consent to be bound by the treaty expressed on behalf of that State is not *ipso facto* void but only voidable in accordance with the **procedure set forth in Arts 65–68**. 31

Only the State whose instructions were disregarded may invoke the non-observance of a specific restriction by its representative.[56] As opposed to Art 46 (→ Art 46 MN 54), the wording of Art 47 does not expressly exclude the other States Parties to the treaty from invoking the non-observance of the specific restriction by the representative of their counterpart. Given, however, that the object and purpose of Art 47 is to provide additional protection to the security of international transactions (→ MN 4), the conditions under which the disregard of specific instructions may be invoked cannot be considered less stringent than those relating to other violations of internal law. In addition, it also follows from Art 45 lit b that a State which concludes a treaty despite having been formally notified of a specific restriction imposed on the authority of the other party's representative would be estopped from later relying on the non-observance of that restriction. 32

The right to invoke the non-observance of specific restrictions on the representative's authority as a ground for invalidating consent to be bound to a treaty is subject to the **limitations set forth in Arts 44 and 45**. 33

D. 1986 Convention

The VCLT II extends Art 47 **without substantive modification** to international organizations.[57] The principles developed with regard to Art 47 thus **apply *mutatis mutandis* to international organizations**. 34

The ILC had initially distinguished in its draft of today's Art 2 para 1 lit c, Art 7 para 3 and Art 47 para 2 VCLT II between the authority of a representative "to express" the consent of a State and the authority of a representative "to communicate" the consent of an international organization. The term "to express" consent was considered inappropriate with regard to international organizations because consent of an international organization was, as a general rule, thought to be given by a collective organ composed of government

[55] *Phillips Petroleum Co v Iran* Case No 39, Award No ITL 11-39-2 (dissenting opinion *Shafeiei*) and *Amoco Iran Co v Iran* Case No 55, Award No ITL 12-55-2 (dissenting opinion *Shafeiei*) 78 ILR 637, 647–650 (1983).

[56] *See P Martin-Bidou* in *Corten/Klein* Art 47 MN 25; *contra*: *Villiger* Art 47 MN 7.

[57] See Final Draft 1982, Commentary to Art 47, [1982-II/2] YbILC 53 para 2.

representatives. The person representing the organization in treaty negotiations was accordingly thought to merely transmit that consent.[58] The ILC eventually decided to abandon this distinction and to use the verb "to express" both with regard to States and international organizations. This terminological realignment was, however, made on the understanding that the term "to express" covers both the case of consent made public by the person who established it legally and the case of consent made public by a person other than the person or entity which established it legally.[59]

E. Customary International Law Status

35 Given the extreme paucity of State practice before 1969 (→ MN 10) and the fact that the strict requirement of formal notification introduced at the Vienna Conference (→ MN 15) had neither been considered necessary by doctrine at the time (→ MN 11) nor by the ILC (→ MN 12–14), Art 47 must be regarded as a progressive development of international law.[60]

36 Today, the rule and exception laid down in Art 47 appear to be generally accepted as restating customary international law.[61] Art 47 was adopted by the 1986 Vienna Conference without substantial modifications (→ MN 34). It was considered "[s]o indisputable a rule" that it must be "as valid for [international] organisations as for States".[62] The Iran–United States Claims Tribunal in its jurisprudence applied Art 47 as an authentic reflection of customary international law to treaty relations between Iran and the United States despite the fact that neither State had ratified the VCLT.[63]

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[58] *Reuter* [1982-I] YbILC 137.
[59] See Final Draft 1982, Commentary to Art 7, [1982-II/2] YbILC 27 para 13.
[60] See *Villiger* Art 47 MN 10; *contra*: *P Martin-Bidou* in *Corten/Klein* Art 47 MN 7.
[61] *P Martin-Bidou* in *Corten/Klein* Art 47 MN 7; *Villiger* Art 47 MN 10.
[62] *Reuter* V 136.
[63] *Phillips v Iran* (n 53) 486; *Amoco Iran Co v Iran* (n 54) 492–493.

Article 48
Error

1. **A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty 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.**
2. **Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.**
3. **An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.**

Contents

A. Purpose and Function

Art 48 is based on the premise that **freedom of consent** (3rd recital of the Preamble) is an indispensable condition for the validity of a treaty.[1] A State cannot be considered to have freely concluded a treaty if at the time of giving its consent, it was under a misapprehension about the subject matter of the treaty.[2] On the other hand, reliance on error as a ground for invalidating consent **may easily be abused** **1**

[1] *Lauterpacht* I 149.

[2] ICJ *Temple of Preah Vihear (Cambodia v Thailand)* (Preliminary Objections) [1961] ICJ Rep 17, 30: "[T]he principal juridical relevance of error [. . .] is that it may affect the reality of the consent supposed to have been given." See also *Paredes* [1963-I] YbILC 38, 42.

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by one of the contracting parties as an excuse for reneging on its treaty commitments.[3] The main purpose of Art 48 is therefore to preserve the "**reality of consent**"[4] while at the same time protecting the **stability of treaties** and the **good faith** of the other parties by clearly defining the conditions under which an error is capable of invalidating consent.[5]

2 In marked contrast to the previous two articles, Art 48 states **affirmatively** that an error may be invoked as a ground for invalidating consent if certain conditions are met. This linguistic shift indicates that as compared to Arts 46 and 47 (→ Art 46 MN 21–22, Art 47 MN 24–25), a stronger emphasis is put on upholding the freedom of consent.

3 While error is in principle recognized in all domestic legal systems as potentially affecting the validity of consent,[6] Art 48 cannot be regarded as simply reflecting general principles of law within the meaning of Art 38 para 1 lit c ICJ Statute. **General principles of contract law** may only be applied with great caution to international treaties since the circumstances under which an error might become relevant in the formation of treaties differ considerably from those pertaining to the conclusion of private law contracts.[7] The absence of a judicial body of general and obligatory jurisdiction in international law provides another important structural bar to the wholesale application of general principles of contract law.[8] Last but not least, a closer look at the various systems of domestic law reveals fundamental differences with regard to the specific conditions under which errors might affect the validity of contracts.[9] Principles common to all domestic legal systems can therefore only be identified at a rather high level of abstraction.

4 The ILC and the Vienna Conference were accordingly faced with the challenge of formulating an **autonomous concept** of error in international treaty law. The difficulty of this task was exacerbated by the **paucity of international practice** (→ MN 5–7), which is due to the fact that, in contrast to the conclusion of private law contracts, the process of entering into international treaty obligations is, as a general rule, subject to considerably more care and deliberation.[10]

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[3] See *Lauterpacht* I 149; Harvard Draft 1133.

[4] ICJ *Temple of Preah Vihear* (Preliminary Objections) (n 2) 30.

[5] *Lauterpacht* I 149; *Fitzmaurice* III 22; ICJ *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) (separate opinion *Fitzmaurice*) [1962] ICJ Rep 52, 57: "In the interest of the stability of contracts, the principle of error as vitiating consent is usually applied somewhat strictly; and I consider that this approach is also the correct one in international law, in the interests of the stability of treaties". See also Final Draft, Commentary to Art 45, 244 para 6.

[6] See *EA Kramer* Mistake, in *A von Mehren* (ed) International Encyclopedia of Comparative Law Vol VII (1981) ch 11, 4–65; *K Zweigert/H Kötz* An Introduction to Comparative Law (3rd edn 1998) 410–424.

[7] *Fitzmaurice* III 35–36.

[8] See the statement of the representative of France UNCLOT I 253.

[9] See references in n 6.

[10] *Lauterpacht* I 153; *Fitzmaurice* III 22; Final Draft, Commentary to Art 45, 243 para 1.

B. Historical Background and Negotiating History

I. Historical Background

Early cases involving errors mostly related to maps or other geographical descriptions.[11] More prominent examples in point are the *St Croix River* arbitration[12] and the *Island of Timor* case.[13] However, the decisions rendered in these cases treated the plea of error as affecting the interpretation and application of the treaty rather than its validity. While most **early academic writing** drawing on private law analogies assumed that treaties concluded on the basis of error could be vitiated,[14] it was acknowledged that this was largely an "hypothèse d'école".[15] **5**

The first instance in which the effect of an error on the validity of a treaty was addressed in judicial proceedings, albeit in an *obiter dictum* by a dissenting judge, was the judgment of the PCIJ in the ***Eastern Greenland* case**.[16] The earlier ***Mavrommatis Jerusalem Concessions* case**[17] in which the Court's majority had briefly discussed error as a ground for vitiating consent did not concern a treaty but a State contract. **6**

The first attempt at codifying a rule on error in treaty law was undertaken by the **Harvard Law School** in its Draft Convention on the Law of Treaties.[18] In the 1950s, the special rapporteurs of the **ILC**, *Hersch Lauterpacht* and *Gerald Fitzmaurice*, followed suit and presented draft articles on the effect of an error under treaty law.[19] The breakthrough for the general recognition of error as a ground for invalidating consent to be bound by a treaty came in the early 1960s with the decisions of the ICJ in the ***Temple of Preah Vihear* case**.[20] **7**

[11] See references in Harvard Draft 1127–1129; *Lauterpacht* I 153 n 119.

[12] *St Croix River (United Kingdom v United States)* 28 RIAA 1 (1798).

[13] PCA *Boundaries in the Island of Timor (Netherlands v Portugal)* 11 RIAA 481 (1914).

[14] See *eg GF de Martens* Précis du droit des gens moderne de l'Europe Vol I (2nd edn 1864) 165 (§ 51); *L Oppenheim* International Law Vol I (3rd edn 1920) 661 (§ 500); *I Tomšič* La reconstruction du droit international en matière des traités (1931) 48; for further references, see Harvard Draft 1126.

[15] *C Rousseau* Principes généraux du droit international public Vol I (1944) 339; *Lauterpacht* I 153.

[16] PCIJ *Legal Status of Eastern Greenland* (dissenting opinion *Anzilotti*) PCIJ Ser A/B No 53, 76, 92 (1933).

[17] PCIJ *The Mavrommatis Jerusalem Concessions* PCIJ Ser A No 5, 29–31 (1925).

[18] Art 29 Harvard Draft.

[19] *Lauterpacht* I 153 (Draft Art 14); *Fitzmaurice* III 25 (Draft Arts 11 and 12).

[20] ICJ *Temple of Preah Vihear* (Preliminary Objections) (n 2) 30; *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, 26. In the earlier case *Sovereignty Over Certain Frontier Land (Netherlands v Belgium)* [1959] ICJ Rep 209, the Netherlands had also relied on the plea of error. The Court, however, came to the conclusion that on the evidence presented by the Netherlands, no error could be established in the case at issue (*ibid* 222–227).

II. Negotiating History

8 Building on the *Temple of Preah Vihear* judgments[21] and the codification efforts of his predecessors as special rapporteurs,[22] ***Humphrey Waldock*** proposed three articles on error.[23] *Waldock* distinguished between substantive errors on the one hand, which render a treaty voidable,[24] and errors in the expression of the agreement on the other, which leave the validity of a treaty untouched.[25] Within the category of substantive errors, he in turn suggested different sets of rules depending on whether the error was mutual[26] or made by one party only.[27]

9 The distinction between unilateral and mutual errors, which followed the common law rules on error and mistake,[28] met with intense opposition within the ILC since it was not known in other municipal legal systems.[29] As a result, the ILC abandoned this distinction and in its **1963 draft** consolidated *Waldock*'s proposal into a single article.[30] Comments from governments on this draft[31] and further discussions within the Commission[32] focused on the status of errors of law (→ MN 19–22) and on the extent to which the *Temple of Preah Vihear* case could be followed in formulating the exceptions under which a substantive error could not be invoked (→ MN 32). In order to accommodate the conflicting views on these issues, the **final draft article** adopted by the ILC in 1966 introduced some slight modifications to the wording of the 1963 draft.[33]

10 The ILC draft remained unchanged at the **Vienna Conference**.[34] Amendments proposed by the governments of Australia[35] and the United States[36] were rejected.[37] The Conference adopted today's Art 48 by 95 votes to none, with 5 abstentions.[38]

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[21] See n 2 and 20.

[22] See n 19.

[23] *Waldock* II 48–50 (Arts 8–10).

[24] *Ibid* 48 (Arts 8 and 9).

[25] *Ibid* 50 (Art 10).

[26] *Ibid* 48 (Art 8).

[27] *Ibid* 48 (Art 9).

[28] *Zweigert/Kötz* (n 6) 419–423.

[29] See the discussions in [1963-I] YbILC 38–46.

[30] [1963-II] YbILC 195 (Draft Art 34). See also the discussions on the preparatory proposals of the Drafting Committee in [1963-I] YbILC 209–211, 290.

[31] See *Waldock* V 12–14.

[32] [1966-I/1] YbILC 18–21, 116–117; [1966-I/2] YbILC 304–305.

[33] [1966-II] YbILC 243 (Draft Art 45).

[34] See the discussions in the Committee of the Whole UNCLOT I 249–255, 464–465 and the plenary discussions UNCLOT II 88–90.

[35] UNCLOT III 168 (UN Doc A/CONF.39/C.1/L.281).

[36] UNCLOT III 168 (UN Doc A/CONF.39/C.1/L.275).

[37] UNCLOT I 254–255.

[38] UNCLOT II 90.

C. Elements of Article 48

I. Error

1. Notion of Error

Error within the meaning of Art 48 is an assumed fact or situation, which is subsequently found to have no existence.[39] An error induced by fraud is covered by Art 49 as *lex specialis* (→ Art 49 MN 1–2).[40] **11**

Unlike certain systems of municipal law,[41] Art 48 does not distinguish between mutual and unilateral errors.[42] As long as the conditions imposed by Art 48 are met, a State may invoke an error as vitiating its consent regardless of whether the mistaken belief was shared by the other contracting parties or not.[43] For the purposes of Art 48, it is equally immaterial whether a unilateral error was caused by (innocent) misrepresentation of the other party (→ MN 38).[44] Instances of fraudulent misrepresentation would, however, fall within the ambit of Art 49 as *lex specialis*.[45] **12**

Not every error may be invoked as a ground for invalidating consent to be bound by a treaty. The general rule laid down in Art 48 para 1 only applies to errors in a treaty (→ MN 14–18), relating to a fact or situation (→ MN 19–23) which was assumed to exist at the time when the treaty was concluded (→ MN 24) and which formed an essential basis of consent (→ MN 25–30). **13**

> The ILC made a conscious decision not to elaborate these requirements any further. According to SR *Waldock* it seemed "preferable to state the requirements in simple form, leaving their application to any given case to be appreciated in the light of its circumstances."[46]

2. Error in a Treaty

Art 48 distinguishes "an error in a treaty" relating "to a fact or situation" (para 1) from "[a]n error relating only to the wording of the text of a treaty" (para 3 in conjunction with Art 79). While the former may be invoked as a ground for invalidating consent, the latter leaves the validity of consent untouched. Material errors under Art 48 para 1 thus concern the **formation** rather than the expression **of** **14**

[39] Harvard Draft 1129, 1131–1132; *Lauterpacht* I 153.

[40] See *Waldock* [1963-I] YbILC 44.

[41] See references in n 6.

[42] Final Draft, Commentary to Art 45, 244 para 5.

[43] *Ibid.*

[44] See the statement of Expert Consultant *Waldock* UNCLOT I 254.

[45] See supra n 40. *Contra*: *Aust* 316.

[46] *Waldock* II 49.

consent.[47] In order to invalidate consent, an error must relate to the **substance of the treaty** rather than the form in which consent was expressed.

Initially the ILC described the error relevant under para 1 as "an error respecting the substance of a treaty".[48] This phrase was, however, thought to be open to the misunderstanding that a material error would involve a wrong interpretation of the treaty rather than a misconception at the time of the conclusion of the treaty.[49] In order to avoid such a misunderstanding the ILC eventually decided to refer to "an error in a treaty" instead.[50]

15 An error "in a treaty" must relate to a fact or situation which is **sufficiently proximate to the subject matter of the treaty**.[51] This does **not necessarily** mean that the fact or situation mistakenly assumed by one of the parties needs to be expressly reflected **in the text** of the treaty. There must, however, be a sufficiently close relationship to the substance of the treaty.

At the Vienna Conference the United States proposed the deletion of the phrase "in a treaty" in order to cover situations "in which the error was not reflected in the text."[52] By its proposed amendment the US delegation sought to tie errors relevant under para 1 "to the question of consent to the treaty rather than to the actual text".[53] Commenting on this proposal SR *Waldock* as expert consultant explained that the ILC "had included the words 'in a treaty' to make clear that the error must relate to the treaty".[54] The ILC had intended to prevent States from invoking "errors of fact totally unrelated to the treaty as having played an important part in their consenting to it."[55] In view of this clarification, which related the error only to the treaty rather than the text of the treaty, the United States withdrew its amendment.[56]

16 The requirement of an error relating to a fact or situation "in a treaty" mirrors the Roman law concept of ***error in substantia***[57] according to which an error is sufficiently proximate to the treaty if it concerns an **essential quality of the subject matter** of the treaty.[58] It must "affect an essential aspect of the treaty"[59] or go to "the substance"[60] or "roots"[61] of the treaty. Both the identification of the relevant

[47] *Waldock* II 48.

[48] [1963-II] YbILC 195.

[49] *Ago* [1966-I/1] YbILC 21.

[50] See *Waldock* [1966-I/1] YbILC 116.

[51] See the statement of Expert Consultant *Waldock* UNCLOT I 254.

[52] UNCLOT III 168 (UN Doc A/CONF.39/C.1/L.275).

[53] See the statement of the representative of the United States UNCLOT I 249.

[54] See the statement of Expert Consultant *Waldock* UNCLOT I 254.

[55] *Ibid.*

[56] See the statement of the representative of the United States UNCLOT I 254.

[57] *Waldock* II 48; statement of Expert Consultant *Waldock* UNCLOT I 254.

[58] As to the concept of *error in substantia* in domestic contract law, see *Kramer* (n 6) 8; *A Oraison* L'erreur dans les traités (1972) 61.

[59] *Lauterpacht* I 153; see also *Fitzmaurice* III 25 (Draft Art 11 para 1).

[60] *Waldock* II 49.

[61] *Lauterpacht* I 153–154.

subject matter of the treaty[62] and the assessment of the sufficient proximity of the error are a matter of the interpretation (Arts 31–33) of the treaty at issue in the light of the specific circumstances of its conclusion.

In the *Kasikili/Sedudu Island* case Judge *Fleischhauer* considered an error as to the navigability of a river not to be a material error "in a treaty" within the meaning of Art 48 para 1.[63] At issue was a treaty between the United Kingdom and Germany which designated the "main channel" of the River Chobe as the dividing line between the territories of what are today Botswana and Namibia. Both the United Kingdom and Germany mistakenly assumed at the time that the River Chobe was navigable. In Judge *Fleischhauer*'s view this mistaken belief did not qualify as an error "in a treaty" but rather as "an error in motivation which led to the use of the term 'main channel of that river'".[64] While this error was not assumed to affect the validity of the treaty,[65] it was considered to be of importance in the interpretation of the treaty which would have to ensure that not one party alone would be burdened with the consequences of the mistaken expectation shared by both parties. [66]

17 While SR *Fitzmaurice* had distinguished material "errors of fact" and immaterial "**errors of motive**",[67] the ILC eventually decided to abandon this distinction.[68] An error of motive is a mistaken assumption which influences the formation of consent to be bound by a treaty.[69] In this sense, all material errors under Art 48 para 1 can be considered errors of motive.[70] Conversely an error of motive may also "relate to a fact or situation" (→ MN 19–23) and thus at the same time qualify as an error of fact.[71] Hence, the qualification of a mistaken belief as an "error of fact" or an "error of motive" does not in itself allow any conclusion to be drawn as to whether an error is material or immaterial under Art 48 para 1.[72]

18 At times, the category of "**error of motive**" or "error in motivation" is, however, used **in a more narrow sense** to describe those errors in the formation of consent, which are not sufficiently related to the substance of the treaty and which accordingly do not qualify as errors "in a treaty" within the meaning of Art 48.[73]

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[62] *Cf Oraison* (n 58) 63–4; *E Wyler* in *Corten/Klein* Art 48 MN 28.

[63] ICJ *Kasikili/Sedudu Island (Botswana v Namibia)* (dissenting opinion *Fleischhauer*) [1999] ICJ Rep 1196, 1203.

[64] *Ibid*. As to the different notions of 'error in motivation' → MN 17–18.

[65] See also ICJ *Kasikili/Sedudu Island (Botswana v Namibia)* (declaration *Higgins*) [1999] ICJ Rep 1113, 1114 arguing that the error did not form an essential basis of consent (→ MN 26).

[66] ICJ *Kasikili/Sedudu Island* (dissenting opinion *Fleischhauer*) (n 63) 1203.

[67] *Fitzmaurice* III 25 (Draft Art 12 para 2 lit a and b): "[The error] must be an error of fact [. . .]; [i]t must not affect merely the motives of the parties in concluding the treaty, unless these themselves involve a mistaken belief as to the existence or actuality of a fact or state of facts".

[68] See *Waldock* II 49.

[69] See with regard to domestic contract law *Zweigert/Kötz* (n 6) 413–414.

[70] *Cf* → MN 14 as to the distinction between material errors in the formation and immaterial errors in the expression of consent.

[71] See *Fitzmaurice* III 25 (Draft Art 12 para 2 lit b *in fine*).

[72] *Waldock* II 49. See also *Oraison* (n 58) 61–64; *E Wyler* in *Corten/Klein* Art 48 MN 26.

[73] In this sense, *Kasikili/Sedudu Island* (dissenting opinion *Fleischhauer*) (n 63) 1203; see → MN 16.

3. Error Relating to a Fact or Situation

19 Material errors under Art 48 para 1 must relate to a "**fact or situation**". This restriction raises the question as the extent to which an **error of law** may constitute a valid ground for vitiating consent to be bound by a treaty.[74] As a general rule, an error of law cannot in itself be regarded as "an error relating to a fact or situation".[75]

The "delicate matter"[76] of errors of law was at the centre of an intense debate within the ILC. The wording of today's Art 48 para 1 reflects a carefully balanced compromise, which sought to accommodate the opposing views within the Commission. SR *Waldock*'s first draft explicitly stated that a material error must be "one of fact and not of law".[77] This clause was criticized on the basis that given the complexity of international law, the maxim *ignorantia juris haud excusat* could not strictly be applied at the international level.[78] In view of this criticism, the ILC decided to delete the explicit exclusion of an error of law while at the same time insisting that a material error must be one of "fact" or of a "state of facts".[79] In its draft commentary, the ILC expressly stated that it did not intend this requirement "to exclude any possibility that an error of law should in some circumstances serve to nullify consent".[80] The draft commentary suggested that certain errors of law could at the same time qualify as errors of fact, since errors of law often concerned mixed questions of law and fact.[81] Certain governments and Commission members subsequently invited the ILC to reconsider the issue. While some argued that the inclusion of errors of law would pose a serious danger to the stability of treaties,[82] others maintained that the Commission should in principle put errors of law on the same footing as errors of fact.[83] In its final draft, the ILC made two changes which are of relevance with regard to errors of law. The original formula according to which a material error had to relate to "a fact or state of facts" ("un fait ou un état de choses") was changed to "a fact or situation" ("un fait ou une situation").[84] This change responded to an intervention by one of the Commission members who had remarked that while the original French version "erreur portant sur un état de choses" could be read as encompassing an error of law, the English expression "error

[74] See Harvard Draft 1129; *Lauterpacht* I 154; *Fitzmaurice* III 25 (Draft Art 12 para 2 lit a), 36; *Oraison* (n 58) 119–130; *H Thirlway* The Law and Procedure of the International Court of Justice 1960–1989 (1992) 63 BYIL 1, 27–28; *Villiger* Art 48 MN 6; *E Wyler* in *Corten/Klein* Art 48 MN 17–21.

[75] Harvard Draft 1129; *Lauterpacht* I 154; *Fitzmaurice* III 25 (Draft Art 12 para 2 lit a), 36; *Villiger* Art 48 MN 6. *Contra: E Wyler* in *Corten/Klein* Art 48 MN 21: the fact that Art 48 does not refer to errors of law does not necessarily lead to the assumption that such errors are *a priori* excluded from its ambit. In a similar vein *Oraison* (n 58) 126, 129–130.

[76] *Waldock* [1966-I/1] YbILC 21.

[77] *Waldock* II 48 (Draft Art 8 para 1 lit a). See also *Fitzmaurice* III 25 (Draft Art 12 para 2 lit a).

[78] See in particular *Rosenne* [1963-I] YbILC 38; *Verdross* [1963-I] YbILC 38.

[79] [1963-II] YbILC 195 (Draft Art 34 para 1).

[80] *Ibid* 196.

[81] *Ibid*.

[82] See in particular *Ago* [1966-I/1] YbILC 21; *Waldock* [1966-I/1] YbILC 18, 21; see also the comments by the government of Portugal, *cf Waldock* V 12.

[83] *Bartoš* [1966-I/1] YbILC 20; *Bedjaoui* [1966-I/1] YbILC 20; see also the comments by the government of Israel, *cf Waldock* V 12.

[84] Art 45 para 1 Final Draft.

relating to a state of facts" could not.[85] At the same time, a paragraph was added to the commentary emphasizing that the term "error relating to a fact or situation" was intended to avoid the appearance of admitting an error of law as in itself constituting a ground for invalidating consent".[86] In addition, the ILC eliminated from the original draft of the commentary the explicit caveat that "cases are conceivable in which an error of law might be held to affect consent".[87] The approach eventually followed by the ILC was fully endorsed by the Vienna Conference (→ MN 10).

The principle that an error of law may not as such be invoked as invalidating consent to be bound by a treaty is in accordance with the position taken by **international courts and tribunals** on this issue. **20**

In the *Eastern Greenland* case[88] Norway's foreign minister *Ihlen* had stated that Norway would not object to the Danish government extending its sovereignty over the whole of Greenland. Norway argued before the PCIJ that its foreign minister's acquiescence to the extension of Danish sovereignty was vitiated by error because he had not realized that this statement also covered the Danish trade monopoly. The PCIJ did not explicitly address the issue of error and simply remarked that the foreign minister's statement had been definitive and unconditional.[89] Judge *Anzilotti*, however, while coming to the conclusion that the Norwegian foreign minister had actually not been mistaken about the consequences of his declaration, added the following observation: "But even accepting, for a moment, that M. Ihlen was mistaken as to the results which might ensue from an extension of Danish sovereignty, it must be admitted that this mistake was not such as to entail the nullity of the agreement. If a mistake is pleaded it must be of an excusable character; and one can scarcely believe that a Government could be ignorant of the legitimate consequences following upon an extension of sovereignty."[90]

A similar question was at issue in *Petroleum Development v Sheikh of Abu Dhabi*[91] with regard to a State contract between Abu Dhabi and a foreign company about an oil concession. The Sheikh of Abu Dhabi argued that at the time of the conclusion of the agreement he had not been aware of the fact that a concession relating to the entire territory of Abu Dhabi would also extend to the territorial waters. The arbitrator *Lord Asquith* rejected this contention: "I am not impressed by the argument [. . .] that the Sheikh was quite unfamiliar with that conception [*ie* of territorial waters] [. . .]. Every State is owner and sovereign in respect of its territorial waters, their bed and subsoil, whether the ruler has read the works of Bynkershoek or not. The extent of the Ruler's Dominion cannot depend on his accomplishments as an international jurist."[92]

In the *Temple of Preah Vihear* case[93] Thailand had mistakenly assumed that her original submission to the compulsory jurisdiction of the PCIJ had still been valid despite the PCIJ having ceased to exist in 1946. On the basis of this mistaken belief Thailand had simply "renewed" her original submission to the PCIJ in 1950 with a view to transforming it into

[85] *Bedjaoui* [1966-I/1] YbILC 20.

[86] Final Draft, Commentary to Art 45, 244 para 6.

[87] Compare the commentary to Art 34 of the 1963 Draft [1963-II] YbILC 196 with the Final Draft, Commentary to Art 45, 244 para 6.

[88] PCIJ *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53, 22 (1933).

[89] *Ibid* 73.

[90] PCIJ *Eastern Greenland* (dissenting opinion *Anzilotti*) (n 16) 92.

[91] *Petroleum Development (Trucial Coast) Ltd v Sheikh of Abu Dhabi* 18 ILR 144.

[92] *Ibid* 253.

[93] ICJ *Temple of Preah Vihear* (Preliminary Objections) (n 2).

an acceptance of the compulsory jurisdiction of the ICJ in accordance with Art 36 para 5 ICJ Statute. Observing that "[a]ny error of this kind would evidently have been an error of law", the ICJ held that Thailand's error was immaterial.[94]

21 An error of law may, however, qualify as a ground for vitiating consent if it **also raises questions of fact**.[95] With regard to the principle of *iura novit curia,* municipal law is generally not considered 'law' before international courts but rather a 'fact' which must be presented and proven by the parties.[96] It is widely assumed that an **error relating to municipal law** must accordingly also qualify as an error of fact.[97] Some caution is, however, called for in drawing such an analogy, since the interests involved in both instances may differ considerably. Whereas international courts may as a general rule be treated as not being cognisant of municipal law, the parties to a treaty cannot plead ignorance with regard to their own municipal law. An error relating to the municipal law of one of the contracting parties may therefore not be invoked by that party as a ground for invalidating its consent.

22 **Errors relating to international law** are genuine errors of law and are as such immaterial under Art 48 para 1.[98] It has been suggested that a caveat should be made with regard to local or **regional customary law**[99] since it is treated in the same way as municipal law with regard to the principle of *iura novit curia* before international courts.[100] Such an error could, however, only be equated to an error of fact if invoked by a State from outside the region. In a similar vein misconceptions about the **secondary law of international and supranational organizations** may be assimilated to errors of fact if a non-member State is at issue.

23 An **error as to the value** of an object does not qualify as a ground for invalidating consent to a treaty.[101] Errors as to value touch upon various aspects of Art 48 para 1.[102] The **market value** of an object may in principle be regarded as an economic 'fact' and not merely as a subjective opinion.[103] It would also qualify as a fact assumed to exist at the time of the conclusion of the treaty

[94] *Ibid* 30.

[95] Final Draft, Commentary to Art 45, 244 para 6.

[96] PCIJ *Mavrommatis Jerusalem Concessions* (n 17) 29–30; *Payment in Gold of Brazilian Federal Loans Issued in France* PCIJ Ser A No 21, 92, 124 (1929). See also *I Brownlie* Principles of Public International Law (7th edn 2008) 38–39.

[97] [1963-II] YbILC 196; *Pal* [1963-I] YbILC 42; *Waldock* [1963-I] YbILC 44; *Yasseen* [1966-I/1] YbILC 18; *Villiger* Art 48 MN 6.

[98] *Waldock* [1963-I] YbILC 44; *Ago* [1966-I/1] 21. As to opposing views within the ILC which, however, did not prevail see n 78 and 83.

[99] [1963-II] YbILC 196; *Yasseen* [1963-I] YbILC 44; *Rosenne* [1963-I] YbILC 45.

[100] ICJ *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, 276–277; *Rights of Nationals of the United States of America in Morocco (France v United States)* [1952] ICJ Rep 176, 180, 200.

[101] *L Dubouis* L'erreur en droit international public (1963) 9 AFDI 191, 201; *Oraison* (n 58) 92–99; *E Wyler* in *Corten/Klein* Art 48 MN 27.

[102] As to different justifications for the irrelevance of errors as to value see *Oraison* (n 58) 96–99.

[103] *Ibid* 93.

and not merely an error of expectation with regard to future economic developments (→ MN 24).[104] However, as a general rule, such an error cannot be considered an "error in the treaty" (→ MN 14–18) since the value of an object is not an essential quality (→ MN 16) of that object.[105] In the bargaining process leading up to the conclusion of a treaty the appreciation of the value of the subject matter falls within the responsibility of each of the contracting parties.[106] Accordingly, the risk of misjudging the value must in principle remain with the erring State and may not later be devolved to the other parties by invoking the error as a ground for invalidating the treaty.[107]

> In the *Temple of Preah Vihear* case the ICJ rejected Thailand's argument that her consent to the delimitation of her border with Cambodia was vitiated in view of the fact that the Siamese authorities had not been aware of the archeological and cultural value of the Temple of Preah Vihear: "The Court [. . .] considers that there is no legal foundation for the consequence it is attempted to deduce from the fact that no one in Thailand at that time may have known of the importance of the Temple or have been troubling about it. Frontier rectifications cannot in law be claimed on the ground that a frontier area has turned out to have an importance not known or suspected when the frontier was established."[108]

a) Fact or Situation Assumed to Exist at the Time the Treaty Was Concluded

24 The fact or situation to which the error relates must have been mistakenly assumed by the erring State to exist **at the time when the treaty was concluded** (Arts 11–17). The validity of the consent given to the treaty is not affected if the error pertains to a fact or situation anticipated in the future (such as profits or other economic developments[109]) or materializing subsequently.[110] Art 48 only covers

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[104] *Ibid* 93, 103.

[105] See with regard to domestic contract law *Zweigert/Kötz* (n 6) 414; *Kramer* (n 6) 45.

[106] See *G-F de Martens* Précis du droit des gens moderne de l'Europe Vol I (*MS Pinheiro-Ferreira* ed 1831) ("L'inégalité seule des avantages n'est pas pour les nations une raison justificative pour se dédire d'un traité sous le prétexte de lésion, vu que, [. . .] c'est à chaque partie contractante à peser d'avance les avantages et les désavantages qui résultent pour elle du traité"); *Oraison* (n 58) 98–99; *cf* with regard to domestic contract law *Kramer* (n 6) 45.

[107] As to the possibility of relying in exceptional cases on *clausula rebus sic stanctibus* (Art 62) see *Oraison* (n 58) 103–104; *E Wyler* in *Corten/Klein* Art 48 MN 27.

[108] ICJ *Temple of Preah Vihear* (Merits) (n 20) 25. See also *Temple of Preah Vihear* (Merits) (separate opinion *Fitzmaurice*) (n 5) 57: "[F]or the reasons given in the Judgment of the Court, the fact that, at this time the Siamese authorities may have attached no importance to the Temple, or may have failed to realize the importance it would eventually assume for them, is legally quite irrelevant."

[109] *Dubouis* (n 101) 201; *Oraison* (n 58) 103; *E Wyler* in *Corten/Klein* Art 48 MN 23.

[110] *Fitzmaurice* III 25 (Art 12 para 2 lit d). See also the example given in Harvard Draft 1133: "[I]f a treaty was entered into on the assumption that a certain river was navigable and that assumption was one of the considerations which led the parties to enter into the treaty, its binding force could not be subsequently challenged on the ground that the river had ceased to be navigable, if it was navigable at the time of the conclusion of the treaty."

errors of fact, not "**errors of expectation**".[111] Errors that only materialize after the conclusion of the treaty may, however, in certain cases allow a State to terminate or withdraw from the treaty if the conditions laid down in Art 61 or 62 are fulfilled.[112]

At the Vienna Conference the United States proposed an amendment according to which an error could have been invoked under today's Art 48 para 1 if "[t]he assumed fact or situation was of material importance to [...] the performance of the treaty."[113] This proposal was rejected by the majority of the delegates.[114] It was felt that the extension to errors materializing after the conclusion of the treaty would broaden the scope of today's Art 48 excessively[115] and that issues relating to the performance of the treaty were adequately covered by today's Art 61.[116]

b) Fact or Situation Forming an Essential Basis of Its Consent

25 The error invoked by a State as a ground for invalidating its consent must relate to a fact or situation, which formed an **essential basis of that State's consent** to be bound by the treaty. This requirement reflects the fundamental rationale underlying the recognition of error as a ground for vitiating consent: only if the error touches upon the "reality"[117] or the essence[118] of consent, may it be justified to give precedence to the principle of the freedom of consent over the stability of treaties and the good faith of the other parties (→ MN 1) by allowing the consent to be invalidated.[119]

26 A fact or situation forms an essential basis of consent if it represents a **condition** on which consent was dependent.[120] In this sense, an error is essential if the State concerned would not have given its consent to the treaty had the real fact or situation been known to that State.[121]

The test of conditionality was first used by the PCIJ in the *Mavrommatis Jerusalem Concessions* case[122] with regard to concession agreements between Ottoman authorities

[111] *Waldock* II 49.

[112] *Dubouis* (n 101) 201; *Fitzmaurice* III 36; *Oraison* (n 58) 103.

[113] UNCLOT III 168 (UN Doc A/CONF.39/C.1/L.275). For a similar proposal see *Paredes* [1963-I] YbILC 38.

[114] UNCLOT I 255.

[115] See the statement of Expert Consultant *Waldock* UNCLOT I 254.

[116] See *Briggs* [1963-I] YbILC 40.

[117] ICJ *Temple of Preah Vihear* (Preliminary Objections) (n 2) 30.

[118] See the statement of Expert Consultant *Waldock* UNCLOT I 254.

[119] *Lauterpacht* I 154; *Fitzmaurice* III 36; Final Draft, Commentary to Art 45, 244 para 7. See also *Oraison* (n 58) 64–80; *E Wyler* in *Corten/Klein* Art 48 MN 30.

[120] Final Draft, Commentary to Art 45, 244 para 7; *Waldock* II 48 (Art 8 para 1 lit c: "material in inducing [...] consent"); Harvard Draft 1126 (Art 29 lit a: "a state of facts, the assumed existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations situplated"); PCIJ *Mavrommatis Jerusalem Concessions* (n 17) 30–31.

[121] Harvard Draft 1129; ICJ *Kasikili/Sedudu Island* (declaration *Higgins*) (n 65) 1114.

[122] PCIJ *Mavrommatis Jerusalem Concessions* (n 17).

and Mr *Mavrommatis*, a Greek citizen. The British Government argued before the Court that the concessions granted to *Mavrommatis* were invalid since the Ottoman authorities had mistakenly assumed that he had been an Ottoman subject. Relying on "principles which seem to be generally accepted in regard to contracts" the PCIJ held that the concessions would only be liable to annulment if "Ottoman nationality was considered as a condition of the grant of the concessions".[123] The Court came, however, to the conclusion that the reference to *Mavrommatis* as an Ottoman subject in the concession agreements was "not intended to represent a condition on which the grant of the concession [was] dependent and that, therefore, the fact that M. Mavrommatis [was] not an Ottoman subject [could] not involve the invalidity of the concession".[124] The ILC considered that the principle formulated by the PCIJ with regard to State contracts applied with equal force to treaties.[125]

In the *Kasikili/Sedudu Island* case, Judge *Higgins* argued that the mistaken assumptions of the United Kingdom and Germany as to the navigability of the River Chobe (→ MN 16) could not be considered to have affected the validity of the treaty in question since the error did not form an essential basis of their consent: "[T]he law of consent, and particularly Article 48 of the Vienna Convention on the Law of Treaties, has no place in all of this, because it cannot plausibly be suggested that the [...] Treaty would not have been concluded if this error had been known".[126]

The assumed fact or situation need **not** be the **sole factor** inducing the erring State to consent to a treaty. The reference in Art 48 para 1 to "a" rather than "the" basis of consent suggests that it is sufficient if the fact or situation is one of a number of factors that were essential in moving the State to give its consent.[127] **27**

The question as to whether a mistakenly assumed fact or situation formed an essential basis of consent must accordingly be assessed from the **perspective of the erring State**.[128] This does not mean, however, that the determination of the essential character of the fact or situation can be left to the appreciation of the State concerned; it remains subject to an **objective assessment**.[129] While the ILC in its draft commentary had stated that the "error must relate to a matter *considered by the parties to form* an essential basis of their consent",[130] the final version of the commentary maintains that the "error must relate to a matter *constituting* an essential basis of its consent".[131] This change was introduced in order to emphasize that an individual State could not determine unilaterally what was considered to constitute an essential basis of consent to the treaty.[132] **28**

[123] *Ibid* 30.

[124] *Ibid* 30–31.

[125] Final Draft, Commentary to Art 45, 244 para 4.

[126] ICJ *Kasikili/Sedudu Island* (declaration *Higgins*) (n 65) 1114.

[127] See also Harvard Draft 1132.

[128] *Cf* Harvard Draft 1126 (Art 29 lit a: "a state of facts, the assumed existence of which was *envisaged by the parties* as a determinig factor moving them to undertake the obligations situplated", emphasis added).

[129] See the statement of the representative of France UNCLOT I 253, calling the need for an objective assessment "self-evident".

[130] [1963-II] YbILC 196 (emphasis added).

[131] Final Draft, Commentary to Art 45, 244 para 4 (emphasis added).

[132] *Waldock* [1966-I/2] YbILC 305.

29 It is thus not sufficient for a State simply to assert that a fact or situation about which it erred was essential in the formation of consent. The essential character must rather be tested against the objective **yardstick** of whether a **third State in a similar situation** would also have refrained from giving its consent had it known the real fact or situation.[133] Such an objective test is not only supported by the *travaux préparatoires*[134] but also by object and purpose of Art 48 (→ MN 1–4). The delicate balance between freedom of consent and the stability of treaties may only be tipped in favour of the former if the essential nature of the error is established objectively from the perspective of a State conducting itself reasonably.

> At the Vienna Conference the United States introduced an amendment[135] which was aimed at making "the essentiality test subject to objective requirements".[136] The amendment required, in addition to the "essential basis" test proposed by the ILC, the assumed fact or situation to be "of material importance" to the State's consent to be bound or to the performance of the treaty (see also → MN 24). While there was general agreement amongst the delegates that an objective test was called for,[137] the US proposal was rejected[138] since it was thought to contain the same subjective elements as the word "essential" and hence not to make the test "more objective".[139]

30 An additional safeguard against the danger of mere subjective perceptions serving as a basis for reneging on treaty commitments is provided by the requirement that the error must be "in a treaty" (→ MN 14–18). Even if the error was essential in inducing a State's consent, it may only be invoked as a ground for invalidating that consent if the mistakenly assumed fact or situation can be considered sufficiently proximate to the subject matter of the treaty (→ MN 15–16).[140]

II. Exception: Inexcusable Error

31 Art 48 para 2 formulates **two exceptions** under which a State may not invoke an error despite the conditions set forth in para 1 being fulfilled. If a State contributed by its own conduct to the error or was put on notice of a possible error that State cannot rely in good faith on its error.[141] In both cases, the error is **inexcusable**[142]

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[133] See the statement of the representative of the United States UNCLOT I 249.

[134] See text accompanying n 135–139.

[135] UNCLOT III 168 (UN Doc A/CONF.39/C.1/L.275).

[136] See the statement of the representative of the United States UNCLOT I 249.

[137] See the discussion in UNCLOT I 249–255.

[138] UNCLOT I 255.

[139] See the statement of Expert Consultant *Waldock* UNCLOT I 254.

[140] *Ibid.* See also the statement of the representative of France UNCLOT I 253 ("the essential nature of the error [. . .] must be assessed from the joint negotiations").

[141] *Villiger* Art 48 MN 10; *E Wyler* in *Corten/Klein* Art 48 MN 35.

[142] *Waldock* II 49; *Fitzmaurice* III 25 (Art 12 para 2 lit c); Harvard Draft 1129 with references to earlier academic writing.

since "the mistaken party in some degree brought the error upon itself".[143] Accordingly the **risk** and hence the consequences of the misconception must be **allocated to the sphere of the erring State** (see also → MN 34).

32 The negative wording according to which para 1 shall not apply if the conditions laid down in para 2 are fulfilled indicates that the party denying the vitiating effect of the error bears the **burden of proving** these conditions.[144]

The formulation of the exceptions set forth in Art 48 para 2 is borrowed from the *Temple of Preah Vihear* case. The ICJ held it to be "an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error."[145] The majority within the ILC, while intending to remain as faithful as possible to the language of the ICJ, considered the exceptions as phrased in the *Temple of Preah Vihear* case too sweeping.[146] This concerned in particular the phrase "or could have avoided it". It was felt that to allow such an exception would in effect render the rule set forth in para 1 nugatory since an error could in most cases be somehow avoided.[147] SR *Waldock* initially suggested qualifying that exception to the effect that the error would only be excluded if it could have been avoided "by the exercise of reasonable diligence."[148] A similar proposal was later introduced by the United States at the Vienna Conference.[149] These proposals were, however, rejected both by the ILC[150] and at the Vienna Conference.[151] It was argued that the standard of due diligence was too vague and therefore difficult to apply on the international plane.[152] Instead the exception "or could have avoided it" was dropped completely since it was felt that the legitimate cases were adequately covered by the other two exceptions formulated by the ICJ.[153]

1. Contribution to the Error

33 The **first exception** set forth in para 2 excludes the invocation of error as a ground for invalidating consent if the State in question **contributed by its own conduct to**

[143]Final Draft, Commentary to Art 45, 244 para 8.

[144]The final version of Art 48 para 2 is in marked contrast to *Fitzmaurice* III 25 (Art 12 para 2 lit c), which required positively that the error must be excusable. See also *Bartoš* [1963-I] YbILC 42 criticizing the negative wording of the ILC draft for not placing the burden of proof on the party relying on the error. As to the burden of proof with regard to para 1 see *Villiger* Art 48 MN 4.

[145]ICJ *Temple of Preah Vihear* (Merits) (n 20) 26.

[146]Final Draft, Commentary to Art 45, 244 para 8.

[147]*Ibid*.

[148]*Waldock* II 48 (Art 8 para 2 lit a).

[149]UNCLOT III 168 (UN Doc A/CONF.39/C.1/L.275).

[150]While the ILC initially retained the original formula of the *Temple of Preah Vihear* case without the qualification proposed by SR *Waldock* (see Draft Art 34 in [1963-II] YbILC 195), it eventually deleted the exception "or could have avoided it" altogether, see Art 45 para 2 Final Draft.

[151]See UNCLOT I 255.

[152]*Rosenne* [1963-I] YbILC 39; *Jiménez de Aréchaga* [1963-I] YbILC 41; see also the statements of the representatives of Cuba, Romania, the United Kingdom and the Ukrainian SSR UNCLOT I 251–253.

[153]See the statement of Expert Consultant *Waldock* UNCLOT I 254.

the error. The erring State is estopped from relying on its error by virtue of its previous conduct (*venire contra factum proprium non valet*).[154]

34 Since there are few errors in the conclusion of treaties to which the erring State would not have made some contribution, this exception must be **construed narrowly**.[155] In the light of object and purpose of Art 48 (→ MN 1–4), it must therefore be carefully established in each individual case whether on account of the erring State's prior conduct the protection of the good faith of the other parties must be given precedence over the preservation of the 'reality of consent'.

> In the *Temple of Preah Vihear* case Thailand contended that the acceptance by Siamese authorities of a map prepared by a French team of topographical officers was vitiated by the misapprehension that the border with Cambodia drawn on the map had consistently followed the previously agreed watershed line.[156] The ICJ considered Thailand to be barred from relying on the plea of error since the Siamese authorities had themselves entrusted the work of producing the maps to the French officers.[157] The risk of error was held to have fallen within Thailand's sphere: "[I]t is evident that the Siamese authorities deliberately left the whole thing to the French elements involved and thus accepted the risk that the maps might prove inaccurate in some respects. Consequently, it was for them to verify the results [. . .]. [T]he legal effect of reliance on the skill of an expert is that one must abide by the results [. . .]. [. . .] [T]he Siamese authorities [. . .] plainly accepted the risk that [. . .] an error [. . .] might in time be discovered: and whoever does that, must be held thereby also, and in advance, to have accepted such errors as do in fact come to light."[158]

2. Error Despite Being Put on Notice

35 Reliance on error as a ground for invalidating consent is also excluded if the circumstances were such as to **put that State on notice of a possible error**. In order to meet the requirements of this exception it is not sufficient to show that the erring State would have been able to avoid the error by the exercise of due diligence.[159] Such a strict standard of care was explicitly rejected by the ILC and the Vienna Conference (→ MN 32). A State can only be considered to have been put on notice of a possible error if in view of the specific circumstances **no interested party could have failed to notice the error**.[160] The real fact or situation

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[154] *Villiger* Art 48 MN 10.

[155] *Waldock* [1966-I/1] YbILC 21.

[156] ICJ *Temple of Preah Vihear* (Merits) (n 20) 21.

[157] *Ibid* 26–27; see also ICJ *Temple of Preah Vihear* (Merits) (separate opinion *Fitzmaurice*) (n 5) 57–59.

[158] ICJ *Temple of Preah Vihear* (Merits) (separate opinion *Fitzmaurice*) (n 5) 59.

[159] A stricter standard of care is apparently advocated by *E Wyler* in *Corten/Klein* Art 48 MN 37 who, in determining the applicable standard of care, attempts to draw inspiration from the jurisprudence of the ICJ on applications for revision of judgment in accordance with Art 61 of the ICJ Statute.

[160] ICJ *Temple of Preah Vihear* (Merits) (n 20) 26: "The map itself drew such pointed attention to the Preah Vihear region that no interested person, nor anyone charged with the duty of scrutinizing it, could have failed to see what the map was purporting to do in respect of that region."

must have been so obvious that nobody could have been under any misapprehension about it.[161]

> The ICJ in the *Temple of Preah Vihear* case rejected Thailand's plea of error with regard to a map accepted by Siam as binding since the Siamese authorities at the time could have easily ascertained the real facts: "It would [. . .] seem that, to anyone who considered that the line of the watershed at Preah Vihear ought to follow the line of the escarpment, or whose duty it was to scrutinize the map, there was everything in the [. . .] map to put him upon enquiry."[162] The special circumstances which were considered to have put the Siamese authorities on notice of the possible error were on the one hand the fact that the map drew pointed attention to the disputed border area[163] and the special qualification of the persons acting on behalf of Siam on the other.[164]

36 It has been suggested that an even lesser standard of diligence would apply to the erring state if the other contracting party was aware of the error and exploited the misconception to its advantage ("**exploited error**").[165] This scenario would only become relevant if the exploitation of the error did not constitute fraud, since the fraudulent causation of error is covered by Art 49 as *lex specialis* (→ MN 11–12). Its proponents base the mitigating effect of a non-fraudulent 'exploitation' of error on the argument that the bad faith evidenced by the failure to put the erring State on notice of the real fact or situation could be considered as one of the "circumstances" to be taken into account under para 2.[166]

37 However, according to the wording of para 2 the decisive question is whether the *actual* circumstances put the erring State on notice and not whether the other contracting party should have *changed* the circumstances with a view to putting that State on notice of its error. By abandoning the common law distinction between mutual and unilateral error (→ MN 9) the ILC and the Vienna conference had made a conscious policy decision to separate the issue of error from the question of fraud or misrepresentation by the other party. It is consistent with this approach that the failure of the other contracting party to put the erring State on notice of its misconception will only become relevant if it amounts to fraud within the meaning of Art 49.

38 A different issue is raised if the initial error is caused by **innocent misrepresentation** on the part of the other contracting party. Since the misrepresentation is not fraudulent, it would not be covered by Art 49. However, the fact that the other contracting party innocently misrepresented a fact or a situation may add weight to the assumption that the misapprehension of the erring State cannot be considered negligent.[167]

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[161] *Ibid*: "Nobody looking at the map could be under any misapprehension about [the border at Preah Vihear drawn in the map]."

[162] *Ibid*.

[163] *Ibid*.

[164] *Ibid*.

[165] *Oraison* (n 58) 138–139; *E Wyler* in *Corten/Klein* Art 48 MN 39.

[166] *Ibid*.

[167] See the statement of Expert Consultant *Waldock* UNCLOT I 254.

III. Invocation as a Ground for Invalidating Consent

39 An error that meets the conditions set forth in para 1 and is not inexcusable within the meaning of para 2 may be **invoked by the erring State** as a ground for invalidating its consent to be bound by the treaty.[168] The State's consent is thus not automatically void but **only voidable** in accordance with the procedure set forth in Arts 65–68. If the invalidity is successfully established under that procedure, the State's consent is void *ab initio* (Art 69 paras 1 and 4).[169] The error may, in principle, only be invoked with respect to the **whole treaty** (Art 44 para 2). If the error, however, relates solely to a clause which is separable in accordance with Art 44 para 3, the error may only be relied upon as a ground for invalidating consent with regard to that clause.

40 The erring State is accordingly provided with the **choice** of (1) setting in motion the procedure of Arts 65–68 with a view to invalidating its consent, (2) attempting to reach an agreement with the other parties on the modification of the treaty (Arts 39–41) or (3) affirming (expressly or by virtue of acquiescence) the validity of its consent (Art 45).[170] As soon as the State opts for the modification or affirmation of the treaty, it may no longer invoke the error as a ground for invalidating consent (Art 45). The same applies if the State by reason of its conduct must be considered as having acquiesced in the validity of the treaty (Art 45 lit b).

IV. Error Relating Only to the Wording of the Text of a Treaty (para 3)

41 An error relating only to the wording of the text of a treaty does not affect its validity. This already follows from para 1 which exclusively pertains to substantive errors "in a treaty" and accordingly excludes errors relating only to the form in which the consent was expressed (→ MN 14). Art 48 para 3 thus simply reaffirms the conclusion that such errors do not affect the validity of consent to be bound by a treaty.[171] Such errors can only be remedied in accordance with the procedure for the correction of errors set forth in Art 79 to which Art 48 para 3 explicitly refers.

D. 1986 Convention

42 The VCLT II extends the ambit of Art 48 to **consent given by international organizations** while leaving the wording otherwise unchanged.

43 In applying Art 48 to international organizations, special attention must, however, be given to the **structural differences between States and international**

[168] Final Draft, Commentary to Art 45, 244 para 7.

[169] *Ibid.*

[170] See *Waldock* II 48 (Art 8 para 2, Art 9 para 2).

[171] Final Draft, Commentary to Art 45, 244 para 9.

organizations.[172] In particular, when ascertaining whether an international organization **contributed by its own conduct to the error** (→ MN 33–34) or whether it can be considered to have been **put on notice of a possible error** (→ MN 35–38) the extent to which the acts and omissions of the organisation's agents and organs can be attributed to the organization itself must be carefully established in the light of the particular structure of the international organization at issue and the specific circumstances of the case.[173]

E. Customary International Law Status

In view of the paucity of international practice at the time (→ MN 5–7), Art 48 could not be considered a mere restatement of customary international law when it was adopted in 1969.[174] Since then, the rules on error laid down in Art 48 have met with general approval within the international community. Art 48 and its counterpart in the VCLT II were adopted without dissenting vote by the two Vienna Conferences.[175] A good case may therefore be made for Art 48 having served as a catalyst for the emergence of a corresponding rule of customary international law.[176] **44**

> Based on this assumption both Judge *Higgins* and Judge *Fleischhauer* relied on Art 48 in the *Kasikili/Sedudu Island* case despite the fact that neither Botswana nor Namibia were parties to the VCLT.[177]

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[172] Final Draft 1982, Commentary to Art 48, 246 para 2.

[173] Final Draft 1982, Commentary to Art 48, 246 para 2; *Ushakov*, *Reuter* and *Valat* [1979-I] YbILC 123. See also *E Wyler* in *Corten/Klein* Art 48 VCLT II MN 3.

[174] See the statement of the representative of the United Kingdom UNCLOT II 89; *Villiger* Art 48 MN 15; *E Wyler* in *Corten/Klein* Art 48 MN 2.

[175] See n 38; UNCLOTIO I 17.

[176] *Reuter* VIII 127; *Villiger* Art 48 MN 15. *Contra: E Wyler* in *Corten/Klein* Art 48 MN 7.

[177] ICJ *Kasikili/Sedudu Island* (declaration *Higgins*) (n 65) 1114; *Kasikili/Sedudu Island* (dissenting opinion *Fleischhauer*) (n 63) 1203.

Article 49
Fraud

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.

Contents

A. Purpose and Function

Art 49 establishes a **separate regime** for an error induced by fraudulent conduct which differs significantly from Art 48 both with regard to the conditions for its invocation as a ground for invalidating consent (→ MN 34) and to its effects (→ MN 35). **1**

In providing for the possibility of invoking this particular type of error as a ground for invalidating consent, Art 49, in the same way as Art 48, primarily protects the **freedom of consent** of the defrauded party (→ Art 48 MN 1). The fact, however, that the error was induced by the **fraudulent conduct** of the other party significantly changes the balance between the conflicting interests involved. Having intentionally caused the misapprehension of the other contracting party, the defrauding State largely forfeits the protection the law would have extended to it had the error been unprovoked (→ Art 48). Fraud is the **antithesis of good faith**.[1] As a consequence, the defrauding party may not legitimately rely on the continuing validity of the treaty. In this sense, the more lenient conditions as compared to Art 48 under which a State may invoke an error induced by fraud to vitiate consent may also be regarded as a "sanction for a delictual act"[2] committed by the other State. **2**

[1] *Bin Cheng* General Principles of Law as Applied by International Courts and Tribunals (1953) 158.

[2] Final Draft 1982, Commentary to Art 49, 54 para 1.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
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3 The conditions imposed by Art 49 on the right to invoke fraud as a ground for vitiating consent are therefore mainly dictated by general considerations of the **security of international transactions**.[3] However, the danger of a State abusing Art 49 to renege on its treaty commitment[4] appears to be limited. On the one hand, a State will not lightly accuse another State of fraud due to the moral indictment inherent in such an allegation.[5] On the other hand a State will be reluctant to admit that it has fallen victim to the deception of another State.[6]

4 Fraud not only affects the "reality of consent"[7] of the other party but "strikes at the root" of the agreement.[8] It "destroys the whole basis of mutual confidence of the parties",[9] ***fraus omnia corrumpit***.[10] Its systematic position within the section on the invalidity of treaties, which in Arts 48–52 establishes a rising scale of gravity from error to coercion, underlines the **seriousness** attached by the Vienna Convention to fraud as a ground for vitiating consent.[11] The emphasis put on upholding the freedom of consent against fraudulent conduct is also highlighted by the fact that, in contrast to Arts 46 and 47, Art 49 states **affirmatively** that an error may be invoked as a ground for invalidating consent (see also → Art 48 MN 2).

5 Fraud, along with error (Art 48) and coercion (Arts 51, 52), is recognized in all domestic legal systems as vitiating consent and as such may therefore be considered a **general principle of law** within the meaning of Art 38 para 1 lit c ICJ Statute.[12] However, there are considerable differences amongst the various national legal orders with regard to the specific conditions under which fraudulent conduct may be invoked as invalidating consent.[13] Given this diversity of domestic law and the lack of guidance in international practice (→ MN 7), the ILC and the Vienna

[3] See the statement by the representative of the United States UNCLOT I 256.

[4] As to such concerns, see *Waldock* [1963-I] YbILC 37 and the statement by the representatives of the United States and the United Kingdom UNCLOT I 256, 261.

[5] *G Niyungeko* in *Corten/Klein* Art 49 MN 5; *A Oraison* Le dol dans la conclusion des traités (1971) 75 RGDIP 617, 621.

[6] *G Niyungeko* in *Corten/Klein* Art 49 MN 5; *Oraison* (n 5) 621.

[7] See *mutatis mutandis* ICJ *Temple of Preah Vihear (Cambodia v Thailand)* (Preliminary Objections) [1961] ICJ Rep 17, 30.

[8] Final Draft, Commentary to Art 46, 244 para 1.

[9] *Ibid.*

[10] As to *fraus omnia corrumpit* as a general principle of law, see *Bin Cheng* (n 1) 158–160. See also *Bartoš* [1963-I] YbILC 30; *Verdross* [1963-I] YbILC 32.

[11] *Waldock* V 11.

[12] Final Draft, Commentary to Art 46, 244–245 para 3. As to private contract law, see Art 3.8 of the 2004 UNIDROIT Principles of International Commercial Contracts. The principles may be applied "when the parties have agreed that their contract be governed by general principles of law" (Preamble para 2). UNCITRAL formally endorsed the UNIDROIT Principles in 2007, see Report of the United Nations Commission on International Trade Law on the Work of Its 40th Session, UN Doc A/62/17 (Part I) para 213.

[13] Final Draft, Commentary to Art 46, 244–245 para 3; *T Probst* Deception, in *A von Mehren* (ed) International Encyclopedia of Comparative Law Vol 7 (1981) ch 11 66–172; *K Zweigert/H Kötz* An Introduction to Comparative Law (3rd edn 1998) 424–428.

Conference decided to content themselves with formulating the "**general concept**"[14] of fraud applicable in the law of treaties while leaving "its precise scope to be worked out in practice and in the decisions of international tribunals."[15]

Since no conclusive practice exists with regard to Art 49 (→ MN 7), the task of giving more specific contours to fraud as an **autonomous concept** of treaty law remains a considerable challenge. In addition to applying the general rules on interpretation laid down in Arts 31–33, guidance and inspiration have to be drawn from domestic legal systems to the extent that general principles on specific aspects of fraud are emerging (Art 31 para 3 lit c; on the caution to be exercised see → Art 48 MN 3).[16] **6**

B. Historical Background and Negotiating History

I. Historical Background

There is **no conclusive practice** as to the effect of fraudulent conduct on the validity of a treaty. It is highly disputed whether the conclusion of the treaties which are occasionally referred to as precedents in this context, in particular[17] the 1842 Webster–Ashburton Treaty (→ MN 16),[18] the 1889 Italo–Abyssinian Treaty of Ucciali[19] and the 1938 Munich Agreement,[20] can be said to have involved fraudulent conduct of the kind envisaged by Art 49.[21] Moreover, the allegedly defrauded parties to the Webster–Ashburton Treaty and the Treaty of Ucciali have never challenged the validity of their consent on the basis of fraud.[22] While the Munich Agreement was pronounced null and void *ab initio* by *Charles de Gaulle* on behalf of Free France in September 1942,[23] it was only after the war that that the French government appears to have relied on fraud as a ground for the claimed **7**

[14]Final Draft, Commentary to Art 46, 244 para 2. See also *ibid* 244–245 para 3 ("broad concept").

[15]*Ibid* para 2.

[16]Art 3.8 of the 2004 UNIDROIT Principles (n 12) provides evidence for the emergence of such an international consensus with regard to private contract law. As to the endorsement of these principles by UNCITRAL as a reflection of general principles of law, see n 12.

[17]As to further cases occasionally referred to as pertinent examples of fraud, see *Oraison* (n 5) 620.

[18]*Cf* [1963-II] YbILC 194.

[19]*Cf Tunkin* [1963-I] YbILC 31, 33; *cf* also the statement by the representative of the USSR UNCLOT I 258; *Oraison* (n 5) 620–621, 643–644.

[20]*Cf Tunkin* [1963-I] YbILC 31–33; *cf* also the statement by the representative of the USSR UNCLOT I 258; *Reuter* [1979-I] YbILC 124; *Oraison* (n 5) 628–629.

[21]As to the Webster-Ashburton Treaty, see → MN 16; as to the Treaty of Ucciali, see *Ago* [1963-I] YbILC 31; see also the statement by the representative of Ethiopia UNCLOT I 264–265; as to the Munich Agreement, see *Ago* [1963-I] YbILC 31.

[22]See references in n 21.

[23]Letter of 29 September 1942 to the President of the Council of the Czechoslovakian Republic *Jan Šrámek,* reprinted in *C de Gaulle* Mémoires de Guerre Vol 2 (1956) 372.

invalidity of its consent to the treaty.[24] However, it remains doubtful whether the mere fact that the German Reich never intended to fulfil the agreement amounted to fraudulent conduct within the meaning of Art 49.[25]

8 Despite the lack of conclusive international practice, **doctrine before 1969** generally assumed that consent to a treaty induced by fraud would be void or voidable.[26] In the same vein, the **Harvard Law School** in its Draft Convention on the Law of Treaties formulated a provision according to which a State induced to enter into a treaty by fraudulent conduct could have sought a declaration from a competent international tribunal or authority that the treaty was void.[27]

II. Negotiating History

9 Following the lead of the Harvard Draft[28] and the drafts elaborated by his predecessors as Special Rapporteur,[29] ***Humphrey Waldock*** proposed the inclusion of a separate article on fraud despite the conspicuous paucity of international practice.[30] The majority of the members of the **ILC** supported SR *Waldock*'s proposal in principle.[31] It was however felt that *Waldock*'s definitition of fraud, which closely followed English law,[32] was too broad for the purposes of the law of treaties.[33] Having failed to agree on an alternative definition the ILC in its **1963 draft**[34] eventually decided to abstain from a precise definition and merely "formulate the general concept of fraud applicable in the law of treaties".[35] During the second reading, the draft article remained largely unchanged.[36]

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[24] *Reuter* [1979-I] YbILC 124; *Reuter* MN 262.

[25] *Ago* [1963-I] YbILC 31. See also the detailed analysis by *P Bretton* Les négociations germano-tchécoslovaques sur l'accord de Munich du 29 septembre 1938 (1973) 19 AFDI 189, 203–205. As to the question whether the agreement was vitiated by coercion exercised by the German Reich see → Art 52 MN 9.

[26] See the references in Harvard Draft 1145, 1147.

[27] *Ibid* 1144 (Draft Art 31).

[28] *Ibid.*

[29] *Lauterpacht* I 152 (Draft Art 13); *Fitzmaurice* III 25–26 (Draft Art 13).

[30] *Waldock* II 47 (Draft Art 7).

[31] See the discussions in [1963-I] YbILC 27–37, 208.

[32] *Waldock* [1963-I] YbILC 37.

[33] See in particular *Ago* [1963-I] YbILC 36.

[34] [1963-II] YbILC 194, Draft Art 33: "If a State has been induced to enter into a treaty by the fraudulent conduct of another contracting State, it may invoke the fraud as invalidating its consent to be bound by the treaty."

[35] [1963-II] YbILC 194. See also the discussions on the preparatory proposals of the Drafting Committee in [1963-I] YbILC 208.

[36] Art 46 Final Draft: "A State which has been induced to conclude a treaty by the fraudulent conduct of anther negotiating State may invoke the fraud as invalidating its consent to be bound by the treaty." The only substantive modification as compared to the 1963 Draft (n 34) concerned the reference to "contracting State", which was changed to "negotiating State".

At the **Vienna Conference,** a number of proposals tabled with a view to either deleting or modifying the ILC's draft article[37] were rejected.[38] Subject to slight linguistic adjustments, the Conference eventually adopted today's Art 49 by 92 votes to none, with 7 abstentions.[39] **10**

C. Elements of Article 49

I. Fraud

Art 49 does not offer a detailed **definition** of fraud. "Fraud", which may be invoked as invalidating a State's consent, is simply described as fraudulent conduct of a negotiating State which induces another State to conclude a treaty. According to this definition, the constituent elements of fraud are "**fraudulent conduct**" by one State and an objective causal link ("**inducement**", → MN 27–32) between this conduct and the conclusion of a treaty by another State. This definition, however, remains incomplete and circular since the notion of fraud is in turn defined by reference to "fraudulent" conduct. **11**

In order to determine when conduct is "**fraudulent**", it is therefore necessary to have recourse to the "**general concept**" **of fraud** as recognized in all domestic legal systems as a general principle of law (→ MN 5). From such a comparative perspective, conduct may be qualified as fraudulent "if it is intended to lead the other party into error and thereby gain an advantage to the detriment of the other party."[40] In the context of the law of treaties, the coveted advantage is the consent to a treaty which the other party would otherwise not have given.[41] **12**

The notion of "fraudulent" conduct hence adds two elements to the **definition of fraud,** which are not explicitly stated in Art 49: first, the element of intention on the part of the defrauding State (→ MN 22–24) and second, the element of error on the part of the defrauded State (→ MN 28–31). A State thus commits fraud if it **13**

[37]The text of the various amendments is reprinted in UNCLOT III 169.

[38]UNCLOT I 265–266.

[39]UNCLOT II 90.

[40]See UNIDROIT Principles (n 12) Comment 2 to Art 3.8. See also Harvard Draft 1145: "the distinguishing characteristic [of fraudulent conduct] is that the act was done with a willful intent to deceive another"; *Fitzmaurice* III 26 (Draft Art 13 para 2): "Fraud [. . .] means wilful intent to deceive"; see also the statement by the representative of the Philippines UNCLOT I 258: "The term 'fraud' bore a precise meaning: it suggested deceit or wilful misrepresentation. It suggested [. . .] a deliberate act committed with full awareness of the effect and consequences. It connoted the intention of one party to gain something at the expense of another."

[41]*Fitzmaurice* III 26 (Draft Art 13 para 2): "Fraud [. . .] means wilful intent to deceive, *ie* statements or representations made [. . .] in the knowledge that they are false [. . .] and for the purpose of deceiving and of procuring the conclusion of the treaty"; *Waldock* II 47 (Draft Art 7 para 2 lit a): "Fraud inducing entry into a treaty comprises [. . .] the making of false statements or representations of fact in the knowledge that they are false [. . .] for the purpose of procuring consent of a State to be bound by the terms of a treaty."

intentionally leads another State into an error which induces that State to conclude a treaty.

14 It is the subjective element of intention rather than the fact that the error is induced by the behaviour of another State, which is the decisive criterion in **distinguishing fraud from other forms of error**. Errors caused by innocent misrepresentation are therefore not covered by Art 49 and may only vitiate consent if the conditions of Art 48 are fulfilled (→ Art 48 MN 12, 38).

1. Fraudulent Conduct

a) Misrepresentation

15 The objective element of fraudulent conduct requires the inducement of an error in the other negotiating party by means of deception or misrepresentation.[42] **Misrepresentation** means the creation of an impression in the mind of the relevant representative of the defrauded State which is not in accord with reality.[43] Such misrepresentation may be made expressly (*eg* by false statements[44]) or by implication,[45] through words or through action[46] (*eg* by forging a map on which the other party relies[47]). The term fraudulent "**conduct**" covers both a single act and a series of acts of fraud.[48]

16 The concealment or **non-disclosure of information** may also qualify as misrepresentation if good faith requires the disclosure of the information.[49] As a general rule, however, the negotiating parties are under no duty to provide the other party with information even if such information were, from the other party's perspective, of essential importance to the conclusion of the treaty.[50]

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[42]Final Draft, Commentary to Art 46, 244–245 para 3: "The expression 'fraudulent conduct' is designed to include any false statements, misrepresentations or other deceitful proceedings."

[43]See *mutatis mutandis Probst* (n 13) 82 MN 169.

[44]Final Draft, Commentary to Art 46, 244–245 para 3.

[45]On the distinction between implicit misrepresentation by 'conclusive silence' as opposed to 'mere silence' see → MN 18.

[46]*G Niyungeko* in *Corten/Klein* Art 49 MN 9–12; *Oraison* (n 5) 630–635. As to general principles of private law, see Art 3.8 of the 2004 UNIDROIT Principles (n 12) ("by [. . .] language or practices").

[47]Harvard Draft 1146.

[48]*Waldock* V 11; *G Niyungeko* in *Corten/Klein* Art 49 MN 12.

[49]See *Fitzmaurice* III 26 (Draft Art 13 para 5); *Waldock* II 47 (Draft Art 7 para 2 lit b); *G Niyungeko* in *Corten/Klein* Art 49 MN 13; *Oraison* (n 5) 632–634; *Villiger* Art 49 MN 4.

[50]See references in n 49.

A commonly cited example is the Webster-Ashburton Treaty of 1842[51] relating to the north-eastern boundary between the United States and Canada. During the negotiations leading up to the treaty a map came into the possession of the US government which had been found in an archive in Paris and which would have been favourable to the British negotiating position. US Secretary of State *Daniel Webster* who led the negotiations on behalf of the United States did not disclose the newly discovered map to his British counterpart *Lord Ashburton*. After the conclusion of the treaty the prior discovery of the map became public and caused a popular outcry in the United Kingdom. There was, however, general agreement amongst international lawyers that the non-disclosure of the map by the US government did not amount to fraudulent conduct. Indeed, *Lord Ashburton* himself rejected the contention that *Webster* had been under a duty to disclose the existence of the map: "The public are very busy with the question whether Webster was bound in honour to damage his own case by telling all. I have put this to the consciences of old diplomatists without getting a satisfactory answer. My own opinion is that in this respect no reproach can fairly be made."[52]

Accordingly, mere silence does not amount to misrepresentation unless **good faith** requires the silent party to disclose certain information.[53] The existence of such a **duty to disclose** will depend on the nature of the contract and the particular circumstances of the case at issue.[54] **17**

SR *Fitzmaurice* and SR *Waldock* assumed that a duty to disclose would only exist under the condition that certain information is exclusively available or accessible to one party only.[55] This restrictive approach was inspired by English law as it stood at the time.[56] It was, however, exactly the strong reliance by *Fitzmaurice* and *Waldock* on the idiosyncracies of English law which led the ILC to abandon their detailed definitions of fraudulent conduct and instead simply refer to the "general concept" of fraud (→ MN 5). Other domestic legal systems have long recognized that good faith may also require the disclosure of information

[51] 1842 Treaty to Settle and Define the Boundaries between the Territories of the United States and the Possessions of Her Britannic Majesty in North America, for the Final Suppression of the African Slave Trade, and for the Giving Up of Criminals Fugitives from Justice, in Certain Cases, reprinted in *H Miller* (ed) Treaties and Other International Acts of the United States of America Vol 4 (1934) Documents 80–121.

[52] Communication of 7 February 1843, reprinted in *F Wharton* A Digest of the International Law of the United States Vol 2 (1886) 180. See also *D Webster* Remarks Made at the New York Historical Society, 15 April 1843, in *E Everett* (ed) The Works of Daniel Webster Vol 2 (1890) 153: "I must confess that I did not think it a very urgent duty on my part to go to Lord Ashburton, and tell him that I had found a bit of doubtful evidence in Paris, out of which he might perhaps make something to the prejudice of our claims, and from which he could set up higher claims for himself, or throw further uncertainty over the whole matter."

[53] *Waldock* II 47 (Draft Art 7 para 2 lit b); *Villiger* Art 49 MN 4.

[54] *Waldock* II 47 (Draft Art 7 para 2 lit b).

[55] *Fitzmaurice* III 26 (Draft Art 13 para 5); *Waldock* II 47 (Draft Art 7 para 2 lit b). In domestic law such a situation is characteristic for contracts *uberrimae fidei* (in particular insurance contracts) with regard to which it is generally recognized that the contracting party, which is in the exclusive possession of information essential for the other party's decision to enter into the contract, is under a duty to disclose such information, see *Probst* (n 13) 103 MN 208. As to the application of the concept to the international sphere, see *Fitzmaurice* III 37.

[56] *Fitzmaurice* III 37; *Waldock* [1963-I] YbILC 37.

in other situations.[57] In the same way, common law systems have always accepted that *bona fides* may establish a duty of disclosure even if the information in question does not lie in the exclusive sphere of the silent party.[58] Such recognized cases include special relationships of trust.[59] In this sense the commentary accompanying SR *Waldock*'s first draft, despite the narrow ambit of the corresponding draft article, referred to **treaties of mutual co-operation**, such as treaties for the mutual exploitation and use of water resources, as possibly giving rise to special duties of disclosure.[60]

18 'Mere silence' needs to be distinguished from **'conclusive' or 'expressive' silence**.[61] While 'mere silence' conveys no meaning at all, the specific circumstances of a given case may attach a particular meaning to a negotiating party's silence. Such instances of 'conclusive silence' are implicit statements and as such tantamount to active misrepresentations (→ MN 15).[62]

19 Unlike the preceding article (→ Art 48 MN 19–23), Art 49 does not explicitly restrict the relevant misrepresentation and the concomitant error to those relating to a **fact**. This raises the issue as to the extent to which misrepresentations of **opinions** and of **law** may constitute fraudulent conduct. In most cases, such misrepresentations would invariably be covered by Art 49 since mispresentations of opinions and of law typically also implicate questions of fact.[63]

20 However, with regard to genuine misrepresentations of **international law**, in particular, the issue needs to be addressed as to whether the limitation to misprepresentations of fact, although not explicitly set forth in Art 49, is inherent in the "general concept" of fraud. Some authors argue that the negotiating parties are presumed to have knowledge of international law and are therefore, as a matter of law, unable to make representations about it.[64] However, the question remains whether this presumption can be said to extend to situations of fraud. Object and purpose of Art 49 are not only to uphold the freedom of consent but also to sanction the bad faith displayed by the defrauding party (→ MN 2). If a State deliberately and knowingly exploits the ignorance of another State concerning a question of international law, it would be contradictory for the international legal system to override the actual ignorance of the one party and the flagrant bad faith of the other party by a legal fiction which would simply deny the occurrence of any misrepresentation.[65] The extension of fraudulent conduct to misrepresentations of

[57] See *Probst* (n 13) 98–101 MN 200–205.

[58] See *ibid* 101–105 MN 206–211 with further references.

[59] *Cf ibid* 103–104 para 209. As to civil law systems, see *ibid* 100 MN 203.

[60] *Waldock* II 48.

[61] See *mutatis mutandis Probst* (n 13) 94–95 MN 194.

[62] *Ibid* 95 MN 194.

[63] See with regard to law → Art 48 MN 21; with regard to opinions *Fitzmaurice* III 37.

[64] *Fitzmaurice* III 37; *G Niyungeko* in *Corten/Klein* Art 49 MN 22.

[65] See also *de lege ferenda Oraison* (n 5) 633 n 35 who, however, assumes that *de lege lata* Art 49 does not encompass misrepresentations of law, *ibid* 645.

law is also supported by general principles of contract law[66] and can hence be said to be inherent in the "general concept" of fraud (→ MN 5).

> The *travaux préparatoires* equally suggest that Art 49 was not intended to exclude misrepresentations of law from its ambit. SR *Fitzmaurice* had explicitly restricted his draft on fraud to "misrepresentations of fact, not of law",[67] whereas SR *Waldock* in his first draft only referred to "false [. . .] representations of fact" without making any reference to misrepresentations of law.[68] The issue was apparently not further discussed in the ILC. The inability to agree on a detailed definition of fraud within the Commission eventually led to the unspecific formula of "fraudulent conduct". Significantly, in the ILC's commentary on its final draft, fraudulent conduct is defined as including "any [. . .] misrepresentations"[69] which suggests that there was a consensus within the Commission to abandon the restriction to false representations of fact. At the Vienna Conference the United States attempted to bring today's Art 49 in line with the article on error by tabling an amendment which would have restricted fraud to "fraudulent conduct [. . .] concerning a fact or situation [. . .]".[70] The US delegate explained that the amendment was specifically aimed at excluding misrepresentations of international law, since "[i]t would be disruptive of stable treaty relations to allow a State to invalidate its consent to be bound on the ground that another State had misled it concerning the relevant rules of international law".[71] The majority of delegates, however, appeared to be of the opinion that the US amendment would "unduly reduce the scope of article 46 [today's article 49]".[72] The US proposal was eventually rejected in the Committee of the Whole by a solid majority of 46 votes to 18 with 27 abstentions.[73]

21 In contrast to Art 48, fraudulent conduct does not presuppose the inducement of an error "in a treaty", *ie* an error relating to a substantive or material aspect of the treaty (→ Art 48 MN 14–18). Apart from the causal link ("inducement") required between the misrepresentation, the error and the conclusion of the treaty (→ MN 27–32), the misrepresentation and the concomitant error need **not** therefore **necessarily pertain to "material" or "substantive" facts or information**. The reprehensible nature of fraud (→ MN 2) provides sufficient justification for invalidating consent induced by fraudulent conduct.[74]

b) Intention to Deceive

22 Conduct only qualifies as fraudulent if it is accompanied by the **intention to deceive** (→ MN 12–14). Accordingly negligent or innocent misprepresentation does not constitute fraud even if it induces the other party to consent to a treaty.

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[66] See *Probst* (n 13) 79–82 MN 166–169.

[67] *Fitzmaurice* III 26 (Draft Art 13 para 3).

[68] *Waldock* II 47 (Draft Art 7 para 2 lit a and b).

[69] Final Draft, Commentary to Art 46, 244–245 para 3.

[70] UNCLOT III 168 (UN Doc A/CONF.39/C.1/L.276).

[71] See the statement by the representative of the United States UNCLOT I 256.

[72] See the statement by the representative of Poland UNCLOT I 257.

[73] UNCLOT I 266.

[74] See *mutatis mutandis* UNIDROIT Principles (n 12), Comment 2 to Art 3.8.

The error caused by such non-intentional misrepresentation may only be invoked as a ground for invalidating **consent** if the conditions set forth in Art 48 are met (→ Art 48 MN 12, 38).

23 The intention to deceive (*animus decipiendi*) encompasses two distinctive elements.[75] First, the State in question (or rather its representative) must be aware of the fact that the representations made to the other State are not in accord with reality (**awareness of untruth**).[76] This requires at least *dolus eventualis*[77]; gross negligence ('recklessness') is not sufficient.[78] In the case of fraudulent non-disclosure (→ MN 16) the necessary awareness relates to the (impending or pre-existing[79]) misapprehension of the other contracting party.[80]

24 The second constituent element of the *animus decipiendi* is the **intention to mislead**, *ie* the intention to cause (or, in the case of fraudulent 'exploitation' of a pre-existent error [→ MN 29], to maintain or corroborate) an error on the part of the other State with a view to inducing that State to give its consent to a treaty.[81] Mere exaggerations, encomiums or eulogies (*dolus bonus*,[82] "puffing"[83]) designed to advertise goods or services during the negotiations by emphasizing their positive features cannot be considered to be made with the intention to mislead.[84]

2. Conduct of Another Negotiating State

25 Only fraudulent conduct **of another negotiating State** may give rise to a right to invoke fraud as a ground for invalidating consent. According to Art 2 para 1 lit e, a "negotiating State" is a State which took part in the drawing up and adoption of the text of the treaty (→ Art 9). Hence, fraudulent conduct by **third States** or contracting States (Art 2 para 1 lit f) which did not participate in the negotiating

[75] *Waldock* II 47 (Draft Art 7 para 2 lit a): "Fraud inducing entry into a treaty comprises [. . .] the making of false statements or representations of fact in the knowledge that they are false or without regard to whether they are true of false, for the purpose of procuring consent of a State to be bound by the terms of a treaty." *Waldock*'s definition was modelled after *Fitzmaurice* III 26 (Draft Art 13 para 3). As to domestic contract law see *Probst* (n 13) 110 MN 223.

[76] See references in n 75.

[77] See with regard to general principles of contract law *Probst* (n 13) 110–111 MN 224.

[78] The proposal made by SR *Waldock* to include in the definition of fraud "reckless" misrepresentations ("representations [. . .] without regard to whether they are true or false", see n 75) was rejected by the ILC as being too close to English law and extending the concept of fraud too far, see *Waldock* [1963-I] YbILC 37.

[79] As to the distinction between inducing an error and exploiting a 'spontaneous' error, see → MN 29.

[80] See *mutatis mutandis Probst* (n 13) 110–111 MN 224.

[81] *Fitzmaurice* III 26 (Draft Art 13 para 3); *Waldock* II 47 (Draft Art 7 para 2 lit a); *G Niyungeko* in *Corten/Klein* Art 49 MN 14. As to domestic contract law, see *Probst* (n 13) 111–112 MN 226.

[82] *Probst* (n 13) 85–89 MN 177–181.

[83] See UNIDROIT Principles (n 12), Comment 2 to Art 3.8.

[84] *Fitzmaurice* III 37; UNIDROIT Principles (n 12), Comment 2 to Art 3.8. As to the different doctrinal explanations in domestic law see *Probst* (n 13) 87 MN 179.

stage is not encompassed by Art 49.[85] Conduct of such States would only be relevant if it could be imputed to a negotiating State in accordance with the general rules on State responsibility.[86]

The limitation *ratione personae* to fraudulent conduct of negotiating States does not restrict the ambit of Art 49 ***ratione temporis*** to acts or omissions during the negotiating stage. As long as a State took part in the drawing up and adoption of the text of the treaty (Art 2 para 1 lit e), its fraudulent conduct remains relevant up until the conclusion of the treaty (→ Arts 10–16).[87] **26**

3. Induced Conclusion of a Treaty

The fraudulent conduct must have induced the conclusion of the treaty by the other contracting party. Inducing a State to conclude a treaty by fraudulent conduct implicates a **double causal relationship**: first, the fraudulent conduct must cause an error on the part of the other contracting State which, secondly, must induce that State to conclude the treaty in question.[88] **27**

a) Causation of Error

The establishment of a causal relationship between the fraudulent conduct and the error poses particular problems with regard to **fraudulent non-disclosure** (→ MN 16). The causation of an error by non-disclosure presupposes that the error would not have arisen had the other negotiating party provided its counterpart with all relevant information. The non-disclosure of information must accordingly in principle induce a previously non-existent error.[89] **28**

In most cases of non-disclosure, however, the other party will already be under a 'spontaneous' misapprehension which is not induced but simply '**exploited**' by the State in question.[90] As long as a State is under a duty to disclose (→ MN 16–17), it is immaterial whether the non-disclosure induces, maintains or merely exploits an error since the bad faith displayed in withholding the relevant information with a view to inducing the other party to conclude a treaty remains the same.[91] Object and purpose of Art 49 therefore call for a broad understanding of 'causation' in cases of **29**

[85] *G Niyungeko* in *Corten/Klein* Art 49 MN 14.

[86] See in particular Arts 16–18 ILC Draft Articles on State Responsibility, UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83. See also *Waldock* [1966-I/1] YbILC 17.

[87] *Villiger* Art 49 MN 5.

[88] See *mutatis mutandis Probst* (n 13) 117–119 MN 238–241.

[89] *Oraison* (n 5) 634. As to domestic contract law, see *Probst* (n 13) 95, 105 MN 195, 213.

[90] This also seems to have been the case in the negotiations leading up to the Webster–Asburton Treaty (→ MN 16).

[91] In a similar vein *Oraison* (n 5) 634–635. Many domestic systems also consider the exploitation of an error to be tantamount to its inducement if the defrauding party is under a duty to disclose; see *Probst* (n 13) 106–109 MN 214–216.

fraudulent non-disclosure. Additional support for this view may be found in the wording of Art 49, which only requires the inducement of consent to the treaty while remaining silent on the exact nature of the relationship between fraudulent conduct and error.

30 It is irrelevant whether the victim of the fraudulent conduct contributed to the error by failing to exercise due diligence (**contributory negligence**). Contrary suggestions, which rely on an analogy to Art 48 para 2 or on general principles of law,[92] are not convincing. Art 48 para 2, in certain instances of contributory negligence, gives precedence to the good faith of the other contracting party despite the fact that the 'reality of consent' of the erring State remains affected by the misapprehension (→ Art 48 MN 33–34). In the case of fraud, however, the bad faith demonstrated by the defrauding State stands in the way of any exception along the lines of Art 48 para 2 even if the defrauded State could easily have avoided the error by exercising due diligence. Neither can such an exception be derived from the "general concept" of fraud since the majority of domestic legal systems also consider contributory negligence to be irrelevant if the error is induced by fraudulent conduct.[93]

31 A certain caveat must, however, be made with regard to cases of **fraudulent non-disclosure**. Since the existence of a duty to disclose will depend on the particular circumstances of the case (→ MN 17), the extent to which the other State was in a position to ascertain the real situation itself will inevitably have to be taken into account: The one State's duty to disclose information ends precisely where the other State's obligation to inform itself begins.[94]

b) Inducement of Consent

32 The fraudulent conduct and the concomitant error must have induced the other State to conclude the treaty. Similar to Art 48 the error must accordingly have constituted an "**essential basis**" of the defrauded State's consent (→ Art 48 MN 25–30).[95] The error is essential if the defrauded State would not have entered into the treaty had it known the real fact or situation (→ Art 48 MN 26).[96] The essential character of the error must be assessed against the objective yardstick of whether a third State in a similar situation would have refrained from giving its consent (→ Art 48 MN 29). The error **need not be the sole factor** inducing the State to conclude a treaty (→ Art 48 MN 27).[97]

[92] *G Niyungeko* in *Corten/Klein* Art 49 MN 21; *Oraison* (n 5) 645–647.

[93] See *Probst* (n 13) 114–115 MN 231–233.

[94] See *mutatis mutandis Probst* (n 13) 115 MN 233.

[95] See *G Niyungeko* in *Corten/Klein* Art 49 MN 20; *Oraison* (n 5) 639–644; *Villiger* Art 49 MN 4.

[96] Final Draft, Commentary to Art 46, 244–245 para 3; see also the statement by the representative of the Philippines UNCLOT I 258.

[97] See with regard to domestic contract law *Probst* (n 13) 122 MN 249.

II. Invocation as a Ground for Invalidating Consent

If the substantive conditions set forth in Art 49 are fulfilled, fraud may be invoked by the defrauded State as invalidating its consent to be bound by the treaty. The defrauded State's consent is accordingly not *ipso facto* void but **only voidable** in accordance with the procedure set forth in Arts 65–68.[98] As a general rule, the principles governing the procedure and effect of invoking fraud as a ground for invalidating consent follow those applicable to invocation of error (see *mutatis mutandis* → Art 48 MN 39–40). In two important respects, however, the VCLT draws a distinction between the consequences of fraud and error. **33**

If an error within the meaning of Art 48 relates solely to a clause which is separable in accordance with Art 44 para 3, the error may only be invoked with respect to that clause. In contrast, if the error affecting a separable clause was caused by fraudulent conduct the defrauded State may choose whether to invalidate only the clause in question or the entire treaty (Art 44 para 4). This additional option (as to other options see *mutatis mutandis* → Art 48 MN 40) reflects the fact that fraud does not just affect the free and informed consent of the defrauded party but rather destroys the entire relationship of mutual confidence between the contracting parties (→ MN 4).[99] **34**

If the invalidity has been established under the procedure laid down in Arts 65–68, the treaty is void *ab initio* (Art 69 paras 1 and 4). Whereas in the case of error within the meaning of Art 48 the contracting parties may each require the re-establishment of the *status quo ante* with regard to acts performed in reliance on the validity of the treaty (Art 69 para 2 lit a), this right is withheld from the defrauding party if fraud is invoked as a ground for invalidating consent (Art 69 para 3). Due to the bad faith inherent in its fraudulent conduct, **the defrauding State cannot in law be held to have relied on the validity of the treaty**.[100] For the same reason, the defrauding State is not protected from the possibility of acts performed in reliance on the continuing validity of the treaty being subsequently rendered unlawful by the invalidity of the treaty (Art 69 para 2 lit a in conjunction with para 3). **35**

D. 1986 Convention

The VCLT II extends Art 49 **without substantive modification** to international organizations. The slight departure from the wording of the 1969 Vienna Convention **36**

[98] Final Draft, Commentary to Art 46, 245 para 4.

[99] In a similar vein, *G Niyungeko* in *Corten/Klein* Art 49 MN 26; *Oraison* (n 5) 656; *Reuter* 178 MN 263 ("intended to penalize the author of the fraud").

[100] Final Draft, Commentary to Art 65, 265 para 4; *Reuter* MN 263; *Villiger* Art 49 MN 6.

was not intended to be of substantive significance.[101] The principles developed with regard to Art 49 thus **apply *mutatis mutandis* to international organizations**.[102]

E. Customary International Law Status

37 Given the lack of any conclusive international practice in which fraud has been invoked to invalidate consent to be bound by a treaty (→ MN), it is difficult to argue that Art 49 reflects customary international law.[103] A good case can, however, be made for the contention that the "general concept" of fraud laid down in Art 49 as a ground for invalidating consent is an expression of a **general principle of law** within the meaning of Art 38 para 1 lit c ICJ Statute (→ MN 5).[104]

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[101] Final Draft 1982, Commentary to Art 49, 54 para 1.

[102] *Ibid; G Niyungeko* in *Corten/Klein* Art 49 VCLT II MN 3.

[103] See however *Villiger* Art 49 MN 8 ("very likely to have become declaratory of customary law").

[104] *G Niyungeko* in *Corten/Klein* Art 49 MN 5. See also *Southern Pacific Properties (Middle East) v Egypt* (dissenting opinion *El Mahdi*) 106 ILR 649, 706 (1992).

Article 50
Corruption of a representative of a State

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.

Contents

A. Purpose and Function

In recognizing corruption as an independent ground for invalidating consent to be bound by a treaty in addition to the classical trinity of error (Art 48), fraud (Art 49) and coercion (Arts 51 and 52), the ILC and the Vienna Conference took a **pioneering role**[1] in the effort of the international community to prevent and eradicate the scourge of corruption.[2] **1**

The main purpose of Art 50 is to protect the **freedom of consent** (3rd recital of the Preamble) of the contracting party whose representative has been corrupted. If the consent purportedly expressed by the representative of a State on its behalf has been procured through corruption, such consent does not reflect the 'real' will of the State since its representative, for personal gain, in reality acted in the interest of the corrupting State.[3] **2**

[1] *Jiménez de Aréchaga* [1966-I/2] YbILC 140 para 84 ("entirely novel idea of a new defect of consent"); *Tsuruoka* [1966-I/2] YbILC 145 para 45 ("the first time that an idea of that kind had been introduced as a ground of invalidity"); statement by the representative of Greece UNCLOT I 263 para 5 (the article on corruption "boldly inaugurated a new institution of international law").

[2] On the development of the international rules against corruption see *KW Abbott* Corruption, Fight Against, in MPEPIL (2010).

[3] Final Draft, Commentary to Art 47, 245 para 3; *de Luna* [1966-I/2] YbILC 142 para 6; *Yasseen* [1966-I/2] YbILC 145 para 49.

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3 In this sense, it may be said that the representative, by violating his or her fiduciary duty, loses his or her **status as a representative**.[4] However, since Art 50 renders consent procured through corruption only voidable rather than *eo ipso* void (→ MN 14), the consent expressed by the representative remains attributable to the represented State unless that State invokes the act of corruption as invalidating its consent to be bound by the treaty.

4 Although the VCLT distinguishes corruption from fraud, the legal consequences attached to both defects of consent as a sanction for the **bad faith** displayed by the defrauding or corrupting State are identical (→ MN 14).[5] As in the case of fraud (→ Art 49 MN 30), any contributory negligence, which with regard to corruption might be attributed to the selection or lack of supervision of a representative susceptible to being corrupted,[6] is outweighed by the bad faith of the corrupting State and hence irrelevant.

B. Historical Background and Negotiating History

I. Historical Background

5 Prior to the 1969 Vienna Conference, there were **no recorded precedents** of a State having invoked corruption as a ground for invalidating consent to be bound by a treaty.[7] The only instances in which the issue of corruption had been raised at the international level before 1969 concerned the nullification of arbitral awards on the basis of an arbitrator having been corrupted.[8] The principles developed in these cases are, however, of only limited precedential value in the context of the law of treaties.[9]

II. Negotiating History

6 None of the Special Rapporteurs discussed the issue of corruption in their respective drafts. It was only at a very late stage in the deliberations of the ILC, during its

[4] *Reuter* [1966-I/2] YbILC 144 para 30; *Reuter* 178; *Villiger* Art 50 MN 6.

[5] See *de Luna* [1966-I/2] YbILC 143 para 11 (fraud and corruption represent "two different forms of international bad faith").

[6] *Jiménez de Aréchaga* [1966-I/2] YbILC 141 para 86; *Castrén* [1966-I/2] YbILC 142 para 2; *Tsuruoka* [1966-I/2] YbILC 143 paras 21, 23; *Waldock* [1966-I/2] YbILC 147 para 11; statement by the representative of Austria UNCLOT I 265 para 2.

[7] *Jiménez de Aréchaga* [1966-I/2] YbILC 140 para 85; statement by the representatives of Japan and the United Kingdom UNCLOT I 259 para 10, 261 para 27; *Villiger* Art 50 MN 2; *JP Cot* in *Corten/Klein* Art 50 MN 12.

[8] As to early case law and practice, see *WM Reismann* Nullity and Revision: The Review and Enforcement of International Judgments and Awards (1971) 493–496; *JL Simpson/H Fox* International Arbitration (1959) 253.

[9] *Jiménez de Aréchaga* [1966-I/2] YbILC 140–141 para 86.

17th session in 1966, that certain Commission members pressed for the inclusion of corruption as a separate ground for invalidating consent in the Commission's draft.[10] The initial proposal tabled by the drafting committee added a paragraph to the article on the coercion of a representative of a State (Art 51), which extended the rules on coercion to the corruption of a representative.[11] Following an intense discussion[12] the Commission eventually decided to formulate a separate article, which in keeping with the article on fraud rendered consent procured through corruption only voidable rather than *eo ipso* void.[13] In addition, the new draft clarified that the act of corruption must have been effected "directly or indirectly by another negotiating State".[14]

7 At the Vienna Conference, a number of amendments introduced with a view to either modifying or deleting the proposed article on corruption[15] were withdrawn or rejected.[16] Today's Art 50 was eventually adopted by 84 votes to 2, with 14 abstentions.[17]

C. Elements of Article 50

I. Corruption of a Representative of Another State

8 Art 50 does not provide a **definition** of corruption.[18] At the heart of the notion of corruption, as it is understood today in the international community, lies the abuse of public office or entrusted power for private gain.[19] Corruption may refer to both the promising, offering or giving of an undue advantage to another party with a view to inducing the abuse of power ('active corruption') and the requesting or

[10]See the discussions in [1966-I/1] YbILC 117–119.

[11][1966-I/2] YbILC 140 para 81 (Draft Art 35 para 2).

[12]See the discussions in [1966-I/2] YbILC 140–157.

[13]See Draft Art 34 *bis* proposed by the Drafting Committee [1966-I/2] YbILC 156 para 2 and Art 47 Final Draft, which is identical to today's Art 50.

[14]See n 13. The initial reference to another "contracting State" was later substituted for "negotiating State", see [1966-I/2] YbILC 293–294.

[15]The proposed amendments are reprinted in UNCLOT III 170.

[16]UNCLOT I 265–266.

[17]UNCLOT II 90 para 60.

[18]See the statement by the representative of the United Kingdom UNCLOT I 261 para 27 ("the notion of corruption was very imprecise and difficult to define").

[19]See *eg* United Nations Global Compact, Guidance Document: Implementation of the 10th Principle (2004) 5; World Bank, Helping Countries Combat Corruption (1997) 8; Art 19 UN Convention Against Corruption, UNGA Res 58/4, 31 October 2003, UN Doc A/RES/58/4; *Villiger* Art 50 MN 3.

receiving of an advantage in return for the betrayal of trust ('passive corruption').[20] Art 50, however, primarily addresses **active corruption** of a State representative. Corruption within the meaning of Art 50 hence presupposes that a State promises, offers or gives the representative of another State an undue advantage in order to induce him or her to give consent to a treaty, which he or she would otherwise not have given.[21]

9 The **undue advantage** promised, offered or given can take many forms.[22] It may be either pecuniary or non-pecuniary. An example for the latter would be the nomination to high posts or missions.[23] The advantage must not necessarily benefit the representative of another State directly. An indirect benefit being passed to a third person or entity close to the representative is sufficient.[24]

10 The advantage must be promised, offered or given with the **intention to exercise influence** on the disposition of the representative to conclude a treaty.[25]

> Accordingly, small courtesies offered in order to maintain good relations with the other negotiating State and its representative[26] or the practice of awarding the representative with decorations as a mark of esteem at the end of important negotiations[27] do not qualify as corruption so long as they are not aimed at influencing the representative's decision to give consent to the treaty (see also → MN 13).

[20] See *eg* Art 2 of the 1999 Council of Europe Civil Law Convention on Corruption ETS 174: "For the purpose of this Convention, 'corruption' means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof." *Cf* also Art 16 UN Convention Against Corruption (n 19).

[21] Final Draft, Commentary to Art 47, 245 para 4 ("acts calculated to exercise [. . .] influence on the disposition of the representative to conclude a treaty"). See also *de Luna* [1966-I/2] YbILC 145 paras 50–51; *Jiménez de Aréchaga* [1966-I/2] YbILC 146 para 57; statement by the representative of Spain UNCLOT I 260 para 16 ("There were two essential elements in corruption: first, the existence of inducements, promises or gifts before the expression of consent and, secondly, the existence of a relationship between those inducements, promises or gifts and the result sought, namely to divert the representatives's will in a direction advantageuous to the corrupter.").

[22] Final Draft 1982, Commentary to Art 50, 54 para 2; *Jiménez de Aréchaga* [1966-I/2] YbILC 141 para 87 ("Corruption would naturally cover bribery, but there were many other ways of obtaining the goodwill of a representative"); *Tsuruoka* [1966-I/2] YbILC 143 para 21 ("Corruption took various forms – a gift of money, the promise of a lucrative position, and other tempting offers").

[23] ILC Final Draft 1982, Commentary to Art 50, 54 para 2; *Tsuruoka* [1966-I/2] YbILC 143 para 21; *Briggs* [1966-I/2] YbILC 145 para 42 ("an offer of support, say, in an election to a United Nations organ").

[24] See Art 16 UN Convention Against Corruption (n 19); *Villiger* Art 50 MN 3.

[25] Final Draft, Commentary to Art 47, 245 para 4; *Tsuruoka* [1966-I/2] YbILC 156 para 10 ("intention of corrupting").

[26] *Tsuruoka* [1966-I/2] YbILC 156 para 10; *Elias* 166; *Villiger* Art 50 MN 4.

[27] See the statement by the representative of Spain UNCLOT I 257 para 57; *Cot* (n 7) Art 50 MN 14.

II. Directly or Indirectly by Another Negotiating State

Only corruption effected **directly or indirectly by another negotiating State** (Art 2 para 1 lit e; → Art 2 MN 46) may be invoked as invalidating the consent to be bound by a treaty. Accordingly, it is not sufficient to show that the representative of a State has been corrupted. Rather, it must be established that the act of corruption was **imputable** to another negotiating State.[28] With regard to the question of attribution, the general rules on State responsibility[29] apply *mutatis mutandis*.[30] The act of corruption may hence either be committed **directly** by organs or representatives of the State or **indirectly** by other (natural or legal) persons under that State's direction or control.[31] **11**

III. Procurement of the Expression of Consent Through Corruption

The expression of a State's consent (→ Art 11) must have been procured through corruption of its representative. There must therefore be a sufficient **causal relationship** between the act of corruption and the expression of consent.[32] Corruption must have induced consent to the treaty. This is the case if it can be established that consent to the treaty would not have been given had the representative not been corrupted by the other negotiating State.[33] However, the act of corruption need not necessarily affect an essential or material aspect of the treaty in order to vitiate the consent given by the representative.[34] **12**

The act of corruption must have been **substantial or of a certain gravity** in order to justify the assumption that it induced the expression of consent to the treaty.[35] Thus, as a general rule, a small courtesy or favour extended to the representative in connection with the conclusion of a treaty will not qualify as corruption within the meaning of Art 50 (see also → MN 10).[36] **13**

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[28]Final Draft, Commentary to Art 47, 245 para 5.

[29]See Arts 4–11, 16–18 ILC Draft Articles on State Responsibility, UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83.

[30]*Reuter* 178–179; *Sinclair* 175–176.

[31]See *Waldock* [1966-I/2] YbILC 156 para 4 ("the phrase 'through corruption of its representative directly or indirectly by another contracting State' was intended to cover all the possible circumstances in which a State could invoke corruption as a ground of invalidity.").

[32]*Reuter* [1966-I/2] YbILC 144 para 32.

[33]*Jiménez de Aréchaga* [1966-I/2] YbILC 141 para 87; *Reuter* [1966-I/2] YbILC 144 para 32; *Ago* [1966-I/2] YbILC 156 para 12. See however *Villiger* Art 50 MN 6 ("Given the seriousness of corruption and contrary to error or fraud it appears irrelevant whether or not the State representative would anyway have consented to the treaty even in the absence of corruption").

[34]*Reuter* 178 MN 265. See also *mutatis mutandis* → Art 49 MN 24.

[35]Final Draft, Commentary to Art 47, 245 para 4; *Cot* (n 7) Art 50 MN 16.

[36]Final Draft, Commentary to Art 47, 245 para 4; *Ago* [1966-I/2] YbILC 156 para 11.

The requirement that the act of corruption must have reached a certain gravity may simply be regarded as a consequence of the *conditio sine qua non* test employed to establish the necessary causal relationship between corruption and consent (→ MN 12).[37] The ILC, however, by using the "strong term 'corruption'", appears to have intended to establish a higher threshold.[38] According to the ILC's commentary only acts having exercised a "substantial influence" on the will of the representative of a State qualify as corruption.[39] The stated motivation behind the introduction of this additional substantive requirement was the concern that a State might otherwise use small courtesies extended to its representative by another negotiating State "as a pretext" for reneging on its treaty commitments.[40]

IV. Invocation as a Ground for Invalidating Consent

14 If the substantive conditions set forth in Art 50 are met, the State whose representative has been corrupted may invoke such corruption as invalidating its consent to be bound by the treaty. The rules governing the procedure and the effect of invoking corruption as a ground for vitiating consent are identical to those applicable to fraud (see *mutatis mutandis* → Art 49 MN 33–35).

D. 1986 Convention

15 The VCLT II extends Art 50 without substantive modifications to international organizations both as perpetrators and victims of corruption. As in the case of Art 49 (→ Art 49 MN 36), the slight linguistic readjustment made in Art 50 VCLT II was not intended to modify its contents as compared to its counterpart in the 1969 Convention.[41] The principles developed with regard to States therefore apply *mutatis mutandis* to international organizations.[42]

The ILC initially considered referring to the "communication" rather than the "expression" of consent with regard to international organizations because it was thought that the representative of an international organization, as a general rule, merely transmitted consent previously established within the collective organ representing the governments of the Member States.[43] As with regard to Arts 7 and 47 (→ Art 7 MN 9–13 ,

[37] *Reuter* 178; *Cot* (n 7) Art 50 MN 16.

[38] Final Draft, Commentary to Art 47, 245 para 4.

[39] *Ibid*.

[40] *Ibid*. See also *Ago* [1966-I/2] YbILC 156 para 11.

[41] See the statement by the Chairman of the Drafting Committee, *Sucharitkul* [1982-I] YbILC 265 para 55 stating that the intention of the Drafting Committee was to make Art 50 "clearer and more precise" by wording it "affirmatively instead of conditionally".

[42] Final Draft 1982, Commentary to Art 50, 54 para 1; *JP Cot* in *Corten/Klein* Art 50 VCLT II MN 1–4.

[43] *Reuter* VIII 138; *Ushakov* [1979-I] YbILC 126–127 paras 30–31.

Art 47 MN 34) the later decision to abandon this terminological distinction was made on the understanding that the term "to express" consent in relation to international organizations did not prejudice the question of whether the representative or another person or entity within the international organization established that consent legally.

E. Customary International Law Status

16 The ILC and the two Vienna Conferences took an innovative step in recognizing corruption as a separate ground for vitiating consent to be bound by a treaty (→ MN 6–7). Given that no case has arisen since 1969 in which the invalidity of a treaty was claimed on the basis of corruption it is difficult to argue that a customary rule corresponding to Art 50 has already emerged.[44]

17 However, since the early 1990s corruption has been comprehensively outlawed both at the national and international level.[45] The prevention and eradication of corruption has been recognized as the responsibility of the entire international community.[46] In this sense, the vitiating effect of corruption on the consent to be bound by a treaty may today be regarded as constituting a specific expression of a general principle of law.[47]

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[44]See however *Cot* (n 7) Art 50 MN 12; *Villiger* Art 50 MN 10 who both consider Art 50 to have crystallized into customary international law.

[45]See n 2.

[46]See Preamble para 10 UN Convention Against Corruption (n 19) ("the prevention and eradication of corruption is a responsibility of all States").

[47]See the statement by the representative of Jamaica UNCLOT I 265 para 23 (the invalidating effect of corruption is "generally recognized by civilized nations as a principle of law"). See also *Southern Pacific Properties (Middle East) v Egypt* (dissenting opinion *El Mahdi*) 106 ILR 649, 706 (1992).

Article 51
Coercion of a representative of a State

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.

Contents

A. Purpose and Function

In denying legal effect to consent procured by coercion of the representative of a State Art 51 primarily protects the **freedom of consent** (3rd recital of the Preamble) of the represented State.[1] By virtue of the coercion directed against the representative, he or she effectively becomes an instrument of the coercing State and therefore ceases to express the real will of the purportedly represented State.[2] **1**

The vitiating effect of coercion reflects a long-standing **general principle of law**.[3] Art 51 thus completes the classical trinity of error (Art 48), fraud (Art 49) and coercion, which is recognized as invalidating consent in all domestic systems of contract law. **2**

In international law, however, a distinction is traditionally drawn between **coercion of the representative of a State** and **coercion of the State itself** (Art 52). Coercion directed against the State itself has long been considered to leave the validity of consent unaffected (→ Art 52 MN 7–9). Although this **3**

[1] *Cf* Harvard Draft 1149–1150 (commentary to Art 32); *Villiger* Art 51 MN 1.

[2] *G Distefano* in *Corten/Klein* Art 51 MN 9; *Reuter* [1966-I/2] YbILC 144 para 30; *Reuter* 179–180; *Villiger* Art 51 MN 1.

[3] See Harvard Draft 1149–1150; *T Probst* Coercion, in *A von Mehren* (ed) International Encyclopedia of Comparative Law Vol VII (1981) 172–254; *K Zweigert/H Kötz* An Introduction to Comparative Law (3rd edn 1998) 424–428.

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position has become untenable since the use of force was categorically outlawed by Art 2 para 4 UN Charter, the VCLT continues to treat the coercion of the representative on the one hand (Art 51) and of the State itself on the other (Art 52) as conceptually different categories.[4]

4 Art 51 constitutes the dividing line between the grounds for invalidity which render consent to be bound merely voidable (Arts 46–50) and those which the VCLT declares *ipso facto* void (Arts 51–53). In treating consent procured by coercion of the representative as automatically and absolutely void (→ MN 27), Art 51 reaches beyond the aim of simply protecting the freedom of the represented State. Coercion under Art 51 is considered "a matter of such gravity"[5] that it touches upon the "international public order"[6] and must hence be sanctioned *erga omnes*[7] by absolute nullity,[8] even though, unlike Art 52, the coercive act or threat must not necessarily have amounted to a violation of Art 2 para 4 UN Charter (→ MN 13–24).

B. Historical Background and Negotiating History

I. Historical Background

5 Relying on general principles of contract law, **legal doctrine** has long assumed that coercion, if directed against the representative of a State rather than the State itself, invalidates the represented State's consent to be bound by a treaty.[9] Early cases discussed by writers related to the acceptance of treaties extorted from the head of State while being held as a prisoner.[10] The classical case concerned the conclusion of the **1526 Treaty of Madrid** between *Francis I* of France and the German Emperor *Charles V*. When assenting to the treaty, *Francis* had been held captive by *Charles* for almost a year.[11] Before signing the treaty, *Francis I* made a "secret declaration" in front of witnesses in which he pronounced the treaty null and void

[4] Final Draft, Commentary to Art 48, 246 para 1.

[5] *Ibid* 246 para 3.

[6] *Cf Waldock* [1963-I] YbILC 51 para 60. See also *Yasseen* and *Amado* [1966-I/1] YbILC 22 para 60, 24 para 80; see also the statements by the representatives of the USSR, the Ukrainian SSR and Poland UNCLOT I 267 para 52, 269 paras 7, 10; *Reuter* 180 MN 268 ("coercion does not simply affect relations between the parties concerned but also between all the other States or [. . .] the international community as a whole"); *G Ténékidès* Les effets de la contrainte sur les traités à la lumière de la Convention de Vienne du 23 mai 1969 (1974) AFDI 79, 86 ("l'acte de contrainte lèse la société internationale dans son ensemble").

[7] *Cf Ago* [1963-I] YbILC 312 para 57.

[8] Final Draft, Commentary to Art 48, 246 para 3.

[9] See with further references the overview in Harvard Draft 1150–1151, 1156–1157 (commentary to Art 32); *I Tomšič* La reconstruction du droit international en matière des traités: Essai sur le problème des vices du consentement dans la conclusion des traités internationaux (1931) 36–48.

[10] *Cf* Harvard Draft 1156 (commentary to Art 32); *G Wenner* Willensmängel im Völkerrecht (1940) 125–143.

[11] As to the facts see *Wenner* (n 10) 126–128.

because it had been forced upon him against his will.[12] Initially, it was disputed amongst writers whether consent given under such circumstances could be considered valid.[13] ***Grotius***, however, argued forcefully that a king who derived his authority from the people could not validly conclude a treaty while in captivity: "It is, in fact not credible that sovereignty was conferred by a people on such terms that it could be exercised by one who is not free."[14] In a similar vein, ***Vattel*** maintained that while being imprisoned a king could not be regarded as representing the State, since "he is under the disability of a minor, or of one who is insane".[15]

Later cases in which the validity of a treaty was challenged on the basis of coercion directed against the head of State or members of the government include the **1807 Treaty of Bayonne** in which *Napoleon Bonaparte* forced *Ferdinand VII* of Spain to renounce his crown under the threat of otherwise trying him for treason[16]; the **treaty concluded between France and Holland on 16 March 1810** which *Louis Napoleon* assented to while being detained against his will in Paris by his brother *Napoleon Bonaparte*[17]; and the **1905 Japan–Korea Protectorate Treaty,** which was signed in the presence of armed Japanese soldiers by the Korean government in Seoul.[18] 6

An example of coercion employed against the ratifying authorities is provided by the **surrounding of the Diet of Poland in 1773 by Russian troops** in order to coerce its members to assent to the first treaty of partition.[19] In a similar fashion, US military forces employed **pressure against the National Assembly of Haiti in 1915** with a view to securing its assent to a treaty proposed by the US government.[20] 7

In more recent times, the most notorious case of coercion directed against State representatives concerned the **Treaty of 15 March 1939 between the German** 8

[12]See *ibid* 127.

[13]*Cf* with further references Harvard Draft 1156–1157 (commentary to Art 32); *Tomšič* (n 9) 36–44; *Wenner* (n 10) 130–139.

[14]*H Grotius* De jure belli ac pacis (1646) book III ch XX § III no 1 (*FW Kelsey* translation (1925) 805).

[15]*E Vattel* Le droit des gens (1758) book IV ch II § 13 (*CG Fenwick* translation (1916) 348).

[16]As to the facts, see *Wenner* (n 10) 185–187. See also Harvard Draft 1155–1156 (commentary to Art 32); *Tomšič* (n 9) 39.

[17]*Cf* Harvard Draft 1156 (commentary to Art 32). In a proclamation to the people of Holland *Louis Napoleon* maintained: "The treaty of the 16th March 1810 [. . .] was accepted by compulsion, and ratified, conditionally, by me in Paris, where I was detained against my will" (reprinted in *LAF de Bourrienne* Memoirs of Napoleon Bonaparte Vol III (1836) 80–81).

[18]See Harvard Draft 1157 (commentary to Art 32); *Tomšič* (n 9) 57; *Wenner* (n 10) 193–194. The Korean Emperor in a declaration published at the time denied the validity of the agreement: "I, the Emperor of the Korean Empire, declare that this Korea–Japan Agreement has no legal effect because it was concluded unlawfully by force." (reprinted in *Kim Young-Koo* The Validity of Some Coerced Treaties in the Early 20th Century: A Reconsideration of the Japanese Annexation of Korea in Legal Perspective (2002) 33 Korea Observer 637).

[19]See Harvard Draft 1157 (commentary to Art 32); *Tomšič* (n 9) 53; *Wenner* (n 10) 188–190.

[20]Harvard Draft 1157–1158 (commentary to Art 32); *Wenner* (n 10) 195–200.

Reich and Czechoslovakia establishing the 'Protectorate of Bohemia and Moravia'.[21] Under circumstances which appeared to be a mixture of personal pressure and threats against the State itself,[22] the Czechoslovak President *Hácha* and Foreign Minister *Chvalkovský*, after having been summoned to Berlin by the *Hitler* regime, were compelled to agree to the cession of control over Czechoslovakia.

9 By the twentieth century, there was general agreement amongst writers that coercion of the representative rendered the represented State's consent to be bound by the treaty voidable or void.[23] **After World War II,** the focus shifted, however, to the vitiating effect of coercion directed against the State itself (→ Art 52). In the wake of the comprehensive ban of the threat or use of force in international relations by Art 2 para 4 UN Charter, it became generally recognized that military force employed against the State itself invalidated consent to be bound by a treaty (→ Art 52 MN 9). Personal coercion of the representative as a ground for vitiating consent has since lost much of its practical significance because the threat or use of military force against the State can now be addressed directly rather than having to be dressed up as coercion against the representative.[24] From a practical point of view, the rule set forth in Art 51 has therefore today largely assumed a **residual function** covering cases of coercion of the representative, which are not accompanied by or which in themselves do not amount to the threat or use of force against the State itself.[25]

II. Negotiating History

10 **SR *Waldock*** proposed two separate provisions dealing with personal coercion of the State representative on the one hand[26] and coercion of the State on the other.[27] In keeping with his draft article on fraud,[28] he vested the affected State with the right to chose whether to invoke the invalidity of consent or to approve the treaty. The majority within the ILC, however, considered coercion a defect of such gravity that it should engender the automatic and absolute nullity of consent.[29] In this sense, the **1963 draft** introduced the formula of today's Art 51 according to which the

[21] Final Draft, Commentary to Art 48, 246 para 1.

[22] *Ibid*. See also → MN 23.

[23] See Harvard Draft 1151 (commentary to Art 32); Final Draft, Commentary to Art 48, 246 para 1.

[24] *Waldock* [1966-I/1] YbILC 27 paras 29, 36.

[25] *Ibid* 27 para 36.

[26] *Waldock* II 50 (Draft Art 11). As to earlier drafts that inspired *Waldock*'s proposal, see Harvard Draft 1151 (Art 32); *Fitzmaurice* III 26 (Draft Art 14).

[27] *Waldock* II 50–51 (Draft Art 12).

[28] *Ibid* 47 (Draft Art 7).

[29] See the discussions in [1963-I] YbILC 46–51, 211, 290–291, 311–312, 317.

expression of consent procured by coercion of the representative "shall be without any legal effect".[30]

Following suggestions made by a number of **governments in their comments** on the ILC's provisional draft,[31] SR *Waldock* submitted a new proposal which would have merely granted the State concerned the right to invoke the coercion as invalidating consent.[32] The majority within the Commission insisted, however, that coercion constituted such a serious violation of international public order that it had to be sanctioned by absolute nullity.[33] The ILC in its **final draft** therefore reverted to the 1963 formula denying "any legal effect" to the expression of consent.[34] **11**

At the **Vienna Conference,** a final attempt was made to switch back to the concept of relative nullity. Following a controversial debate amongst the delegates,[35] all proposals tabled with a view to rendering the expression of consent voidable instead of *ipso facto* and absolutely void[36] were, however, rejected.[37] Subject to slight linguistic adjustments[38] the Vienna Conference eventually adopted the ILC draft by 93 votes to none, with four abstentions.[39] **12**

C. Elements of Article 51

I. Coercion of a Representative of a State

Art 51 does not contain a comprehensive definition of coercion.[40] However, in the light of the structure of Art 51 and of general principles of law[41] coercion may be **13**

[30]ILC 1963 Draft [1963-II] YbILC 194 (Art 35 para 1): "If individual representatives of a State are coerced, by acts or threats directed against them in their personal capacities, into expressing the consent of the State to be bound by a treaty, such expression of consent shall be without legal effect." Draft Art 35 para 2 concerned the issue of separability which is today dealt with in Art 44 para 5 VCLT.

[31]See *Waldock* V 14–15.

[32]*Ibid* 15.

[33]See the discussions in [1966-I/1] YbILC 21–28, 117–119; [1966-I/2] YbILC 308.

[34]Art 48 Final Draft: "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 personally shall be without any legal effect."

[35]See UNCLOT I 266–269.

[36]See the amendments submitted by Australia (UN Doc A/CONF.39/C.1/L.284), France (UN Doc A/CONF.39/C.1/L.300) and the United States (UN Doc A/CONF.39/C.1/L.277), reprinted in UNCLOT III 171.

[37]UNCLOT I 269.

[38]Following a proposal made by the Austrian delegation, the Vienna Conference decided to delete the word "personally", UNCLOT II 90 paras 63–64 (→ MN 19).

[39]UNCLOT II 90 para 64.

[40]See *Dubai–Sharjah Border Arbitration* 91 ILR 543, 569 (1981): "There is still a measure of uncertainty, of course, over the definition and content of 'coercion'".

[41]*Cf Probst* (n 3) 186–187.

defined as the procurement of consent through acts or threats, which induce such fear in the representative, that he or she feels compelled to express the represented State's consent to be bound by the treaty in a manner which he or she would not have done without such compulsion.[42]

1. Means of Coercion: Acts or Threats

14 Art 51 describes the means of coercion as "**acts or threats**" directed at the representative. By extending the notion of coercion to "acts" directed against the representative, Art 51 encompasses cases in which the expression of consent is procured by the actual exercise of physical force against the representative rather than its mere threat. This raises the question as to what extent *vis absoluta* is covered by Art 51.[43]

> *Vis absoluta* (physical coercion) leaves the coerced representative with no choice but to express consent while *vis compulsiva* (mental or moral coercion) undermines the representative's autonomy by giving him or her the choice between enduring the threatened act of coercion on the one hand and betraying his or her fiduciary duty towards the represented State by expressing consent on the other.[44] However, very few cases of applied acts of physical force will involve genuine instances of *vis absoluta*.[45] This would for instance be the case if the hand of the representative were lead against his or her will when signing a treaty[46] or if the representative were induced to express consent under the influence of brainwashing[47] or of drugs administered to him or her.[48] In most cases of physical violence consent is procured by *vis compulsiva* since it is the implied threat and concomitant fear of continued violence which motivates the representative to succumb to the will of the coercing party rather than to endure further pain or discomfort.[49]

15 Some authors, drawing on analogies to domestic contract law, maintain that ***vis absoluta*** is not covered by the notion of coercion in Art 51 since it renders consent *a priori* inexistent.[50] However, neither the wording of Art 51 nor the *travaux préparatoires* contain any indication to the effect that consent procured by *vis absoluta* is excluded from its ambit.[51] Since in the interest of the stability of treaties, consent may only be impeached on the basis of the grounds specified in the VCLT

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[42] See Harvard Draft 1151 ("physical or mental coercion applied directly against [State representatives] for the purpose of compelling them under fear of injury to accept a treaty, when they would not do so in the absence of such compulsion)".

[43] *G Distefano* in *Corten/Klein* Art 51 MN 31–33.

[44] See *ibid* MN 31; *Probst* (n 3) 176–177; *Wenner* (n 10) 119–122.

[45] *Probst* (n 3) 176–177.

[46] *Wenner* (n 10) 121.

[47] *Fitzmaurice* III 38 para 58.

[48] *Waldock* [1966-I/1] YbILC 27 para 30.

[49] *Probst* (n 3) 175, 176–177.

[50] See *Lauterpacht* I 150 para 8; *G Distefano* in *Corten/Klein* Art 51 MN 32–33; *G Napoletano* Violenza e trattati nel diritto internazionale (1977) 39–44.

[51] *Contra: G Distefano* in *Corten/Klein* Art 51 MN 32; *Napoletano* (n 50) 39–40.

(Art 42), any allegation of consent having been vitiated by coercion, be it through physical or moral coercion, must be based on Art 51 and follow the procedure set forth in Arts 65–68.

Acts or threats amounting to coercion within the meaning of Art 51 are **not limited to physical means**.[52] The applied or threatened act of coercion must therefore not necessarily affect the physical sphere of the representative. Coercion also includes blackmail aimed at the reputation of the representative,[53] such as the threat to ruin the representative's career by disclosing certain information about him or her.[54] **16**

Any forms of pressure other than *vis compulsiva* (→ MN 14–15), which do not involve the inducement of fear (→ MN 13–14, 26), such as **argument**, **entreaty**, **advice** and **persuasion,** do not qualify as coercion.[55] **17**

> In the *Dubai-Sharjah Border Arbitration* the arbitral tribunal in considering whether the treaty at issue was invalid on the basis of coercion directed against the Ruler of Dubai emphasized that **a certain degree of pressure** brought upon the negotiators is **inherent in the process of negotiations**: "Of course, this does not mean that some pressure may not have been brought to bear upon the Rulers in order to secure their consent to the delimitations of the boundaries. Every kind of international negotiation is subject to influences of this kind. Mere influences and pressures cannot be equated with the concept of coercion as it is known in international law."[56]

2. Object of Coercion: Directed Against the Representative Expressing Consent to Be Bound by a Treaty

Art 51 only addresses coercion affecting the **representative expressing consent to be bound by a treaty** (→ Art 11). If a signature is subject to later ratification (→ Art 14), it is accordingly the act of ratification which must have been procured by coercion. Coercion employed against the representative at the prior stage of signing the treaty would only be relevant under Art 51 if it persisted and were subsequently also directed against the representatives charged with ratifying the treaty.[57] **18**

[52]Final Draft, Commentary to Art 48, 246 para 2 ("*any* form or constraint of or threat against a representative", emphasis added). See also Art 11 para 1 of SR *Waldock*'s first draft which explicitly referred to "physical or mental" coercion in order "to underline that coercion is not confined to acts or threats of physical force", *Waldock* II 50 para 3.

[53]*Waldock* [1966-I/1] YbILC 27 para 30.

[54]Final Draft, Commentary to Art 48, 246 para 2; *Waldock* [1963-I] YbILC 51 para 58; *Villiger* Art 51 MN 3.

[55]*Fitzmaurice* III 26 (Draft Art 14 para 3); Harvard Draft 1151 (commentary to Art 32).

[56]*Dubai–Sharjah Border* (n 40) 571.

[57]*Waldock* [1966-I/1] YbILC 27 para 35; *G Distefano* in *Corten/Klein* Art 51 MN 26–27; *Villiger* Art 51 MN 7.

SR *Waldock* had proposed a draft article specifically addressing the procurement of a "signature" by coercion with a view to covering cases in which a State would subsequently ratify in good faith only to discover later that coercion had taken place at an earlier stage.[58] The majority within the ILC, however, insisted that only coercion relating to the expression of consent to be bound by the treaty should be covered by the article.[59]

19 The coercive act or threat must be directed against the **representative in his or her private capacity** rather than his or her official function as an agent or organ of his or her State.[60] Any form of constraint directed at the representative in his or her official capacity would be attributable to the represented State and hence be covered by Art 52 (→ Art 52 MN 5).[61]

The final draft article proposed by the ILC explicitly stated that the coercive acts or threats must be directed against the representative "personally". The Vienna Conference, following a proposal made by the Austrian delegation,[62] decided to delete the word "personally".[63] This modification of the ILC draft was, however, not intended to broaden the ambit of Art 51 so as to include coercion against the representative in his official capacity but was rather meant to ensure that vicarious forms of constraint against the representative's next-of-kin (→ MN 21) would not be excluded.[64]

20 Coercion is directed against the representative in his or her private capacity if the act or threat of constraint **affects the representative's personal sphere**, such as his or her life, physical well-being or reputation.[65] The nature of the action extorted from the representative is irrelevant in this context since the ultimate aim of the coercion, namely to compel the representative to express consent on behalf of his or her State, can only be achieved if the representative acts in his or her official function.[66]

21 The coercive acts or threats must not necessarily affect the representative directly. Coercion primarily **affecting individuals close to the representative** (in particular family members and dependents) is also covered by Art 51 to the extent that such coercion exerts a compelling effect on the representative, which is comparable to that of acts and threats against his or her own person.[67]

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[58] *Waldock* V 15.

[59] See in particular *Briggs* [1966-I/1] YbILC 22 paras 56–58; *Yasseen* [1966-I/1] YbILC 22 para 61; *Ago* [1966-I/1] YbILC 23 paras 65–66; *Tunkin* [1966-I/1] YbILC 23 para 71; *Rosenne* [1966-I/1] YbILC 24 para 86.

[60] Final Draft, Commentary to Art 48, 246 paras 1–2; *G Distefano* in *Corten/Klein* Art 51 MN 29; *Villiger* Art 51 MN 5.

[61] *Villiger* Art 51 MN 3.

[62] UNCLOT II 90 para 63.

[63] *Ibid* 90 para 64.

[64] *Ibid* 90 para 63.

[65] *G Distefano* in *Corten/Klein* Art 51 MN 30.

[66] As to the question whether under the influence of coercion the representative can still be considered to express the will of the represented State, see → MN 1 with further references.

[67] Final Draft, Commentary to Art 48, 246 para 2; *Waldock* II 50 para 3; *Fitzmaurice* III 26 (Draft Art 14 para 2).

However, the **vicarious effect of coercion of the State itself** on its representative is not covered by Art 51.[68] The VCLT draws a clear distinction between coercion of the representative (Art 51) and coercion of the State (Art 52). In the latter case, coercion only invalidates consent to be bound by a treaty if it amounts to a violation of the prohibition of the use of force within the meaning of Art 2 para 4 UN Charter. The indirect effect that coercive acts or threats directed against the State will invariably have on a State representative may not be relied on in order to circumvent the limitations imposed by Art 52 on the recognition of coercion of the State as a ground for invalidating consent to be bound by a treaty. Hence, if the consequences of coercing the State itself affect its representative in the same way as any other citizen of that State (*eg* if the occupation or bombardment of the State's territory is threatened[69]), such coercion is with regard to the State representative but a reflex and therefore not directed against him or her in his or her personal capacity.[70] **22**

The **two forms of coercion** provided for in the VCLT **may**, however, **coincide**.[71] A pertinent example would be coercive acts or threat against the State tailored in such a manner as to specifically induce the representative's fear for his or her (or his or her direct next-of-kin's) personal life or well-being (*eg* the threat of a bombardment particularly targeting the representative's family home). **23**

The circumstances of the conclusion of the Treaty of 15 March 1939 between the German Reich and Czechoslovakia establishing the 'Protectorate of Bohemia and Moravia' (→ MN 8) provide a good illustration of a combination of coercion against the State itself and its representatives.[72] According to the account of the events leading up to the treaty in the judgment of the Nuremberg Tribunal against the German major war criminals it was mainly the explicit threat of the destruction of Czechoslovakia by the impending German invasion which induced President *Hácha* and Foreign Minister *Chvalkovský* to sign the treaty.[73] These threats would by today's standards fall exclusively within the ambit of Art 52. Other accounts suggest, however, that *Hácha* and *Chvalkovský* "had been locked

[68]See *Waldock* II 50 para 3; *Fitzmaurice* III 26 (Draft Art 14 para 4 cl 2), 38 para 61; Harvard Draft 1152, 1154 (commentary to Art 32); *G Distefano* in *Corten/Klein* Art 51 MN 29.

[69]See *Bartoš* [1966-I/1] YbILC 27 para 40; *contra*: *Paredes* [1963-I] YbILC 27 para 40.

[70]See references in n 68.

[71]Final Draft, Commentary to Art 48, 246 para 1.

[72]*Ibid*.

[73]International Military Tribunal *Trial of German Major War Criminals*, 1 October 1946, in The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part 22 (22 August–1 October 1946) 429: "The proposal was made to Hacha that if he would sign an agreement consenting to the incorporation of the Czech people in the German Reich at once, Bohemia and Moravia would be saved from destruction. He was informed that German troops had already received orders to march and that any resistance would be broken with physical force. The Defendant Goering added the threat that he would destroy Prague completely from the air. Faced by this dreadful alternative, Hacha and his Foreign Minister put their signatures to the necessary agreement at 4:30 in the morning".

up without food and subjected to constant threats until they signed".[74] The confinement and the deprivation of food would have qualified as coercion directed against the State representatives within the meaning of Art 51.

3. Source of Coercion

24 As opposed to the preceding articles on fraud and corruption (Arts 49–50), Art 51 does not specify the source from which the coercive act or threat must originate. It is therefore immaterial whether coercion was employed by another negotiating State or whether it was employed by a third party, be it a State, an international organization or a private entity.[75] This indifference finds its explanation in the fact that coercion is not only considered to affect the relationship between the negotiating or contracting parties but is at the same time considered to touch upon the international *ordre public* (→ MN 4).[76] Consent procured by coercion, regardless of its origin, must accordingly be denied any legal effect.

A proposal tabled by the United States at the Vienna Conference which would have restricted the ambit of today's Art 51 to coercive acts or threats "by another negotiating State"[77] was rejected.[78]

II. Procurement of Expression of Consent Through Coercion

25 The expression of the State's consent must have been procured through coercion of its representative. Accordingly, there must have been a **causal link** between the coercive act or threat and the consent expressed.[79] It must be established that

[74] *Waldock* [1966-I/2] YbILC 308 para 22. See also the report of 17 March 1939 to the French Ministry of Affairs by French Ambassador *Coulondre*, reprinted in The French Yellow Book: Diplomatic Documents 1938–1939 (1949) No 77: "The German ministers were pitiless. They literally hunted Dr. Hacha and M. Chvalkovsky round the table on which the documents were lying, thrusting them continually before them, pushing pens into their hands, incessantly repeating that if they continued in their refusal, half Prague would lie in ruins from aerial bombardment within two hours, and that this would be only the beginning. [. . .] President Hacha was in such a state of exhaustion that he more than once needed medical attention [. . .]".

[75] *Jiménez de Aréchaga* [1966-I/2] YbILC 141 para 90; Briggs (USA) UNCLOT I 267 para 44; *G Distefano* in *Corten/Klein* Art 51 MN 34; *Reuter* 180; *Ténékidès* (n 6) 86; *Villiger* Art 51 MN 7.

[76] *Reuter* 180 MN 269; *Ténékidès* (n 6) 86.

[77] UN Doc A/CONF.39/C.1/L.277, reprinted in UNCLOT III 171.

[78] UNCLOT I 269 para 15.

[79] Harvard Draft 1151 (commentary to Art 32); *G Distefano* in *Corten/Klein* Art 51 MN 30; *HG de Jong* Coercion in the Conclusion of Treaties: A Consideration of Articles 51 and 52 of the Convention on the Law of Treaties (1984) 15 NYIL 209, 226; *Villiger* Art 51 MN 7.

the representative would not have expressed consent in the absence of coercion.[80] The coercion must, however, not necessarily have been the only cause.[81]

In the case of consent having been procured by a threat (*vis compulsiva*; → MN 14), a **double causal relationship** is required: first, the threat must have caused the representative's fear of an imminent evil, which, secondly, must have induced the representative to express consent.[82] Hence, apart from *vis absoluta* (→ MN 14–15), forms of pressure which do not cause fear (→ MN 17) cannot vitiate consent under Art 51. **26**

III. Expression of Consent Shall Be Without Any Legal Effect

According to Art 51, the expression of a State's consent procured by the coercion of its representative is without any legal effect. Despite the consent expressed thus being declared *ispo facto* and absolutely void,[83] its invalidity **must be invoked in accordance with the procedure of Arts 65–68**. However, whereas the grounds for invalidity set forth in Arts 48–50 may only be relied on by the State directly affected by the defect in its consent, **any party to the treaty** (Art 65 para 1 in conjunction with Art 2 para 1 lit g) may invoke the nullity of consent on the basis of Art 51. This reflects the fact that sanctioning coercion is not only considered to be in the interest of the represented State but also in the "public interest" of all other parties to the treaty, if not of the "international community as a whole" (→ MN 4).[84] The **coercing State** may not invoke the invalidity of the other party's consent. Although this is not explicitly stated in the VCLT, it follows from the general principle *ex turpi causa non oritur ius*.[85] **27**

According to Art 44 paras 2 and 5 the invalidity of consent may only be invoked **with regard to the whole treaty** even if the coercion of the representative only related to particular clauses of the treaty. **28**

Due to its 'absolute' nature, the invalidity of consent **cannot be remedied** by express affirmation of the treaty or by virtue of acquiescence (see Art 45, which only applies to the grounds for vitiating consent set forth in Arts 46–50). If the State whose representative has been coerced into expressing consent on its behalf wishes to uphold the substance of the treaty, it may do so only by way of concluding a new agreement.[86] **29**

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[80] *Yasseen* [1963-I] YbILC 50 para 45; Harvard Draft 1151 (commentary to Art 32).

[81] *G Distefano* in *Corten/Klein* Art 51 MN 30. See with regard to general principles of contract law *Probst* (n 3) 222.

[82] See *mutatis mutandis Probst* (n 3) 222.

[83] Final Draft, Commentary to Art 48, 246 para 3.

[84] *Reuter* 180.

[85] See the statement by the representative of the Ukrainian SSR UNCLOT I 269 para 8; *Sinclair* 176; *Villiger* Art 51 MN 9.

[86] *Yasseen* [1966-I/1] YbILC 22 para 62; *G Distefano* in *Corten/Klein* Art 51 MN 44; *Reuter* 180; *Villiger* Art 51 MN 10.

30 The **special protection granted to parties having relied *bona fide* on the validity of the treaty** (Art 69 para 2) does not apply to the coercing State due to the bad faith inherent in the act of coercion (Art 69 para 3).[87]

D. 1986 Convention

31 The slight modifications made in the wording Art 51 VCLT II as compared to its counterpart in the 1969 Convention were not intended to introduce any substantive changes. The principles developed with regard to States therefore apply *mutatis mutandis* to international organizations.[88]

> Within the ILC it was doubted as to whether it was accurate to refer to the "expression" of consent with regard to the representative of an international organization. Many Commission members assumed that the representative of an international organization, as a general rule, merely "communicated" consent previously established within the collective organ representing the governments of the Member States (→ Art 47 MN 34, Art 50 MN 15). In order to avoid this terminological difficulty the ILC in its Final Draft adopted the formulation of today's Art 51 VCLT II according to which the expression of consent is attributed to the State or the international organization rather than the respective representative ("expression *by a State* or an international organization of consent").[89]

E. Customary International Law Status

32 State practice prior to the adoption of the VCLT (→ MN 5–9) and the broad support received at the two Vienna Conferences[90] suggest that the rule formulated in Art 51 can be considered today a reflection of customary international law.[91] However, the absolute nullity of consent (→ MN 27) constituted a progressive development of international law at the time of the 1968–1969 Vienna Conference, which has yet to be backed up by concomitant practice.[92]

> In the *Dubai-Sharjah Border Arbitration* the arbitral tribunal explicitly held that Art 51 reflects a customary rule of international law.[93]

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[87] See *mutatis mutandis* → Art 49 MN 35.

[88] *G Distefano* in *Corten/Klein* Art 51 VCLT II MN 1–7.

[89] See *Reuter* VIII 138 (commentary to Draft Art 51 in conjunction with the commentary to Art 50).

[90] Art 51 VCLT II was adopted without a vote, see UNCLOTIO I 17 para 97. As to Art 51 VCLT see n 39.

[91] See the statement by the representative of the United Kingdom UNCLOT I 268 para 2; *G Distefano* in *Corten/Klein* Art 51 MN 12–23; *Villiger* Art 51 MN 13.

[92] See the statement by the representative of the United Kingdom UNCLOT I 268 paras 2–3; *Villiger* Art 51 MN 13.

[93] *Dubai–Sharjah Border* (n 40) 569. See also Iran–United States Claims Tribunal *Amoco International Finance Corporation v Iran* Case No 56, Partial Award No 310-65-3, 83 ILR 500, para 91 (1987) referring in an *obiter dictum* to Art 51 VCLT as an authentic reflection of customary international law to treaty relations between Iran and the United States despite the fact that neither State had ratified the VCLT.

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Article 52

Coercion of a State by the threat or use of force

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.

Contents

A. Purpose and Function

The first recital of the UN Charter's preamble puts the most pressing reason for establishing the United Nations Organization into poignant words: "We, the Peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow for mankind [. . .]". At the heart of this pledge is the general prohibition to use force in international relations, embodied in Art 2 para 4 UN Charter in "its most authoritative form".[1] **1**

Whereas Art 2 para 4 UN Charter and the corresponding customary principle[2] are conceived as behavioural rules, Art 52 stipulates the prominent but unwieldy **2**

[1] *WM Reisman* Editorial Comments, Coercion and Self-Determination: Construing Charter Article 2(4) (1984) 78 AJIL 642.

[2] ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, para 73; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, para 176.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
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legal consequence that results from the breach of these rules: the voidness of the treaty forced upon one party. However, it is not the purpose of Art 52 to invalidate any treaty relation whatsoever resulting from unlawful hostilities (→ MN 24). Rather, the aggressor shall be prevented from lawfully harvesting the fruits of his unlawful conduct prohibited by Art 2 para 4 UN Charter.

3 Given that Art 52 interconnects the voidness of a forced treaty with the illegality of the use of force according to the principles embodied in the UN Charter (→ MN 28–32), Art 75 reaffirms the legal situation already described in Art 52: (peace) treaties **forced upon an aggressor State** are not void pursuant to Art 52 provided that the measure conforms to the UN Charter.

4 The general prohibition of the use of force is one of the few principles recognized as ***ius cogens*** (→ Art 53 MN 81). Nonetheless, Art 53 does not absorb the message of Art 52: whereas Art 53 stipulates that a treaty is void because of its **proscribed subject matter**, Art 52 stipulates that – irrespective of the subject matter – a treaty is void because of the **proscribed methods** that procured its conclusion. The voidness of the treaty results from the **lack of free consent** on the part of the coerced State.[3] In this respect, Art 52 puts a universally recognized principle of international law into operation, the principle of free consent, which is highlighted by the 3rd recital of the Preamble in the same breath as *pacta sunt servanda* and good faith (Preamble MN 7).

5 The principle of free consent is the cornerstone not only of Art 52 but of Art 51, pronouncing that the expression of consent is without legal effect if the State's representative has been coerced into accepting the treaty. However, Art 51 has a much wider scope of application than Art 52: whereas Art 51 applies to acts of threats or coercion directed against the **State's individual representative in his or her personal capacity** (→ Art 51 MN 19), Art 52 covers exclusively the force addressed to a State organ (*eg* the government) or the State's representative in his or her official capacity (*eg* the head of State, foreign minister). Depending on circumstances, both targets – the individual (Art 51) and the decision maker (Art 52) – may be coincident.[4]

6 The somewhat rigid legal consequence proclaimed by Art 52 and Art 69 para 1 – the *ab initio* voidness of the forced treaty in all its parts (Art 44 para 5) – is watered down by Art 69 para 4, securing the validity of a **multilateral treaty** for all parties that have freely consented to it (→ Art 69 MN 39–40). In addition, the Convention sets up a **dispute settlement procedure** (Art 65–67 and Annex) in order to prevent States from eroding *pacta sunt servanda* under the pretext of forced consent.

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[3] *HG de Jong* Coercion in the Conclusion of Treaties: A Consideration of Articles 51 and 52 of the Convention of the Law of Treaties (1984) 15 NYIL 209, 220; *A Verdross* Die Quellen des universellen Völkerrechts: eine Einführung (1973) 60–61; but see *Sinclair* 180: "It can accordingly be maintained that coercion of a State by the threat or use of force does not, strictly speaking, vitiate consent; it rather involves the commission of an international delict with all the sanctions attached thereto."

[4] *Villiger* Art 52 MN 3.

B. Historical Background and Negotiating History

I. Historical Background

Regardless of the causes of war and their justification, *Hugo Grotius* – and in his wake *Samuel Pufendorf*[5] – considered **peace treaties** as valid for the pragmatic reason that they bring wars to an end.[6] However, the advantages obtained by an unlawful war are to be treated differently: "For essentially and in its nature the transaction remains unjust. This essential injustice of the action cannot be removed except through a new and absolutely free consent."[7] In the nineteenth century, the issue of forced treaties sank into insignificance, together with the time-honoured **just war theory**.[8] Treaties imposed by force were considered legally valid because the principle of free consent could be maintained on a purely formal basis: no matter what has procured the consent, in law, both parties are equally bound by the treaty.[9] This classical view – marked by the colonial interests of the European powers[10] as well as their *opinio iuris* that armed force is a lawful means of international politics – was expressed 1864 by *Sir Robert Phillimore*, advocate of the British Queen: "[T]he distinction between just and unjust wars is wholly inadmissible to affect the question of the construction of the treaty, which, as to this subject, must be interpreted as considering all parties upon equal footing."[11] **7**

The slow alteration of this eurocentric approach was initiated by the League of Nations. In 1932, the Assembly of the League adopted a resolution which stated that it is "incumbent upon the Members of the League of Nations not to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the [Briand–Kellogg] Pact of Paris."[12] However, the *ex lege* invalidity of a treaty concluded under the pressure of force was by no means undisputed. When the American Society of International Law discussed the topic at their annual meetings in 1927 and 1932, the nineteenth **8**

[5] *S Pufendorf* Elementorum jurisprudentiae universalis libri duo (1672) book I definition XII para 22 (*WA Oldfather* translation Vol 2 (1964) 95).

[6] *H Grotius* De jure belli ac pacis (1646) book III ch XIX thesis XI § 1 (*FW Kelsey* translation (1925) 798–799).

[7] *Ibid* book III ch XIX thesis XI § 2 (*Kelsey* translation 799).

[8] *SS Malawer* Imposed Treaties and International Law (1977) 16.

[9] *L Oppenheim* International Law Vol 1 (1905) para 499 (*RF Roxburgh* (3rd edn 2005) 660); *M Craven* What Happened to Unequal Treaties? The Continuities of Informal Empire (2005) 74 Nordic JIL 335, 374. Referring to the German signature of the Treaty of Versailles, the Solicitor for the Department of State took the view: "Even though a vanquished nation is in effect compelled to sign a treaty, I think that in contemplation of law its signature is regarded as voluntary." (*GH Hackworth* Digest of International Law Vol 5 (1943) 158).

[10] *Craven* (n 9) 335.

[11] Reported by *McNair* 408; see already *E de Vattel* Droit des gens ou principes de la loi naturelle (1758) book IV ch IV §§ 37–38 (*CG Fenwick* translation (1964) 356).

[12] Official Journal of the League of Nations Special Supplement No 101 (1932) 87.

century approach was still prevailing.[13] *Edgar Turlington* opposed the idea that coercion of a State shall be tantamount to a lack of consent comparable to the doctrine in private law (→ MN 21). He considered this idea to be "a somewhat dangerous analogy" that "overemphasizes the free consensus of parties, which, we have been told is the fundamental condition of the validity of contracts in private law, but which is not essential in international law".[14] The Harvard Project on the Law of Treaties (1935)[15] discussed the effects of the use of force on treaties in the context of coercion directed against representatives signing the treaty on behalf of the State (Art 32 Harvard Draft). The academic controversy in mind, the Reporter *Garner* considered the invalidating effect of force against contracting States as law in transition and left it at that.[16] In contrast, the 1939 Harvard Draft Convention on Rights and Duties of States in Case of Aggression stipulated in Art 4 para 3: "A treaty brought about by an aggressor's use of armed force is voidable."[17]

9 In the aftermath of World War II, the legal opinion shifted towards the voidness of forced treaties by virtue of international law. In this development, the aggressive power policy of Nazi Germany palliated by 'consensual' treaties was decisive. However, international practice with regard to the legal treatment of treaties forced upon one party is far from uniform.

> In 1956, the District Court of The Hague[18] and the Dutch Judicial Division of the Council for the Restoration of Legal Rights[19] denied the legal validity of the German-Czechoslovak Treaty of Berlin, concluded on 20 November 1938. The 'treaty' had imposed German nationality upon Sudeten Germans who in turn were to be deemed 'enemy aliens' under Dutch laws. The Dutch Judicial Division reasoned: "The validity of the Treaty as a whole cannot be accepted; it was concluded by Czechoslovakia under clear, inescapable and unlawful duress. Czechoslovakia adhered to the Treaty only after she had under protest consented to the transfer of the Sudetenland to Germany, who was threatening war if she did not. [...] All acts performed [after the Munich Agreement] by Czechoslovakia, eg, the formal acceptance of the Munich Agreement of September 30, 1938, the evacuation of the Sudeten region [...] and the acceptance of the Treaty of Berlin of November 20, 1938, were ineluctably linked with the unlawful German threat of war. [...] This view is supported by the fact that shortly after the Second World War broke out the Czechoslovak, British and French Governments repeatedly declared that the Munich Agreement was without effect."[20] Four years earlier, in 1952, the Arnhem Court of Appeals had reversed a similar decision of the Arnhem District Court on the grounds that, first, the invalidity of a forced treaty is a controversial issue and, second, Czechoslovakia had in fact complied

[13] *AH Putney* The Termination of Unequal Treaties (1927) 21 ASILP 87, 89.

[14] *CH Butler/EAH Turlington* Treaties Made Under Duress (1932) 26 ASILP 45, 49.

[15] (1935) 29 AJIL Supp 657.

[16] (1935) 29 AJIL Supp 1152–1153.

[17] (1939) 33 AJIL Supp 895.

[18] District Court of The Hague (Netherlands) *Amato Narodni Podnik v Julius Keilwerth Musikinstrumentefabrik* 24 ILR 435, 437 (1955).

[19] Judicial Division of the Council for the Restoration of Legal Rights (Netherlands) *Ratz-Lienert and Klein v Nederlands Beheers-Instituut* 24 ILR 536 (1956).

[20] *Ibid* 538.

with the provisions of the treaty.[21] This decision, however, neglected relevant State practice: the French National Committee – recognized as the legitimate French government in 1944 – notified to the exiled Czechoslovak government in 1942: "Dans cet esprit, le Comité national français, rejetant les accords signés à Munich le 29 septembre 1938, proclame solennellement qu'il considère ces accords comme nul et non avenues, ainsi que tous les actes accomplis en application ou en conséquence des dits accords."[22] The UK position leaned towards invalidity triggered by the breach of the Munich Agreement when Germany occupied Prague 1939.[23] In 1965, Foreign Secretary *Michael Steward* outlined the British view: "I said that the agreement was completely dead and had been dead for many years. [. . .] The mere fact that it was once made cannot justify any future claims against Czechoslovakia."[24] While Czechoslovakia and the German Democratic Republic held the position that the Munich Agreement was invalid *ab initio*,[25] this position has never been shared by West Germany.[26] The 1973 Treaty of Mutual Relations between the Federal Republic of Germany and the Czechoslovak Socialist Republic,[27] as a compromise, recognizes that the Munich Agreement has been imposed under threat of force (3rd recital of the Preamble) but does not confirm its being void *ab initio*. Instead, Germany and Czechoslovakia 'consider' the Agreement void in their mutual relations (Art I).

The West Irian dispute between Indonesia and the Netherlands in 1962 illustrates that international practice is not free from ambiguity. After Indonesia's threat with the annexation of the Dutch colony followed by naval actions against the Netherlands, the latter entered into an agreement with Indonesia, arranging for a UN interims administration and the final transfer of the sovereignty over West Irian to Indonesia.[28] Despite the remonstration of the Netherlands stating that the treaty was concluded under the pressure of war, the UN General Assembly simply declared in its Resolution 1752 (XVII): "The General Assembly, Considering that the Government of Indonesia and the Netherlands have resolved their dispute concerning West New Guinea (West Irian), [. . .] 1. Takes note of the agreement [. . .]."[29]

When Warsaw Pact forces invaded Czechoslovakia on 10 August 1968, the international community – western as well as non-aligned States – protested against the flagrant violation of Art 2 para 4 UN Charter, even though no further action was taken.[30] In order to

[21] Court of Appeal of Arnhem (Netherlands) *Nederlands Beheers-Institut v Nimwegen and Männer* 18 ILR 249 (1952).

[22] *C de Gaulle* Memoires de guerre (1954) 372.

[23] See the letter of UK Foreign Minister *Eden* pointing at *Churchill*'s statement addressed to *Beneš* that "the Munich agreement had been destroyed by the Germans"; reprinted in *R Lemkin* Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress (2008) 131.

[24] *EW Bruegel* Czechoslovakia Before Munich: The German Minority Problem and British Appeasement Policy (1973) 304.

[25] *HA Winkler* Germany: The Long Road West 1933–1990 (2007) 292; see Art 7 of the 1967 Treaty of Friendship, Co-operation and Mutual Assistance between Czechoslovakia and the German Democratic Republic 609 UNTS 309.

[26] *C Hofhansel* Multilateralism, German Foreign Policy and Central Europe (2005) 28.

[27] 951 UNTS 365.

[28] *H Brosche* Zwang beim Abschluß völkerrechtlicher Verträge (1974) 129.

[29] Agreement between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian), UNGA Res 1752 (XVII), 21 September 1962, UN Doc A/RES/1752 (XVII).

[30] *AM Weisburd* Use of Force: The Practice of States since World War II (2009) 225; *RM Goodman* The Invasion of Czechoslovakia (1969) 4 International Lawyer 42, 43–44.

bring the occupation to a peaceful end, the Czechoslovak government was forced to sign a status-of-forces agreement in October 1968, regulating the future presence of Soviet troops on Czechoslovak soil.[31] Apart from academia,[32] the legal validity of the agreement was at no time contested, neither by the UN General Assembly nor by western States.[33]

II. Negotiating History

10 SR *Lauterpacht* dealt with the issue of forced treaties in Art 12 of his draft, linking the invalidity of the treaty *ab initio* with a declaration of the ICJ to that effect.[34] Every member of the United Nations, whether State Party to the VCLT or not, should have the right to initiate proceedings before the ICJ, equipped with compulsory jurisdiction,[35] since treaties imposed by force are a "matter of concern for the entire international community".[36] *Lauterpacht* advocated a wide conception of the term "use or threat of force": unlawful coercion, "however indirect", should invalidate a treaty.[37]

11 *Lauterpacht*'s successor SR *Fitzmaurice* made a complete reversal. He took the view that duress should affect the validity of a treaty only if addressed to State representatives in the process of negotiating or ratifying a treaty.[38] Contrary to the considerations leading to a similar approach in the Harvard Draft (→ MN 8), *Fitzmaurice* stressed the practical problems linked to a provision invalidating treaties procured by use or threats of force against a State: "Either the demand for the treaty in question is acceded to, or it is not. If it is not, then *cadit quaestio*. If, *per contra,* it is, then the same compulsion or threat that procured the conclusion of the treaty will ensure its execution; and by the time, if ever, that circumstances permit of its repudiation, it will have been carried out, and many steps taken under it will be irreversible or reversible, if at all, only by further acts of violence."[39]

12 Neither did SR *Waldock* share his predecessor's disenchanted point of view,[40] nor did he adopt *Lauterpacht*'s proposal. *Waldock*'s Draft Art 12 left it with the forced State to declare its consent null and void *ab initio*, to denounce the treaty or to affirm it after the coercion has ceased, subject to the forced State's reservation

[31] 1968 Treaty on Stationing of Soviet Troops in Czechoslovakia 7 ILM 1331.

[32] *G Fischer* Quelques problèmes juridiques découlant de l'affaire tchécoslovaque (1968) 14 AFDI 15, 36–37.

[33] For a different view, see *Malawer* (n 8) 99.

[34] *Lauterpacht* I 147.

[35] *Ibid* 151.

[36] *Ibid* 150.

[37] *Ibid* 149.

[38] *Fitzmaurice* III 26.

[39] *Ibid* 38.

[40] *Waldock* II 51.

of rights with respect to any loss or damage resulting from the coercion.[41] For the purpose of the proposed article, *Waldock* understood the term 'coercion' as a reference to the use or threat of armed force.[42]

13 The ILC was not overly convinced by *Waldock*'s draft article. Many members opposed the idea of voidability and insisted upon the voidness of the forced treaty by virtue of international law.[43] The ILC's discussion on the *ipso iure* voidness *ab initio*[44] was closely linked to the discussion on the procedure in which an impartial body – above all the ICJ – should decide on the illegality of the force involved.[45] However, the idea of obligatory judicial dispute settlement procedure was contested as inappropriate in such highly political matters.[46] As a compromise it was agreed to adhere to the notification procedure envisaged by the present Art 65.[47]

14 At the Vienna Conference, the debate on ILC Draft Art 49 evolved around three issues: the scope of the term 'force' (→ MN 28–32), the retroactivity of the envisaged provision (→ MN 54) and the procedure in which the nullity plea should be **notified to competent UN organs** (→ MN 44–46). Proposals by Japan and the Republic of Vietnam to involve the United Nations went unheeded.[48] With regard to a possible **retroactivity** of the provision, a coalition of fourteen States emphasized the *lex lata* character of Art 52 following the entry into force of Art 2 para 4 UN Charter and the emergence of its customary equivalent.[49] It was agreed that the phrase "in violation of the principles of international law embodied in the Charter of the United Nations" should convey this approach.[50] In addition, the reference was aimed at clarifying that the Convention passes no judgment of its own with regard to the unlawfulness of force. When the arguments regarding the quality of force – exclusively armed force or economic and political coercion as well – got irreconcilable, the Conference took a Salomonic stance and adopted the '**Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties**' (→ MN 55).[51] The Conference maintained the 'open-ended' approach favoured by the ILC, leaving the precise definition of 'force' to

[41] *Ibid.*

[42] *Waldock* II 52.

[43] *Cf* the statements of ILC members *Tunkin* [1963] YbILC I 48–49 paras 29–31; *Yasseen ibid* 50 para 46; *de Luna ibid* 52 para 72; *Bartoš ibid* 53 para 9; *Tabibi ibid* 59 para 68; *Paredes ibid* 60 para 2; *Castrén ibid* 61 para 8.

[44] [1963-II] YBILC 198 para 6.

[45] *Tsuruoka* [1963-I] YbILC 61 paras 10–12.

[46] *Tunkin* [1963-I] YbILC 58 para 60; *Rosenne* [1966-I/1] YbILC 32 para 18.

[47] *Cf HW Briggs* Procedures for Establishing the Invalidity or Termination of Treaties under the International Law Commission's 1966 Draft Articles on the Law of Treaties (1967) 61 AJIL 976.

[48] UNCLOT III 172 para 449, A/CONF.39/C.1/L.298.

[49] UNCLOT III 172 para 449, A/CONF.39/C.1/L.289.

[50] UNCLOT I 271 paras 39–41, 291 para 40, 329 para 8.

[51] The so-called 19-State amendment: UNCLOT III 173 para 459; for the debate, see UNCLOT I 269–276, 281–282.

international practice when interpreting and applying Art 2 para 4 UN Charter (→ MN 28–32).[52]

15 Art 52 was adopted in plenary by 98 votes to none with 5 abstentions.[53]

C. Elements of Article 52

I. Treaty

16 Academia and international practice have coined many labels for treaties based on flawed consent: **unequal** or **leonine** treaties, **imposed**, **forced** or **coerced** treaties, **immoral**, **unjust** or **inequitable** treaties.[54] Each term carries a specific reproach, either of a legal or a political nature,[55] *eg* the imbalance of substantive treaty obligations (unequal treaty) or the outside interference in decision-making processes (imposed treaties).[56] Most terms are closely linked to political phenomena such as colonialism, hegemony or imperialism. All terms are utilized to denote a ground for the voidability or invalidity of the treaty in question. Given that the Convention enumerates all recognized grounds for deviating from the principle *pacta sunt servanda* (see Art 42), the adjective denotation of the treaty bears no legal relevance.

> Classical examples of 'unequal treaties' are the 19th century 'capitulations treaties' with China, granting the United Kingdom, France and the United States full jurisdiction over their subjects in China.[57] In the Sixth Committee, discussing the ILC Draft on the Law of Treaties, the Ukraine considered the 1962 Évian Accords between France and Algerian Front de Libération Nationale an 'unjust' treaty because it had forced concessions upon Algeria (military bases, control over natural resources) at the price of the new State's freedom.[58]

17 Art 52 focuses on the legal effects of force on treaties – no matter if **bilateral, plurilateral** or **multilateral** (→ Art 2 MN 8–10) – without explicitly touching upon the legal effects force has on **unilateral acts**, *eg* on the declaration of accession to or the withdrawal from a treaty. Inspired by the Israeli delegate,[59] SR *Waldock* gave his attention to the matter and suggested a clarification: "Any treaty and **any act expressing the consent of a State to be bound by a treaty** which is procured [. . .]."[60] The ILC, however, advanced the view that the reference

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[52] Final Draft, Commentary to Art 49, 246 para 3.

[53] UNCLOT II 93.

[54] *A Peters* Treaties, Unequal in MPEPIL (2008) MN 1; *Aust* 108.

[55] *Cf I Detter* The Problem of Unequal Treaties (1996) 15 ICLQ 1069, 1070.

[56] *I Delupis* International Law and the Independent State (1974) 194.

[57] *FE Hinckley* Consular Authority in China by New Treaty (1927) ASILP 82, 84.

[58] See the statement by the representative of the Ukrainian SSR in the Sixth Committee UN Doc A/C.6/SR.784.

[59] [1966-I/1] YbILC 29 para 70.

[60] *Waldock* VI 68; [1966-I/1] YbILC 30 para 76.

to the 'treaty' is sufficiently broad to include unilateral acts of consent to an already existing treaty.[61] Undeniably, one can get this message out of the present wording: the **declaration of accession** can be construed as a treaty of accession, given that the declaration meets the (anticipated) consent of the other parties. The same is valid for the **declaration of withdrawal** (Art 54). Consequently, Art 52 invalidates the forced participation or the forced retreat without affecting the validity of the multilateral treaty for the other parties[62] provided that the latter's consent to the treaty has been freely given.[63] The same result is procured by Art 64 para 4, which bears traces of the original *Waldock* proposal. Even though not perfectly fine tuned with the wording of Art 52, Art 69 para 4 affirms the limited effects of forced accessions on the legal validity of multilateral treaties (→ Art 69 MN 39).

II. Conclusion

The term 'conclusion' is not defined in Art 2, even though it is applied throughout the Convention: depending on the specific context, 'conclusion' can denominate any act in the progress of treaty making, ranging from the adoption of the treaty text to its entry into force.[64] In the case of Art 52, the phrase "if its conclusion has been procured by [...] force" reveals that the term 'conclusion' is the very goal of the State threatening to use force or using it: the creation of treaty relations that oblige the coerced State to perform or endure according to the will of the coercing State.[65] Consequently, the term 'conclusion' stands for the 'consensus' that would – without defects – generate **legal relations between the contracting parties**. **18**

Whereas the wording of Art 52 shields the conclusion of the treaty from prohibited force, the question arises whether the treaty performance – *eg* the renunciation of treaty rights – can be the target of coercion as well. As a rule, Art 52 does not address **forced treaty performance** if this performance is required by the treaty. If, however, the coerced party waives or alters its treaty rights and this act meets the consent of the coercing party, Art 52 is applicable to this renouncement or alteration agreement. **19**

[61] Although met with some resistance by *Waldock*, the amendment was withdrawn, see [1966-II] YbILC 67–68; due to this broad understanding of the term 'treaty', *Rosenne* [1966-I/1] YbILC 35 para 53 was content to see the matter dealt with in the commentary.

[62] *Aust* 256.

[63] The issue has not been dealt with by the ILC or the Vienna Conference, but see *Waldock*'s caveat [1966-I/1] YbILC 36 para 58 that the wide wording "would make a whole treaty void if a subsequent act of participation in it was procured by the threat or use of force".

[64] *EW Vierdag* The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions (1989) 60 BYIL 74, 109.

[65] Final Draft, Commentary to Art 49, 247 para 7.

Without dwelling on the legal consequences, Libya made a case of Art 52 in the Lockerbie dispute before the ICJ: "The principle of the prohibition of force set out, *inter alia,* in Article 52 of the 1969 Vienna Convention on the Law of Treaties concerning the conclusion of treaties, and therefore force with respect to the conclusion of treaties, applies equally to their performance. If, as Article 26 of this Convention stipulates, '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith', this provision – Article 26 – is *a fortiori* violated when a States Parties to a convention resorts to threats in order to force the other contracting party to renounce its rights under that Convention.'"[66] Given that the purpose of the argument within the oral proceedings was not clear, the ICJ did not seize on it.

III. Has Been Procured: Causality

20 Deliberately or not, the ILC and the Vienna Conference overlooked the causality issues that can rightly be called the crux of Art 52.[67] The ILC's policy decision to choose an 'open-ended' formulation ceded the legal fine tuning to the subsequent practice under the UN Charter.[68] The delegates on the Vienna Conference, in turn, focused on more pressing issues such as the nature of proscribed force (→ MN 29). Regrettably, neither the wording of Art 52 nor the subsequent international practice contributes to the clarification of the causality criterion, leaving the central element of Art 52 – "has been procured" – undefined and vague.

1. Causal Link Between Force and the Conclusion of a Treaty

21 Probably all **national legal systems** recognize the voidness or at least the voidability of civil law contracts procured by unlawful duress or force and thus have to clarify the decisive causal link. Indeed, most legal systems are surprisingly homogeneous in this regard: unlawful force or duress must be one of the reasons for entering a contract, but it does not have to be the only or even the main reason; however, the force or duress has deprived the person of the freedom to choose.[69]

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[66] ICJ *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v United States)* (Preliminary Objections) Verbatim Record, CR 1997/20, 17 October 1997, 45.

[67] The issue of causality has been slightly touched by *Lauterpacht* I 149 para 7: "[I]f a State, as the result of unlawful use of force, has been reduced to such a degree of impotence as to be unable to resist the pressure to become a party to a treaty although at the time of signature no obvious attempt is made to impose upon it by force the treaty in question."

[68] *Waldock* [1966-I/1] YbILC 29 para 62.

[69] For example, United Kingdom: Privy Council (United Kingdom) *Barton v Armstrong* [1976] AC 104, [1975] 2 All England Reports 465, 475: "threats were 'a' reason"; United States: Restatement (Second) of Contracts (1981) § 175 comment c: "A party's manifestation of assent is induced by duress if the duress substantially contributes to his decision to manifest his assent"; Germany: *O Jauernig* Bürgerliches Gesetzbuch (2009) § 123 MN 18, 68; *EA Kramer* in *FJ Säcker* (ed) Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 1 (2006) § 123 MN 47; Federal Court of Justice (Germany) 2 BGHZ 287, 299 = [1951] NJW 643; *Commission on European Contract*

Although a private law analogy that produces a **general principle of law** is appealing, it is misguided in the case of Art 52. Admittedly, both domestic laws and Art 52 protect the free consent in contractual relations (→ MN 4).[70] However, in international law, the general prohibition of armed force is a relatively recent legal concept that does not follow the rationale of the time-honoured domestic notion of the governmental monopoly on legal coercion.[71] Consequently, the causal link between the unlawful use of force or threat with force in international relations and the conclusion of an international treaty has to be determined on the basis of either international customary law or Art 52's object and purpose (→ Art 31 MN 53–59).

22 In **international customary law**, causality or causation is mainly discussed in the context of redress for damages. When working on the codification of the **law of state responsibility**, the ILC emphasized that various concepts are used to describe the causal link which must exist between the wrongful act and the injury or loss in order for the obligation of reparation to arise, *eg* 'remoteness', 'directness', 'forseeability', 'proximity' and 'intent'.[72] Suggesting that, for the purpose of Art 31 of the Law of State Responsibility, the causal link should be "not too remote", the ILC left it at that.[73] Not only is this approach unsatisfactory, but the causality criterion applied to limit the scope of reparations under the law of State responsibility serves a different purpose than that applied to contractual deficits pursuant to Art 52.

23 The object and purpose of Art 52 is twofold: the provision aims at safeguarding the principle of free consent and preventing the coercing party from extracting contractual advantages from the unlawful use of force (→ MN 1–4). In the light of these aims, Art 52 is utterly **target oriented**: if unlawful force is applied by a State in order to bring about a specific treaty with another State, the treaty is void pursuant to Art 52 ('**coercive intent cases**').[74] In conformity with the wording of Art 52, it does not matter whether the coercing State's intention is to procure treaty relations between himself and the coerced State or between the latter and a third State. The same is valid if the coercing State initially uses force for other objectives than the conclusion of a specific treaty but takes advantage of the pressure already

Law (*O Lando*/*H Beale* (eds)) Principles of European Contract Law Parts I and II (2000) Art 4:108 comment D, 258; *cf T Probst* Coercion (2001) in *A von Mehren* (ed) International Encyclopedia of Comparative Law Vol 7 ch 11 (defects in the contracting process) II-450, 222.

[70]For the rationale of § 123 of the German Civil Code (unlawful duress), see *T Schindler* Rechtsgeschäftliche Entscheidungsfreiheit und Drohung (2005) 24.

[71]*M Weber* Economy and Society (1922) ch I (The Economy and Social Norms) (*G Roth*/*C Wittich* translation (1978) 314).

[72]*J Crawford* The International Law Commission's Articles on State Responsibility (2002) Art 31 MN 10; see also *S Ripinsky*/*K Williams* Damage in International Investment Law (2008) 137.

[73]*Crawford* (n 72) Art 31 MN 10.

[74]*M Bothe* Consequences of the Prohibition of the Use of Force: Comments on Arts 49 and 70 of the ILC's 1966 Draft Articles on the Law of Treaties (1967) 27 ZaöRV 507, 513.

born by the coerced State ('**repurposing cases**'). In all cases mentioned, the treaty is void in all its parts (→ MN 39, → Art 44 MN 24–25).

24 In contrast, a treaty does not fall within the scope of Art 52 when a third State presses the coerced State into treaty relations by **exploiting** the latter's weakness caused by unlawful force applied by another State for other reasons than the conclusion of this specific treaty. The same is valid for treaties concluded between the coerced State and the coercing State for the purpose of ending the use of force (**cease-fire agreements**, **peace agreements,** *etc*) or regulating the effects of force (agreements on **humanitarian assistance** or **prisoners of war exchange,** *etc*). Even though the use of force necessarily procures treaties of such a kind, force is not applied in order to procure these specific contractual contents. However, pursuant to Art 44, peace agreements or cease-fire accords that grant the coercing State additional benefits encompassed by coercive intent, *eg* territorial gains or other concessions, result in the voidness of the entire treaty in all its parts. This rigid legal consequence faces major practical problems (→ MN 39, → Art 44 MN 25).

2. Degree of Force

25 Provided that the threat or use of force is unauthorized (*cf* Chapter VII of the UN Charter) or unjustified (*cf* Art 51 UN Charter), force is unlawful pursuant to Art 2 para 4 UN Charter irrespective of its gravity.[75] In contrast, the degree of force has to be taken into account when determining whether a treaty has been procured by means of force. As a rule, a treaty is void if the coerced State, "as the result of unlawful use of force, has been reduced to such a degree of impotence as to be **unable to resist the pressure** to become a party to a treaty".[76]

> With regard to the Treaty on Questions of Nationality and Option concluded between Germany and Czechoslovakia on 20 November 1938, the Dutch District Court of The Hague stated in 1955: "The German-Czechoslovak Nationality Treaty was invalid because it was concluded under clear and unlawful duress – the effect of which Czechoslovakia could not escape – exercised by Germany."[77]

26 **Additional motives** of the coerced State to conclude that specific treaty must be eclipsed by the dead-end pressure imposed by the coercing State. If the coerced State succeeds in negotiating the coercing State into a **compromise**, the cooperation does not necessarily destroy the causal link between the use of force and the conclusion. To begin with, the compromise in all its parts (Art 44) is void if the coercing State's initial objectives partly prevail and the coercing States would not

[75] ICJ *Nicaragua* (Merits) (n 2) para 247.

[76] *Lauterpacht* (n 34) para 7; even though the decision does not concern an international treaty but a State contract, the arbitral tribunal in the *Kuwait v Aminoil* arbitration stated that Aminoil was in the position to make a choice and therefore, the pressure it was under was not of a kind to inhibit its freedom of choice, 66 ILR 518, 570 (1982).

[77] District Court of The Hague (Netherlands) *Amato Narodni Podnik v Julius Keilwerth Musikinstrumentefabrik* (n 18) 437.

have concluded the compromise treaty but for the force.[78] Beyond that, the coercing State may repurpose the initial coercive intent (→ MN 23), which from that time on covers the compromise. When assessing the room to negotiate, one has to bear in mind that the purpose of Art 52 is not only to protect the principle of free consent but also to prevent the coercing State from harvesting the fruits of its aggression (→ MN 2).

At least before an **international dispute settlement body**, it is extremely difficult to demonstrate the sufficient degree of pressure linking the threat or use of force to the conclusion of a treaty. **27**

> In the *Fisheries Jurisdiction Case*, Iceland brought forward the argument that "[t]he 1961 Exchange of Notes took place under extremely difficult circumstances, when the British Royal Navy had been using force to oppose the 12-mile fishery limit established by the Icelandic Government in 1958".[79] While acknowledging the message of Art 52 VCLT, the ICJ reasoned that it "cannot consider an accusation of this serous nature on the basis of a vague general charge unfortified by evidence in its support".[80] For the dissenting opinion of Judge *Padilla Nervo* (FN 81) see → MN 27. criticized that "[t]he Court should not overlook that fact, and does not need to request documentary evidence as to the kind, shape and manner of force which was used [. . .]. A big power can use force and pressure against a small nation in many ways, even by the very fact of diplomatically insisting in having its view recognized and accepted. The Royal Navy did not need to use armed force, its mere presence on the seas inside the fishery limits of the coastal State could be enough pressure. It is well known by professors, jurists and diplomats acquainted with international relations and foreign policies that certain 'Notes' delivered by the government of a strong power to the government of a small nation, may have the same purpose and the same effect as the use or threat of force. There are moral and political pressures which cannot be proved by the so-called documentary evidence, but which are in fact indisputably real and which have, in history, given rise to treaties and conventions claimed to be freely concluded and subjected to the principle of *pacta sunt servanda*."[81]

IV. Use of Force in Violation of the UN Charter

Art 52 does not define the term 'force' but builds on the UN Charter's general prohibition to use force in international relations (**Art 2 para 4 UN Charter**), a principle substantiated and refined by the **General Assembly's Definition of Aggression**[82] and the **ICJ's pertinent jurisprudence**.[83] On the face of it, Art 52 **28**

[78] ICJ *Fisheries Jurisdiction (United Kingdom v Iceland)* (Jurisdiction of the Court) [1973] ICJ Rep 3, para 24: "[The 1961 Exchange of Notes was] freely negotiated by the interested parties on the basis of perfect equality and freedom of decision on both sides."

[79] *Ibid.*

[80] *Ibid.*

[81] ICJ *Fisheries Jurisdiction (United Kingdom v Iceland)* (Jurisdiction of the Court) (dissenting opinion *Padilla Nervo*) [1973] ICJ Rep 3, 46–47.

[82] UNGA Res 3314 (XXIX), 14 December 1974, UN Doc A/RES/3314 (XXIX).

[83] ICJ *Nicaragua* (Merits) (n 2); *Oil Platforms (Iran v United States)* (Merits) [2003] ICJ Rep 161; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, para 148.

appears to refer to all possible rules of inter-State conduct embodied in the UN Charter, including the principle of non-intervention in matters within the national jurisdiction of States (*cf* Art 2 para 7).[84] However, by copying the wording of Art 2 para 4 ("the threat or use of force"), Art 52 makes its focus quite clear: only force prohibited under Art 2 para 4 is qualified to result in the voidness of a treaty.

> The **Port-au-Prince Agreement** of 18 September 1994[85] concerning the restoration of President *Aristide*, signed by the provisional President of Haiti and former US President *Jimmy Carter*, cannot be characterized as a forced treaty pursuant to Art 52[86]: Security Council Resolution 940 of 31 July 1994 had previously authorized Member States to use all necessary means to restore the legitimately elected President of Haiti. The same can be said about the NATO bombings of Sarajevo in August 1995, which led to the conclusion of the **Dayton Accords**, since the use of force by NATO previously received Council endorsement.[87]

29 The restrictive interpretation of the term 'force' is supported by the provision's telling *travaux préparatoires*. Various ILC members expressed their view that the term 'force' should be understood in a broader sense, arguing that "economic blockades [. . .] could be severe enough to strangle a nation"[88] and naming the customs war between Austria–Hungary and Serbia as an example.[89] With reference to the stability of treaty relations, other ILC members declined the idea that 'force' should include, apart from armed force, economic or political coercion as well.[90] Although the ILC finally agreed on an 'open-ended formulation' in order to prevent an impasse, the debate unavoidably came up again at the Vienna Conference.[91] A coalition of nineteen Asian, African and South American States, joined by Yugoslavia, proposed the insertion of the words "including economic or political pressure" after the term "force".[92] However, the opponents of the amendment succeeded with their appeal not to press the proposal to a vote since it would "seriously jeopardize the prospect of producing a convention".[93] As a compromise,

[84] ICJ *Nicaragua* (Merits) (n 2) para 202.

[85] As printed in *JR Ballard* Upholding Democracy: the United States Military Campaign in Haiti 1994–1997 (1998) Appendix D, 229–230.

[86] *Aust* 256.

[87] *Cf* UNSC Res 836 (1993), 4 June 1993, UN Doc S/RES/836 (1993).

[88] *Paredes* [1963-I] YbILC 52 para 69.

[89] *Bartoš* [1963-I] YbILC 53 para 5.

[90] *Castrén* [1963-I] YbILC 52; see also statements of the Netherlands and the United Kingdom [1966-II] YbILC 16.

[91] *Cf SE Nahlik* The Grounds of Invalidity and Termination of Treaties (1971) 65 AJIL 736, 744; *C Murphy* Economic Duress and Unequal Treaties (1970) 11 VaJIL 51, 57.

[92] UN Doc A/CONF.39/C.1/L.67/Rev.1/Corr.1, UNCLOT III 172; for the debate, see the statements by the representatives of Afghanistan, India, Tanzania, UNCLOT I 269–270 paras 21–27, 33; for the opposite stance, see the statements by the representatives of the Netherlands, Portugal and France UNCLOT I 275 para 21, 278 para 46, 286 para 55.

[93] See the statement by the representatives of the United Kingdom UNCLOT I 284 para 37, and the similar statements by the representatives of Sweden, Canada and the United States UNCLOT I 278 para 51, 281 para 9, 292 para 49.

it was agreed to wrap the nineteen-State proposal on economic and political force up in a '**Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties**' (→ MN 55):

> *"The United Nations Conference on the Law of Treaties*,
> [. . .]
> 1. *Solemnly condemns* the threat or use of pressure in any form whether military, political, or economic, by any State, in order to coerce another State to perform any act relating to the *conclusion* of a treaty in violation of the principle of the sovereign equality of States and freedom of consent,
> [. . .]"

The legally non-binding instrument,[94] unanimously adopted by the Vienna Conference with four abstentions,[95] has the potential to influence the interpretation of Art 52's term 'force' pursuant to Art 31 para 2 lit b, even though the Declaration uses the much broader term 'pressure'. The Declaration's potential influence on the scope of Art 52 is made possible by latter's unspecific reference to the violation of "the principles of international law embodied in the Charter of the United Nations", which includes the **principle on non-intervention** (*cf* Art 2 para 7 UN Charter) and the **sovereign equality of States** (Art 2 para 1 UN Charter). However, the Declaration does not take on a momentum of its own; the extended meaning of 'force' must be supported by the general practice of States when dealing with treaties procured under economic or political pressure, claiming not only the international responsibility of the coercing State but also the voidness of that treaty. **30**

> The continuing reluctance of States to accept a broad interpretation of Art 52 is demonstrated by the dismissive reaction of Japan, Sweden, the United Kingdom and the United States to the **interpretative declaration** of Syria on the occasion of the ratification of the Convention: "The Government of the Syrian Arab Republic interprets the provisions in article 52 as follows: The expression 'the threat or use of force' used in this article extends also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests."

In order to set the stage for a change in general practice and *opinio iuris* regarding the definition of 'force' for the purpose of the law of treaties, the Vienna Conference agreed on a '**Dissemination Resolution**':[96] **31**

> *"The United Nations Conference on the Law of Treaties*,
> *Having adopted* the Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties as part of the Final Act of the Conference,
> 1. *Requests* the Secretary-General of the United Nations to bring the Declaration to the attention of all Member States and other States participating in the Conference, and in the principal organs of the United Nations;

[94] *Dubai–Sharjah Border Arbitration* 91 ILR 543, 569 (1981).

[95] UNCLOT II 101 para 13.

[96] Resolution Relation to the Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, A/Conf. 39/L. 32/Rev. 1; adopted with 99 votes in favour, 4 abstentions, none against, UNCLOT II 101 para 13.

> 2. *Requests* Member States to give the Declaration the widest possible publicity and dissemination."

32 However, as long as a shift in international practice cannot be substantiated, and this is not possible so far, the term 'force' has to be interpreted in accordance with Art 2 para 4 UN Charter.

V. Threat of Force

33 Art 52 follows the path of Art 2 para 4 UN Charter by treating the use of force and the threat of force equally grave. Consequently, the answer to the question what constitutes a 'threat' in the international arena is identical for both provision. According to *Sadurska*, "a threat of force is a message, explicit or implicit, formulated by a decision maker and directed to the target audience, indicating that force will be used if a rule or demand is not complied with".[97]

34 It is the prevailing view that the illegality of threats is linked to the illegality of the use of force in the same circumstances.[98]

> In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ stated: "Whether a signalled intention to use force if certain events occur is or is not a 'threat' within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of 'threat' and 'use' of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal."[99]

35 A State's declaration of its readiness to use force "in conformity with the Charter" is not an illegal 'threat' but a lawful and - in the words of *Dinstein* - legitimate warning and reminder.[100]

36 The threatening State has to show its **intentions** to allow the threat to produce its coercive effect, which naturally requires that the threat must be – directly or indirectly, explicitly or in a roundabout way – **communicated** to the targeted State.[101] The more a State leaves to the imagination of the other State the forcible

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[97] *R Sadurska* Threats of Force (1988) 82 AJIL 239, 242; for further definitions, see *I Brownlie* International Law and the Use of Force by States (1963) 364; *M Roscini* Threats of Armed Force and Contemporary International Law (2007) 54 NILR 229, 235; see also the written statement No 19 of the French government in proceedings before the ICJ *Legality of the Threat or Use of Nuclear Weapons*, 20 June 1995, 25.

[98] *Sadurska* (n 97) 364.

[99] ICJ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 47.

[100] *Y Dinstein* War, Aggression and Self-Defence (2005) 86.

[101] *Roscini* (n 97) 230–231; see also dissenting opinion of Judge *Weeramantry* in ICJ *Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 541.

consequences of the refusal to conclude the treaty, *eg* in contemplation of manpower and weapons stockpile, the more difficult it is to **prove** the 'coercive intent' (→ MN 23) of the threatening State.[102]

In the *Lockerbie* case, Libya tried to establish a pattern of threats of force that should coerce Libya into waiving its contractual rights under the Montreal Convention by demonstrating the use of cryptic declarations of the United States such as "we are exploring a full range of options", "we have not ruled out anything" and "we will use all tools at our disposal".[103] However the United States rejected these allegations by arguing that these "claims are based on a handful of public statements in 1992 that simply confirm that no decision had been made on any option, and that do not amount to a threat of the use of force."[104] Being in the procedural stage of preliminary objections, the ICJ did not feel compelled to deal with the matter.

In the *Fisheries Jurisdiction* case, Iceland brought forward the argument that "[t]he 1961 Exchange of Notes took place under extremely difficult circumstances, when the British Royal Navy had been using force to oppose the 12-mile fishery limit established by the Icelandic Government in 1958".[105] The ICJ showed its readiness to interpret Iceland's communication as a veiled charge of duress but pointed out that it "cannot consider an accusation of this serious nature on the basis of a vague general charge unfortified by evidence in its support."[106] For the dissenting opinion of Judge *Padilla Nervo*, see MN 27.[107]

Claiming to be the victim of a threat of force, the Federal Republic of Yugoslavia (FRY) challenged the Rambouillet draft agreement in the proceedings of the *Legality of Use of Force* dispute before the ICJ. The FRY argued that it was "not defeated as an aggressor State in an inter-State conflict" and that the "draft looks like a dictated peace treaty with a defeated aggressor State".[108] The Rambouillet conference was even compared to the 1938 Munich agreement (→ MN 9).[109] Neither did the respondents nor the ICJ react to that charge.[110] However, in the Decision on Provisional Measures, the ICJ declared to be "profoundly concerned with the use of force in Yugoslavia [that] raises very serious issues of international law".[111]

37 The mere intention to use force is not enough to constitute an illicit threat of force, even if vociferously communicated. The threat to use force must be **credible**,[112] *ie* the aggression is being **seriously contemplated** against the coerced State and

[102] *O Schachter* The Right of States to Use Armed Force (1984) 82 Michigan LR 1620, 1625.

[103] *Cf* ICJ *Lockerbie* (n 66) 51–54.

[104] *Cf ibid* 9.

[105] ICJ *Fisheries Jurisdiction* (Jurisdiction of the Court) (n 78) para 24.

[106] *Ibid*.

[107] ICJ *Fisheries Jurisdiction* (dissenting opinion *Padilla Nervo*) (n 81) 46–47.

[108] Counsel *de Waart* for Yugoslavia in ICJ *Legality of Use of Force (Yugoslavia v Belgium et al)*, Verbatim Record, CR 99/14, 10 May 1999, 43–44.

[109] Counsel *Suy* for Yugoslavia *ibid* 48.

[110] ICJ *Legality of Use of Force (Yugoslavia v Belgium et al)*, Verbatim Record, CR 99/25, 12 May 1999, 30.

[111] ICJ *Legality of the Use of Force (Yugoslavia v Belgium et al)* (Order on Request for the Indication of Provisional Measures) [1999] ICJ Rep 124, para 16.

[112] ICJ *Legality of the Threat or Use of Nuclear Weapons* (n 99) para 47; Art 13 ILC Draft Code of Offences Against Peace and Security [1989-II/2] YbILC 68.

coercing State must have the **military and geopolitical capacity** to translate the threat into action.[113]

D. Legal Consequence

I. Voidness *ex lege*

38 A treaty procured by the use or threat of force is void ('**absolute invalidity**'). Being a 'nullity',[114] it has **no legal force** on the international plane **by virtue of the law** (→ Art 69 MN 11). In contrast, a voidable treaty is a valid treaty that can be nullified at a party's instigation.

> By Resolution 662 (1990) the Security Council decided "that the annexation of Kuwait by Iraq *under any form* and whatever pretext has no legal validity, and is considered null and void."[115]

39 According to Art 44 para 5, the voidness afflicts all parts of the forced treaty, irrespective of whether some parts are freely negotiated (→ Art 44 MN 24). At least when **peace treaties** and **cease-fire accords** are concerned, the ridged sanction envisaged by Art 44 appears too uncompromising with regard to the undeniable **necessity to end wars** irrespective of the legality of the use of force. According to the law of state responsibility, the coercing State is under the legal obligation to cease the use of unlawful force (Art 30 ILC Articles on State Responsibility). This regularly requires an agreement on the *modus operandi* for achieving the restoration of peace. Under the realm of the UN Charter, the gap between the legal situation stipulated by Art 44 para 5 and **practical and political needs** can be bridged by the **Security Council**'s demand under Chapter VII of the UN Charter to conclude a peace agreement with a specific content (→ MN 48–50).

> In the *Armed Activities on the Territory of the Congo* case, the ICJ did not consider the Lusaka Agreement of 1 August 1999 – a bilateral agreement between the Congo and Uganda "on the withdrawal of Ugandan troops from the Democratic Republic of the Congo, co-operation and normalization of relations between the two countries" – void in all its parts even though the Court decided on Uganda's unlawful use of armed force against the Congo since September 1998. To the contrary: the Court acknowledges that the Lusaka Agreement "authorizes" Uganda's military presence on Mount Ruwenzori, *ie* partly on the territory of the Congo, without dwelling on Art 52. The agreement reflects "the acknowledgment by both parties of Uganda's security needs in the area, without pronouncing upon the legality of prior Ugandan military actions there or elsewhere".[116] In Resolution 1234 (1999), the Security Council called for the immediate signing of a cease-fire agreement

[113] *H Hofmeister* Ceterum censeo Carthaginem esse delendam – eine Analyse des völkerrechtlichen Gewaltverbots (2010) 48 AVR 248, 258.

[114] *Lauterpacht* I 151 para 2.

[115] UNSC Res 662 (1990), 9 August 1990 (emphasis added), UN Doc S/RES/662 (1990).

[116] ICJ *Armed Activities on the Territory of the Congo* (n 83) paras 104–105.

allowing the orderly withdrawal of all foreign forces between Uganda and the Congo without acting explicitly under Chapter VII of the UN Charter.[117]

Given that bilateral as well as multilateral treaties fall within the scope of Art 52 (→ MN 17), Art 52 would have been more precise if declaring the voidness of the **forced consent** instead of the voidness of the treaty. Due to the imperfect wording of Art 52, it is Art 69 para 4's function to keep multilateral treaties intact for all other non-coerced parties (→ MN 6). **40**

According to Art 69 para 3, all acts performed by the coerced State in **compliance with the forced treaty** before the voidness claim has been positively established are legally null and void in relation to the coercing State. In contrast, the coerced State's acts in execution of the forced treaty addressed to a non-coercing State are legally valid pursuant to Art 69 para 2 lit b. However, Art 69 para 2 lit a imposes the positive obligation of that State to comply with the coerced States demand to restore the *status quo ante*.[118] **41**

II. *Ab initio*

A forced treaty is void *ab initio, ie* it has not come into legal existence on the international plane ('absolute nullity').[119] Consequently, the maxim *pacta sunt servanda* (Art 26) applies at no time to the forced and therefore void treaty.[120] However, as long as the voidness is not established by appropriate ways and means of dispute settlement (Art 65 para 2 or para 3 in conjunction with Art 33 UN Charter), international law hazards the **apparent validity of a treaty** (*cf* Art 69 para 2). **42**

The concept of *ad initio* voidness is prone to legal uncertainty considering the possible discrepancy between the *de iure* non-existence of the forced 'treaty' and its *de facto* ostensible existence. In addition, the concept carries the risk of destabilizing treaty relations given that the unilateral claim of voidness does not necessarily come along with a submission to (judicial) dispute settlement. As a remedy, the Convention sets up a dispute settlement procedure (Arts 65–67) to be followed if the allegedly forced State wants to free itself from legal uncertainty (→ MN 44–46). At times, however, affected States do not raise the ground of voidness but perform the 'treaty' uncomplainingly; or, they notify their voidness claim (*cf* Art 65 para 1) without reaching a dispute settlement. (*cf* Art 65 para 3, Art 66, Annex). Even after the lapse of a considerable time, Art 45 does not deprive forced States of their right to invoke force as a ground for the treaties' voidness (→ Art 45 MN 10). Consequently, the *ex post* declaration of voidness made by a **43**

[117]UNSC Res 1234 (1999), 9 April 1999, UN Doc S/RES/1234 (1999), para 4.

[118]*M Reisman/D Pulkowski* Nullity in International Law in MPEPIL (2008) MN 37.

[119]Final Draft, Commentary to Art 49, para 6; *S Rosenne* The Settlement of Treaty Disputes under the Vienna Convention of 1969 (1971) 31 ZaöRV 44, 52–53.

[120]*Cf* the statement by the representative of Bolivia UNCLOT I 154 para 27.

competent dispute settlement mechanism or by the disputing parties themselves necessarily has retroactive effects. It destroys the **apparent validity of the 'treaty'** from the beginning. As long as no peaceful dispute settlement is reached between the parties, the coerced State bears **the risk of international responsibility** in case of a premature suspension of the disputed treaty.

III. Procedure

44 According to the wording of Art 65 para 1, the forced party alone may claim the voidness of the treaty ("a party which [. . .] invokes [. . .] a defect in its consent"; for details, see Art 65 MN 28–29).[121]

45 **(Quasi-)judicial dispute settlement mechanisms** that are competent to apply all relevant international treaties to a pending dispute have to observe the voidness of a forced 'treaty' on their own motion without requiring the party's submission to declare the forced 'treaty' void.[122] Nothing, however, relieves the forced party to provide evidence so as to put the arbitrator into the position to assess the legal situation in the light of Art 52 and its customary equivalent (→ MN 27, 51).

46 Whereas the voidness of a forced 'treaty' is customarily recognized (→ MN 53), the procedure stipulated in Arts 65–67 is not (→ Art 4 MN 8). However, the legal position of Non-States Parties to the Convention does not vary too much; their voidness claim also perishes or prevails in the **process of the political contestation** (Art 33 UN Charter).[123]

E. Confirmation by Executing

47 The execution of the forced treaty bears no legal significance as long as the use or threat of force continues to constrain the free will of the coerced State. When the pressure gradually abates, the continuing compliance with the treaty before becomes meaningful. Due to the absolute voidness of the forced treaty, the voluntary execution cannot be interpreted as an act **curing** the forced treaty's defects and thereby **restoring** its legal validly.[124] This message is carried by Art 45, which stipulates that a State acting inconsistently loses its right to invoke invalidity in all cases apart from Arts 51, 52 and 53.[125] However, depending on the circumstances of the particular case, the voluntary execution of the void 'treaty' can be interpreted

[121] For an opposite view, see *O Corten* in *Corten/Klein* Art 52 MN 36; *Reuter* VIII 127; *Lauterpacht* I 150–151 para 11 and note para 2; *G Haraszti* Reflections on the Invalidity of Treaties in *G Haraszti* (ed) Questions of International Law (1977) 59, 61.

[122] *Haraszti* (n 122) 61.

[123] *Reisman/Pulkowski* (n 119) MN 36.

[124] *Lauterpacht* I 151 para 2.

[125] Final Draft, Commentary to Art 42, 239–240 para 5.

as the **newly formed consent**, this time freely given.[126] The legal device to construe a **valid oral treaty** mirroring the content of the void written one cushions the ridged and in some ways unrealistic legal effects procured by Art 52, Art 44 para 5 and Art 69.

F. Security Council *ex post* Approval

It is beyond discussion that the Security Council has the power under the UN Charter to **authorize** the threat or use of force (Art 39 in conjunction with Art 42 UN Charter); peace agreements procured by authorized measures of unilateral or collective self-defence are legally valid pursuant to Art 52 and Art 75 provided that the addressee of the authorized force committed an **aggression** (→ Art 75 MN 15–17). **48**

Much more legal explosiveness bears the question whether the Security Council has the power to **validate an agreement** procured by unlawful force. **49**

> Although the Security Council did not authorize the use or threat of force, on 13 October 1998 the North Atlantic Council decided to issue activation orders (ACTORDs) for air strikes within Yugoslavia within a time frame of 96 hours.[127] The threat of force by NATO led to the conclusion of the Holbrooke agreement[128] as well as the Kosovo Verification Mission agreements between the FRY and OSCE[129] and the Air Surveillance Mission Agreement between the FRY and NATO.[130] The Security Council acting under Chapter VII endorsed and supported these agreements and demanded the full and prompt implementation,[131] without making the unauthorized threat of force prior to the agreements a subject. When violence broke out in December, NATO again resorted to the threat to use force,[132] coercing the FRY back to the negotiating table, this time in Rambouillet.[133] In a Presidential Statement, the Security Council welcomed and supported these international efforts.[134] Despite the ongoing threat to use force, the Rambouillet Draft Interim Agreement for Peace and Self-Government in Kosovo was not accepted by the FRY, leading to the NATO air bombing campaign that lasted until 9 June when the Military

[126]Final Draft, Commentary to Art 49, 247 para 6.

[127]*Cf* NATO, Statement by the Secretary-General Following Decision on the ACTORD, NATO HQ, 13 October 1998.

[128]UN Doc S/1998/953, Annex, 2 (1998).

[129]Agreement between the North Atlantic Treaty Organization and the Federal Republic of Yugoslavia, Annex, UN Doc S/1998/991 (1998).

[130]Agreement on the Kosovo Verification Mission of the Organization for Security and Cooperation in Europe, Annex, UN Doc S/1998/978 (1998) 4.

[131]UNSC Res 1203 (1998), 24 October 1998, UN Doc S/RES/1203 (1998).

[132]*Cf* NATO Press Release (99)12, 30 January 1999, para 5.

[133]For a detailed analysis, see *AJ Bellamy* Reconsidering Rambouillet (2001) 22 Contemporary Security Policy 31; *M Weller* The Rambouillet Conference on Kosovo (1999) 75 International Affairs 211; *M Weller* Enforced Negotiations: The Threat and Use of Force to Obtain an International Settlement for Kosovo (1999) 5 International Peacekeeping 4.

[134]Security Council Presidential Statement, 29 January 1999, UN Doc S/PRST/1999/5, reprinted in Press Release SC/6637, 29 January 1999.

Technical Agreement between the International Security Force ('KFOR') and the FRY and the Republic of Serbia was signed (Kumanovo Agreement).[135] The treaty's purpose was to establish and define KFOR's future authority in Kosovo. Given that the suspension of the NATO bombing campaign was conditioned upon the fulfilment of the treaties conditions, the conclusion of the Kumanovo Agreement was procured by unauthorized force, the lawfulness of which is highly disputed.[136] In Security Council Resolution 1244 (1999) of 10 June 1999, enacted one day after the signing of the Kumanovo Agreement, the Security Council did not mention the treaty explicitly but authorized UN Member States and relevant international organizations to establish the international security presence in Kosovo (operative para 7 of the resolution) with substantial NATO participation (para 4 of Annex II to the resolution) on the basis of a military agreement still to be concluded (para 10 of Annex II).[137] For NATO, the Kumanovo Agreement remains the primary tool for the KFOR's presence in Kosovo, along with Resolution 1244.[138]

50 It is considered that the Security Council has the **authority to impose a treaty** even when the prior use of force was unilateral and arguably unlawful.[139] Consequently, the treaty would not derive its legality from lawfulness of the use of force but from the legislative power of the Council to override the treaty law consequences of the unlawful use of force.[140] Irrespective of whether the Security Council has the power to impose treaties, Art 103 UN Charter would prevent the forced party from pointing at Art 52 (or its customary equivalent) in order to escape the duty under Chapter VII to comply with the forced 'treaty' obligations as demanded by the Security Council Resolution. If the Security Council merely welcomes the conclusion of the treaty even though the use or treat of force hovers above the treaty, the *ex post* approval can be regarded as the **authoritative dispute settlement** with regard to the ground of voidness pursuant to Art 52.

G. Evidence

51 As a rule, the burden of evidence is with the State that claims the voidness of a 'treaty' allegedly procured by the threat or the use of force. Given that the stability of treaty relations (Art 26) is a great good in international law and the violation of Art 2 para 4 UN Charter a serious allegation in international relations, the standard of evidence required is high.

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[135]Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, signed in Kumanovo, FYROM, 9 June 1999, 38 ILM 1217.

[136]Other authors qualify the Kumanovo Agreement as a treaty procured by the threat of force: *Roscini* (n 97) 259.

[137]According to *E Milano* Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status (2003) 14 EJIL 999, 1008, the Kumanovo Agreement is part and parcel of the legal and political solution provided by Resolution 1244.

[138]*LJ Puleo* The Military Technical Agreement [2003] KFOR Chronicle No 5 (3 June 2003).

[139]*GH Fox* Humanitarian Occupation (2008) 183.

[140]*Ibid.*

In the *Dubai-Sharjah Border* award, the arbitral tribunal stated that "it is manifestly clear that any allegation of duress, of whatever kind, which is alleged to vitiate consent must be subject of very precise proof".[141] In the *Fisheries Jurisdiction Case*, the ICJ dismissed Iceland's voidness claim by stating that it "cannot consider an accusation of this serious nature on the basis of a vague general charge unfortified by evidence in its support."[142]

52 Whereas the use or threat of force can often be supported by **UN documents** "to the extent that they are of probative value and are corroborated, if necessary, by other credible sources",[143] coercive intent of the forcing State (→ MN 23) and the incapacitation of the forced State are difficult to prove by means of documentary evidence. However, these elements can be established by other ways of **direct evidence**, *eg* witnesses, or by **indirect or circumstantial evidence**.

In the *Armed Activities* dispute between Congo and Uganda, the ICJ paid particular attention to the issue of conclusive evidence: "The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them [...]. The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention."[144]

H. Customary Law

53 International jurisprudence confirmed the customary basis of Art 52 without providing support for its general acceptance.[145] Even though the mere reference to the universally recognized prohibition to use armed force is not an exceedingly persuasive argument, there is no doubt that Art 2 para 4 UN Charter is the very foundation for the conviction of States that unlawful force should not produce any contractual benefits (*ex iniuria ius non oritur*):[146] no participant on the UNCLOT Conference questioned the effects of armed force on the validity of treaties. However, the customary basis of Art 52 as well as the provision itself necessarily mirror the flaws of Art 2 para 4 UN Charter produced by inconsistent State practice.[147]

[141] *Dubai–Sharjah Border* (n 94) 571.

[142] ICJ *Fisheries Jurisdiction* (Jurisdiction of the Court) (n 78) para 24.

[143] ICJ *Armed Activities on the Territory of the Congo* (n 83) para 205.

[144] *Ibid* para 61.

[145] ICJ *Fisheries Jurisdiction* (Jurisdiction of the Court) (n 78) para 24; *Dubai–Sharjah Border* (n 94).

[146] *Cf I Brownlie* International Law and the Use of Force by States (1963) 410.

[147] For the willingness to accept recourse to the threat to use force, see *Roscini* (n 97) 249–250.

I. Retroactivity

54 At the Vienna Conference, the Bolivian delegation expressed its view that Art 52 applies not only to future but to all treaties.[148] In contrast, the US delegation called early for clarification that Art 52 shall not be applied to treaties coming into force before the entry into force of the UN Charter (*ie* before 24 October 1945), or, alternatively, before the entry into force of the Art 52 incorporating Art 2 para 4 UN Charter (*ie* before 27 January 1980).[149] The Convention's non-retroactivity is already emphasized in Art 4 (→ Art 4 MN 8): if it is established that armed force has procured the conclusion of a treaty prior to 1980, Art 52 is not applicable. However, the provision's customary equivalent invalidates the forced treaty anyway, provided that the forced 'treaty' has been concluded after the entry into force of the UN Charter.[150]

J. UNCLOT Declaration

55 In order to find sufficient support for the flexible reference to force prohibited by principles of international law embodied in the UN Charter (→ MN 28–32), it was agreed to wrap the nineteen-State proposal on economic and political force up in the '**Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties**'[151]:

> "*The United Nations Conference on the Law of Treaties*,
> *Upholding* the principle that every treaty in force is binding upon the parties to it and must be performed by them in good faith,
> *Reaffirming* the principle of sovereign equality of States,
> *Convinced* that States must have complete freedom in performing any act relating to the conclusion of a treaty,
> *Deploring* the fact that in the past States have sometimes been forced to conclude treaties under pressure exerted in various forms by other States,
> *Desiring* to ensure that in the future no such pressure will be exerted in any form by any State in connexion with the conclusion of a treaty,
> 1. *Solemnly condemns* the threat or use of pressure in any form whether military, political, or economic, by any State, in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principle of the sovereign equality of States and freedom of consent,
> 2. *Decides* that the present Declaration shall form part of the Final Act of the Conference on the Law of Treaties."

[148] *Waldock* V 16.

[149] *Ibid*; the US government argued that the "validity of a large number of treaties, notably peace treaties, might be thrown into question".

[150] *Waldock* V 19 para 6 emphasized that "a peace treaty or other treaty procured by coercion prior to the emergence of the rule codified in the present article would not, under the inter-temporal law be deprived of its validity by the operation of that rule".

[151] UNCLOT II 101 para 13.

In practice, the legally non-binding instrument has little relevance although in theory, it is eligible of influencing the **interpretation** of Art 52 (→ MN 30; Art 31 → MN 97). **56**

In the *DubaiSharjah Border* award of 1981, the arbitral tribunal indirectly acknowledged the document's potential: because the UNCLOT Declaration is dated of 1969, the expression "threat or use of force" could not have, earlier in 1956 when the contested agreement between Dubai and the British authorities was concluded, comprehended the use of economic coercion.[152]

Apart from the Declaration's potential influence on the definition of the term "force" in Art 52 (→ MN 30), it carries a message of its own. In its **preamble**, the Declaration refers to the principle ***pacta sunt servanda*** (1st recital) as the guiding principle of treaty relations and international law (→ Art 26) and two equally important principles of international law that are capable of easing the duty of States to perform their valid treaties in good faith: principle of **sovereign equality of States** (2nd recital) and the principle of **free consent** (3rd recital). In para 1 of its operational part, the Declaration reveals what is already recognized as international customary law: military, economic or political pressure in order to coerce another State into the conclusion of a treaty violates the **principle of sovereign equality of States** (Art 2 para 1 UN Charter) and likewise its essential pillar, the principle of **free consent**.[153] This is at least valid if the degree of pressures reduces the States to such impuissance that it sees no alternative but to conclude the desired treaty. In customary international law, the infringement of these fundamental principles of international law triggers the coercing State's **international responsibility** with all its consequences, *inter alia* to give its consent in the termination of the forced treaty (Art 31 ILC Articles on State Responsibility). In contrast, the voidness *ab initio* of the treaty (→ MN 42–43) does not flow from the law of State responsibility. **57**

An example for an agreement falling under the scope of the UNCLOT Declaration would be the 1981 Hostage Settlement Agreements concluded between the United States and Iran which paved the way for the release of the US diplomats held hostage in Iran for 444 days.[154] While the taking of hostages in foreign embassies can be classified as political pressure, the act does not infringe Art 2 para 4 UN Charter.

Even though the Declaration surely visualizes international customary law when it comes to dead-end pressure of whatever nature procuring the **conclusion of a treaty**, it is noteworthy that the Declaration goes one step further: according to para 1 of the operational part, it constitutes a violation of the principle of sovereign equality and the freedom of consent if a State is coerced to perform **any act relating to the conclusion of a treaty**, which includes the adoption (Art 9) or the authentication of the treaty text (Art 10).[155] Given that the duty to respect another State's **58**

[152] *Dubai–Sharjah Border Arbitration* (n 94) 569.

[153] *Villiger* Preamble MN 10.

[154] *JM Redwine* The Effects of Duress on the Iranian Hostage Settlement Agreement (1981) 14 Vanderbilt JTL 847, 851–854.

[155] For a different view, see *Villiger* Art 52 Declaration MN 6.

autonomy under international law flows from the principle of sovereign equality,[156] there is a strong argument that the State's free will is protected by law in any stage of treaty making.

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Article 53

Treaties conflicting with a peremptory norm of general international law ("jus cogens")

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.

Contents

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A. Purpose and Function

1 By adopting Art 53 VCLT, States Parties seized the widely academic notion of *ius cogens* in international law, imparted legal essence to legal theory and introduced the outcome into positive international law for the first time.[1] Since then, the *ius cogens* concept constitutes one of the few mainstays of the international legal order, designed to protect overriding interests and values of the international community of States from selective alteration and corrosion.[2] Indeed, the very idea of *ius cogens* is to delimit the destructive effects of **relativism**[3] and **consensualism**[4] on the international community's essential normative commitments.[5] Today, the *ius cogens* concept reflected in Art 53 is generally accepted – albeit seldom invoked in State practice – and a rule of **customary international law**.[6] With a view to the overall agreement on the existence of *ius cogens* expressed on the UN conference (→ MN 14–15), it is safe to say that Art 53 reflects a customary rule that has gradually developed long before the Convention entered into force (non-retroactivity of the Convention → Art 4 MN 11–13).

2 Even if the invalidating effect of *ius cogens* on deviating treaties has been rarely put to test in practice, the overall concept holds an unwaning fascination for international scholars and lawyers.[7] Part of this fascination stems from the

[1] *MM Magallona* The Concept of ius cogens in the Vienna Convention on the Law of Treaties (1976) 51 Philippine LJ 521, 523, reprinted in *S Davidson* (ed) The Law of Treaties (2004) 495, 497; some authors dispute the legal validity of the *ius cogens* concept, considering it a purely "rhetorical weapon" or "normative myth", see *eg GA Christenson* Jus cogens: Guarding Interests Fundamental to International Society (1988) 28 VaJIL 585, 590; *AM Weisburd* The Emptiness of the Concept of jus cogens, as Illustrated by the War in Bosnia-Herzegovina (1995–1996) 17 Michigan JIL 1, 40; *W Czapliński/GM Danilenko* Conflict of Norms in International Law (1990) 21 NYIL 3, 5: "international legal Yeti".

[2] *L Hannikainen* Peremptory Norms in International Law (1988) 4.

[3] *J Combacau/S Sur* Droit international public (1995) 26.

[4] *M Koskenniemi* From Apology to Utopia (2005) 321 *et seq*.

[5] Federal Constitutional Court (Germany) 18 BVerfGE 441 (1965), translation of the relevant parts in *SA Riesenfeld* Jus dispositivium and jus cogens in International Law: in the Light of a Recent Decision of the German Supreme Constitutional Court (1966) 60 AJIL 511, 513.

[6] *Cf* ICJ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 22 July 2010, para 81.

[7] But see the critique of *M Koskenniemi* International Law in Europe: between Tradition and Renewal (2005) 113, 122 that *ius cogens* is burdened with *kitsch*: *ius cogens* is a notion "expressed in a dead European language that [has] no clear reference in this world but which invoke[s] a longing for such reference and create[s] a community of such longing."

academic desire to constitutionalize the somewhat anarchic international legal order. Originally, the international *ius cogens* doctrine is taken *inter alia* from municipal law concepts, especially the law of contracts (→ MN 6). In this field, municipal law traditionally opposes *ius strictum*, which cannot be set aside by contracting parties due to *ordre public* considerations, and *ius dispositivum*, which yields to the will of the parties.[8] Today, however, the constitutional law parallel is even more striking[9]: the municipal notion of a **normative hierarchy** aims at safeguarding constitutional ideas and values stipulated by the *pouvoir constituant* and *pouvoir constituant dérivé* respectively against the hasty interference by the ordinary lawmaker. Art 53 appears to seize on this approach by granting the "international community as a whole", a newly invented and still mysterious international actor (→ MN 26–29),[10] the power to create a body of 'higher law'[11] (→ MN 43) constituting some sort of 'international *ordre public*'[12] (→ MN 21).

Being the focal provision on international *ius cogens,* Art 53 is complemented by other articles of the VCLT: Arts 65 and 66 provide for a procedure to be followed when a party to a dispute claims the invalidity of a treaty allegedly resulting from Art 53; Art 71 – *lex specialis* to Art 69 – outlines the legal consequences resulting from the infringement of *ius cogens*. Art 71 is complemented by Art 44, which rules out any attempts to limit the damage to the treaty caused by Art 53 by separating the void provisions so as to save the remaining ones. And lastly, Art 64 stipulates the termination of prior treaties in conflict with a newly established peremptory norm. **3**

B. Historical Background and Negotiating History

I. Historical Background

The first precursor of modern *ius cogens* is typically seen in **Roman civil law** of which it is contended that it recognized the distinction between *ius strictum* and *ius dispositivum* to partially limit private autonomy. It is certain that Roman law knew another dichotomy, namely between *ius strictum* and *ius aequum*, the latter permitting the praetor to deviate from 'strict law', similar to the common law concept of equity.[13] Of equal interest with respect to *ius cogens* was the late Roman **4**

[8] *E Schwab* Some Aspects of International ius cogens as Formulated by the International Law Commission (1967) 61 AJIL 946, 948.

[9] For this approach, see *M Byers* Conceptualising the Relationship between jus cogens and erga omnes Rules (1997) 66 Nordic JIL 211, 239; *A Orakhelashvili* Peremptory Norms in International Law (2006) 9–10.

[10] But see Art 50 Final Draft, which does not disclose the creator of *ius cogens*.

[11] *S Kadelbach* Zwingendes Völkerrecht (1992) 26, see also *Orakhelashvili* (n 9) 68.

[12] *CL Rozakis* The Concept of jus cogens in the Law of Treaties (1976) 13.

[13] *HE Yntema* Equity in the Civil and the Common Law (1966–1967) 15 AJCL 60, 73, 77.

distinction between *ius publicum*[14] and *ius privatum*, the first of which was unalterable.[15] The notion of *ius cogens* proper was however unknown to classical Roman law[16]; in ancient texts, the term only appears in a single instance, used in a completely different sense.[17] In fact, the supposedly 'Roman' origins of *ius cogens* seem to owe their pervasiveness almost exclusively to eighteenth and nineteenth century German pandectists.[18]

5 The second forerunner of *ius cogens* is the ***ius naturale***, a notion that is typically ascribed to *Aristotle*, the Stoics and *Cicero* and which was introduced into international law by way of the School of Salamanca (*Francisco Suárez*, *Francisco de Vitoria*)[19] and of *Hugo Grotius*, the latter of whom typically employed the terms "law of nature" (universally binding), "volitional divine law" (binding for those who know the laws) and "volitional human law".[20] *Vitoria*, one of the early theorists of natural law, acknowledged the existence of voluntary law binding the entire world (*totus orbis*) from which no derogation is permitted.[21]

6 In opposition to natural law theory, **legal positivism** of nineteenth and early twentieth centuries inherently had trouble with the idea that the freedom of the will of States could be limited[22]; yet, quite a number of influential scholars regarded an international treaty legally void if its content violates basic moral principles.[23] Apparently, they conceived the idea in analogy to the *ordre public* notion of

[14]On the term *ius publicum* in Roman sources, understood as a reference to form (acts of the Praetor) or substance (all norms concerning public policy), see *B Rudden* Ius cogens, ius dispositivum (1980) 11 Cambrian Law Review 87, 88.

[15]See *eg* Digest 2, 14, 38 (*Papinian*): "ius publicum privatorum pactis mutari non potest"; Digest 50, 17, 45, 1: "privatorum conventio iuri publico non derogat".

[16]As pointed out correctly *eg* by *E Suy* The Concept of ius cogens in International Law (1967) 18.

[17]Digest 50, 17, 82: "donari videtur, quod nullo iure cogente conceditur" (definition of donation, see *J Domat* Les loix civiles dans leur ordre naturel, le droit public et legum delectus Vol I (1722) 182).

[18]See *eg CF Glück* Ausführliche Erläuterung der Pandecten nach Hellfeld Vol I (1797) 92. The pandectist heritage is also emphasized by *P Guggenheim* Traité de droit international public Vol I (2nd edn 1967) 128.

[19]*Cf* separate opinion of Judge *Moreno-Quintana* in ICJ *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)* [1958] ICJ Rep 102, 107.

[20]See *eg H Grotius* De jure belli ac pacis (1646) book I ch I §§ IX, X, XIII (*FW Kelsey* translation (1925) 38, 40, 44).

[21]*F de Vitoria* De potestate civili (1528) § (translation in *A Pagden/J Lawrance* (eds) Vitoria: Political Writings (1991) 1, 40).

[22]*K Strupp* Theorie und Praxis des Völkerrechts (1925) 69: "Pacta sunt servanda (einziger völkerrechtlicher Satz iuris cogentis!)"; *GWF Hegel* Grundlinien der Philosophie des Rechts (1821) § 336; *H Triepel* Völkerrecht und Landesrecht (1899) 82.

[23]*JC Bluntschli* Das moderne Völkerrecht der civilisirten Staten (1872) 237; *FF Martens* Sovremennoe meždunarodnoe pravo civilizovannych narodov (in German Völkerrecht: das internationale Recht der civilisirten Nationen Vol I (1883) 406); *A Rivier* Principes du droit des gens Vol II (1896) 57 para 141.

domestic civil law rather than natural law theory.[24] The academic attempts to limit the contractual freedom of States gained momentum after World War I[25]: Judge *Schücking* argued in the *Oscar Chinn* case (1934) that the PCIJ should reject to apply an agreement contrary to international public policy[26]; *Verdross*' paper of 1936 on treaties *contra bonos mores*[27] – written in response to the Harvard Draft Convention on the Law of Treaties,[28] which had failed to discuss the topic[29] – emerged as the most influential contribution to the present Art 53 VCLT, not least because *Verdross* was a member of the ILC.[30]

II. Negotiating History

At the very beginning of the ILC's work on the law of treaties, *ius cogens* was a non-topic. Conscious of this lacuna, ILC member *Yepes* wanted his proposal on "invalidity of treaties having an unlawful purpose"[31] to be recorded if not discussed. Reverting to this early proposal, SR *Lauterpacht* in 1953 introduced his Draft Art 15 on treaties being "illegal under international law".[32] When explaining this rather enigmatic provision, *Lauterpacht* emphasized that the test whether the object of the treaty is illegal, causing the treaty's voidness, was not its inconsistency with customary international law but "with such overriding principles of international law which may be regarded as constituting principles in international public policy (*ordre international public*)".[33] The prohibition of piracy and aggressive war and the general principles of law seizing on norms of international morality (*eg* good faith) were named as examples.[34] Despite the "substantial practical and **7**

[24] *L Alexidze* Legal Nature of jus cogens in Contemporary International Law (1981) 172 RdC 219, 229.

[25] *FA von der Heydte* Die Erscheinungsformen des zwischenstaatlichen Rechts: jus cogens und jus dispositivum im Völkerrecht (1932) 16 ZVR 461, 463; *J Jurt* Zwingendes Völkerrecht (1933) 98–100.

[26] Separate opinion of Judge *Schücking* in PCIJ *Oscar Chinn Case* PCIJ Ser A/B No 63, 148, 149–150 (1934).

[27] *A Verdross* Forbidden Treaties in International Law (1937) 31 AJIL 571; *id* Der Grundsatz pacta sunt servanda und die Grenzen der guten Sitten (1936) 16 ZÖR 79.

[28] (1935) 29 AJIL Suppl. 657.

[29] *D Shelton* Normative Hierarchy in International Law (2006) 100 AJIL 291, 298.

[30] *K Zemanek* How to Identify Peremptory Norms of International Law in *PM Dupuy et al* (eds) Festschrift Tomuschat (2006) 1103.

[31] [1950-I] YbILC 299 para 49c: "In order to be valid, a treaty, as understood in this Convention, must have a lawful purpose according to international law."

[32] *Lauterpacht* I 154: "A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice."

[33] *Lauterpacht* I 155.

[34] *Lauterpacht* I 155–156.

doctrinal difficulties" of the concept, *Lauterpacht* considered Draft Art 15 of central importance for the legal regime governing international treaties.[35]

8 In his 3rd report, *Lauterpacht*'s successor *Fitzmaurice* introduced the denomination '*ius cogens*'[36] in the context of his 'essential validity'-concept, which should denote the validity of a treaty in points of substance.[37] By distinguishing between the legality and the morality of a treaty, *Fitzmaurice* regarded a treaty as lawful if its content was "in conformity with or [did] not contravene, or that its execution should not involve an infraction of those principles and rules of international law which are in the nature of *jus cogens*".[38] In contrast, unethical treaties should not be *per se* invalid but unenforceable.[39] *Fitzmaurice* named rules concerning the position of the individual (*eg* international humanitarian law on protection of prisoners of war), the prohibition of planning a war of aggression and prohibition of piracy as rules of law having an "absolute and non-rejectable character".[40]

9 SR *Waldock* combined *Lauterpacht*'s and *Fitzmaurice*'s proposals in his Draft Art 13:

> "1. A treaty is contrary to international law and void if its object or its execution involves the infringement of a general rule or principle of international law having the character of *jus cogens*.
> 2. In particular, a treaty is contrary to international law and void if its object or execution involves –
> (a) the use or threat of force in contravention of the principles of the Charter of the United Nations;
> (b) any act or omission characterized by international law as an international crime; or
> (c) any act or omission in the suppression or punishment of which every State is required by international law to co-operate.
> 3. [. . .]
> 4. The provisions of this article do not apply, however, to a general multilateral treaty which abrogates or modifies a rule having the character of *jus cogens*."[41]

10 Even though *Waldock* avoided delineating the characteristics of *ius cogens*, he considered the examples given in Draft Art 13 para 2 as guidelines for determining rules having *ius cogens* character.[42]

11 Draft Art 37 of the 1963 ILC Report[43] and the identical Art 50 of the 1966 Final Draft[44] already contained the general features of the present Art 53 VCLT.

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[35] *Lauterpacht* I 155.

[36] *Fitzmaurice* III 26 (Draft Arts 16, 17, 18 and 22).

[37] *Fitzmaurice* I 109.

[38] *Fitzmaurice* III 26 (Draft Art 16 para 2).

[39] *Fitzmaurice* III 28 (Draft Art 20); see also *Fitzmaurice* II 45. *Cf* separate opinions of Judges *Eysinga* and *Schücking* in PCIJ *Oscar Chinn Case* PCIJ Ser A/B No 63, 135, 148 *et seq*.

[40] *Fitzmaurice* III 40.

[41] *Waldock* II 52.

[42] *Waldock* II 53.

[43] [1963-I] YbILC 314.

[44] Final Draft, Commentary to Art 50, 247 para 1.

However, the discussions leading to the 1963 draft revealed diverging views regarding the nature of *ius cogens*: some ILC members took the line that *ius cogens* derives from positive law, explicitly or implicitly recognized by States as *ius cogens*[45]; others held the view that *ius cogens* derives from the international public order ("a higher allegiance to the principle of justice"[46]) as expressed by the UN Charter[47] and beyond.[48] In its commentary, the ILC took note of the divergent opinions yet justified the proposed draft article as an attempt to seize a comparatively recent development in international law.[49] For illustration of *ius cogens*, the ILC conceived trade in slavery, piracy and genocide as examples of *Waldock*'s third category (Draft Art 13 para 2 lit c); the human rights and self-determination were named by some members as legal positions protected under the second category (*Waldock*'s Draft Art 13 para 2 lit b).[50] Other cases in point indicated as *ius cogens* during the ILC debate were principles of the UN Charter,[51] sovereign equality of States,[52] freedom of navigation on the high seas,[53] the ICJ Statute for parties to a dispute,[54] rules of the Geneva Conventions of 1929 and 1949 concerning the treatment of prisoners of war[55] and *pacta sunt servanda*.[56] However, the ILC abstained from burdening their draft article on *ius cogens* with exemplary lists, leaving future determination to State practice and international jurisprudence.[57]

Reactions of States to the proposed ILC article were generally positive,[58] even though they voiced different ideas concerning the derivation of *ius cogens*.[59] Some States linked their support of the *ius cogens* article to the

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[45]*Yasseen* [1963-I] YbILC 63 para 41; *Tunkin* [1963-I] YbILC 69 paras 24–26.

[46]*Pal* [1963-I] YbILC 65 para 67.

[47]*Pal* [1963-I] YbILC 65 para 64; *Bartoš* [1963-I] YbILC 66–67 para 63.

[48]*Rosenne* [1963-I] YbILC 64 para 55.

[49][1963-II] YbILC 198 para 3.

[50][1963-II] YbILC 199 para 3. For details of the discussions, see [1963-I] YbILC 63 *et seq*.

[51]*Tabibi* [1963-I] YbILC 63 para 44; critical *Ago* [1963-I] YbILC 71 para 52.

[52]*Lachs* [1963-I] YbILC 68 para 10; *Tunkin* [1963-I] YbILC 69 para 28; *contra* inequality *Pal* [1963-I] YbILC 70 para 33; *Jiménez de Aréchaga* [1963-I] YbILC 70 para 45.

[53]*Ago* [1963-I] YbILC 71 para 53.

[54]*Waldock* [1963-I] YbILC 78 para 49, 216–217 para 108 referring to ICJ jurisprudence.

[55]*Verdross* [1963-I] YbILC 125 para 45.

[56]*Tunkin* [1963-I] YbILC 197 para 19.

[57][1963-II] YbILC 199 para 3; see also *Castrén* [1963-I] YbILC 65–66 para 70, *Ago* [1963-I] YbILC 66 para 74, *Amado* [1963-I] YbILC 69 para 17; *Waldock* [1963-I] YbILC 78 para 48; Final Draft, Commentary to Art 50, 247–248 para 2.

[58]See the comments of Algeria, Brazil, Bulgaria, Cyprus, Czechoslovakia, Ecuador, Ghana, Guatemala, Hungary, Indonesia, Iraq, Israel, Italy, Morocco, Netherlands, Pakistan, Panama, the Philippines, Poland, Portugal, Romania, Spain, Syria, Thailand, the Ukrainian SSR, the USSR, Uruguay, Venezuela, the United Arab Republic and Yugoslavia [1966-II] YbILC 279 *et seq*.

[59]See the comments of Algeria (morality and public policy), Panama (internal law and the principles of social justice), Brazil, Iraq, Thailand and Uruguay (principle of hierarchy of norms) [1966-II] YbILC 21–23; *Yasseen* [1963-I] YbILC 63 para 38 (substance of the rule).

establishment of an effective dispute settlement procedure[60] as most criticism concerned the legal uncertainty involving the invalidity of treaties conflicting with rules whose *ius cogens* character is very likely to be disputed.[61] The colorful bouquet of '*ius cogens*' brought up by State representatives illustrates the legal uncertainty involving the determination of rules having *ius cogens* character: *pacta sunt servanda*,[62] arguably all treaty norms,[63] threat or use of force,[64] intervention in internal affairs of a State,[65] sovereignty and independence of a State,[66] principles enshrined in the UN Charter,[67] human rights,[68] the principle of self-determination[69] and the independence and equality of States (understood as a shield against unjust treaties designed as instruments of colonial oppression and exploitation)[70] were all submitted as examples of *ius cogens*.

13 In the midst of all these praises, the delegation of Luxembourg openly rejected the concept of *ius cogens* as an attempt to utilize the domestic law notion of morality and public policy aimed at determining the compatibility of private law contracts with fundamental concepts of the social order. Luxembourg argued that this domestic concept was not suitable for international law.[71] Draft Art 50 was adopted by the ILC in 1966 without changes by 14 to 1.[72]

14 At the Vienna Conference, the inclusion of a provision on *ius cogens* was widely supported. Its necessity was explained with the experience of World War II[73] and the importance of morality in inter-State relations.[74] While some delegates referred to *ius cogens* as a fairly recent concept,[75] others considered it as a longstanding

[60]See the comments of Turkey, the United Kingdom and the United States [1966-II] YbILC 21, 341 para 2.

[61]See the comments of Luxembourg, Sweden, Turkey, the United Kingdom and the United States [1966-II] YbILC 20–21, 311, 340, 341 para 2, 344, 354.

[62]See the comment of Luxembourg [1966-II] YbILC 20.

[63]*Ibid*.

[64]See the comments of Cyprus and Sweden [1966-II] YbILC 22, 285, 340. For a strict interpretation of "use of force" as only referring to armed aggression, see the comment of the Netherlands [1966-II] YbILC 317 and the statement by the representative of Malaysia UNCLOT I 326.

[65]See the comment of Cyprus [1966-II] YbILC 22.

[66]See the comment of Cyprus [1966-II] YbILC 285.

[67]See the comments of Italy, Morocco, the United Arab Republic and the United Kingdom 21–23.

[68]See the comments of the Philippines and Spain [1966-II] YbILC 22.

[69]See the comment of the Philippines [1966-II] YbILC 22.

[70]See the comments of the Ukrainian SSR, the USSR and Czechoslovakia [1966-II] YbILC 23, 286.

[71]See the comment of Luxembourg [1966-II] YbILC 20.

[72][1966-I] YbILC 121 para 129.

[73]See the statement by the representative of Italy UNCLOT I 311 para 42.

[74]See the statement by the representative of Ivory Coast UNCLOT I 321 para 50.

[75]See *eg* the statements by the representatives of Chile and Turkey UNCLOT I 298 para 53, 300 para 1.

principle.[76] As to its foundation, numerous explanations were brought forward, circumscribing *ius cogens* as "rules which derived from principles that the legal conscience of mankind deemed absolutely essential to coexistence in the international community",[77] "rules of the universal legal conscience of civilized countries"[78] and the "higher interests of the international community as a whole".[79] Again, two famous schools of thoughts divided the delegates into naturalists,[80] positivists[81] and 'go-betweens'.[82]

Only very few States opposed the concept as such.[83] However, a number of States criticized the vagueness of the provision, in particular the lack of clarity what constitutes *ius cogens*.[84] Continuing along the same lines, some States stressed the importance of providing means for impartial settlement of disputes over *ius cogens*.[85] Another point of diverging opinions was the severability of treaty provisions if not all of them are contrary *ius cogens*.[86] Unsurprisingly, various examples were referred to as reflecting rules of *ius cogens* character, these being the maintenance of international peace,[87] the prohibition of the threat or use of force,[88] **15**

[76]See the statement by the representative of Italy UNCLOT II 104 para 37.

[77]See the statement by the representative of Mexico UNCLOT I 294 para 7; see also the statement by the representative of Ceylon UNCLOT I 319 para 37 (Draft Art 50 is legal expression of moral principle).

[78]See the statement by the representative of Colombia UNCLOT I 301 para 26.

[79]See the statement by the representative of Cyprus UNCLOT I 305 para 67.

[80]See the statements by the representatives of Colombia and Ecuador UNCLOT I 301 para 26, 320 para 43.

[81]See the statements by the representatives of Hungary, Brazil, the Philippines and Mali UNCLOT I 311 para 46, 317 para 22, 322–323 para 15, 327 para 68.

[82]See the statement by the representative of Lebanon UNCLOT I 297 para 43.

[83]See the statements by the representative of Turkey UNCLOT I 300 para 8, 471–472 para 9; partly critical statement by the representative of Switzerland UNCLOT I 324 para 31.

[84]See the statements by the representatives of Madagascar, Austria, the United Kingdom, Sweden, France, Australia, Japan, Belgium, Monaco and Norway UNCLOT I 301 para 21, 303 para 47, 304 para 53, 306 paras 2 *et seq*, 309 para 31, 316 para 13, 318 para 30, 320 para 47, 324 para 33, 325 paras 37 *et seq*.

[85]See the statements by the representatives of Finland, Lebanon, Italy, Pakistan, Australia, Japan, Germany, Belgium, Canada, Norway UNCLOT I 294 para 12, 297 para 45, 311 para 43, 316 para 9, 316 para 14, 318 para 30, 319 para 35, 320 para 47, 323 para 21, 325 para 37; against a junctim, see statements by the representatives of Iraq, Kenya, Cuba, Sierra Leone, Cyprus, Israel, Romania and Trinidad and Tobago UNCLOT I 296 paras 24–26, 296 para 33, 297 MN 35, 300 para 10, 306 para 70, 310 para 35, 313 para 62, 327 para 66; for judicial control: statement by the representative of France UNCLOT I 309 para 29.

[86]In favour of separability: statements by the representatives of Finland and Canada UNCLOT I 294 para 13, 323 para 24; *contra*: statements by the representatives of Cuba, the Byelorussian SSR, Hungary, the Ukrainian SSR UNCLOT I 297 para 39, 307 para 10, 312 para 47, 322 para 7.

[87]See the statement by the representative of the Byelorussian SSR UNCLOT I 307 para 9.

[88]See the statements by the representatives of Greece, Kenya, Chile, Uruguay, Germany, Ecuador, Tanzania and the Ukrainian SSR UNCLOT I 295 para 18, 296 para 13, 298 para 55, 303 para 48, 318 para 31, 320 para 42, 321 para 2, 322 para 6.

non-aggression,[89] non-interference in the internal affairs of a State,[90] sovereign equality of States,[91] the principle of self-determination,[92] Art 1,[93] Art 2[94] and the Preamble of the UN Charter,[95] the prohibition of slave trade,[96] the prohibition of slavery,[97] the prohibition of genocide,[98] the protection of (fundamental) human rights,[99] proper treatment of protected persons in wartime (prisoners of war, wounded, civilians),[100] the prohibition of piracy,[101] the prohibition of imperialism,[102] the prohibition of forced labor,[103] the equality of human beings,[104] Art 33,[105] Art 51[106] and Art 103 UN Charter,[107] the prohibition of racial discrimination,[108] the freedom of the high seas,[109] certain rules of land warfare,[110] the prohibition of

[89]See the statements by the representative of the USSR, Uruguay, Czechoslovakia, the Ukrainian SSR and Canada UNCLOT I 294 para 3, 303 para 48, 318 para 25, 322 para 6, 323 para 22.

[90]See the statement by the representative of the USSR UNCLOT I 294 para 3.

[91]See the statements by the representatives of the USSR, Sierra Leone and Ghana UNCLOT I 294 para 3, 300 para 9, 301 para 16.

[92]See the statements by the representatives of the USSR, Sierra Leone and Ghana UNCLOT I 294 para 3, 300 para 9, 301 para 16.

[93]See the statements by the representatives of the USSR and Cuba, Czechoslovakia UNCLOT I 294 para 3, 297 para 34, 318 para 25.

[94]See the statements by the representatives of the USSR, Cuba, Lebanon, Sierra Leone, Poland and Czechoslovakia UNCLOT I 294 para 3, 297 para 34, 294 para 43, 300 para 9, 302 para 35, 318 para 25.

[95]See the statement by the representative of Cuba UNCLOT I 297 para 34.

[96]See the statements by the representatives of Iraq, Czechoslovakia and Tanzania UNCLOT I 295 para 21, 318 para 25, 321 para 2.

[97]See the statements by the representatives of Lebanon, Chile, Sierra Leone, Ghana and Poland UNCLOT I 297 para 43, 299 para 61, 300 para 9, 301 para 16, 302 para 35.

[98]See the statements by the representatives of Lebanon, Ghana, Poland, Uruguay, Czechoslovakia, Tanzania and Canada UNCLOT I 297 para 43, 301 para 16, 302 para 35, 303 para 48, 318 para 25, 321 para 2, 323 para 22.

[99]See the statements by the representatives of Kenya (referring to ICJ jurisprudence), Sierra Leone, Uruguay and Canada UNCLOT I 296 para 31, 300 para 9, 303 para 48, 323 para 22.

[100]See the statement by the representative of Lebanon UNCLOT I 297 para 43; generally on the Geneva Conventions statements by the representatives of Italy and Switzerland UNCLOT I 311 para 41, 324 para 26.

[101]See the statements by the representatives of Chile, Australia and Czechoslovakia UNCLOT I 299 para 61, 317 para 16, 318 para 25.

[102]See the statement by the representative of Sierra Leone UNCLOT I 300 para 9.

[103]*Ibid.*

[104]*Ibid.*

[105]*Ibid.*

[106]*Ibid.*

[107]*Ibid*; statement by the representative of Poland UNCLOT I 302 para 35.

[108]See the statements by the representatives of Ghana and Uruguay UNCLOT I 301 para 16, 303 para 48.

[109]See the statement by the representative of Poland UNCLOT I 302 para 35.

[110]*Ibid.*

colonial domination,[111] rules of diplomatic and consular relations[112] and certain ILO Conventions.[113]

Draft Art 50 – the present Art 53 VCLT – was adopted by the plenary with 87[114] to 8[115] votes and 12 abstentions.[116] **16**

Considering the *ius cogens* concept as "nebulous", Art 53 remains the main reason for **France** not to ratify the VCLT.[117] The **reservations practice** reveals that several States consider Art 53 and 64 inextricably linked to Art 66 lit a, because – as stressed by the United Kingdom – "[t]heir inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference."[118] Consequently, the reservation by Tunisia according to which the submission of a dispute to the ICJ referred to in Art 66 lit a requires the consent of all parties thereto was objected by Germany, the United Kingdom, Sweden, Japan, Netherlands, the United States[119] and Belgium to the effect that Art 53 does not apply in treaty relations with Tunisia. **17**

C. Theoretical Basis for *ius cogens*' Legal Authority

Even though the *travaux préparatoires* of Art 53 reveal the diverging views of ILC members and State representatives on the theoretical foundation of *ius cogens* (→ MN 11, 14), the **wording of Art 53**, especially the passage "norms [...] accepted and recognized by the international community of States as a whole", points towards the consensus-based positivist's approach.[120] However, as *Criddle* and *Fox-Decent* emphasize, the wording can equally be interpreted as serving a purely evidentiary function in clarifying what must be considered a peremptory **18**

[111] See the statements by the representatives of the Byelorussian SSR and the Ukrainian SSR UNCLOT I 307 para 9, 322 para 6.

[112] See the statement by the representative of Italy UNCLOT I 311 para 41.

[113] See the statement by the representative of Switzerland UNCLOT I 324 para 26.

[114] Some States voted in favour but remained critical towards Draft Art 50, see the statements by the representatives of Cameroon, the United States and the Netherlands UNCLOT II 98 para 58, 102 para 20, 105 para 47.

[115] Australia, Belgium, France, Liechtenstein, Luxembourg, Monaco, Switzerland, Turkey; for reasons, see the statements by the representatives of France, Australia, Switzerland and Belgium UNCLOT II 95 para 18, 95 para 21, 97 paras 53 *et seq*, 103 para 31, 106 para 55; Turkey completely opposed the concept, see the statement by its representative UNCLOT II 99 para 66.

[116] UNCLOT II 107 para 65.

[117] UNCLOTIO I 8 para 11.

[118] 1989 Declaration of the United Kingdom.

[119] "[T]he United States Government intends, at such time as it becomes a party to the Convention, to reaffirm its objection to the Tunisian reservation and declare that it will not consider that Article 53 or 64 of the Convention is in force between the United States of America and Tunisia."

[120] *D Shelton* Normative Hierarchy in International Law (2006) 100 AJIL 291, 300.

norm of international public order or a fundamental ethical necessity.[121] Indeed, with some goodwill, one can construe the phrase "recognized by the international community" in that sense, meaning that the international community endorsed a rule originating from non-consensual sources (*cf* Art 38 para 1 lit c ICJ Statute). Conversely, Art 53's reference to "general international law" indicates that the VCLT adheres to legal positivism by relying on traditional sources of positive international law (→ MN 30–34).

19 According to the predominant **positivist theory**, norms of international customary law attain a peremptory status through verifiable State consent. However, it is difficult to reconcile the consensus-based approach with actual State practice: most States are ready to call for *ius cogens* in words alone. In addition, the positivist theory has difficulties explaining why *ius cogens* would bind dissenters, third parties and persistent objectors (but see → MN 51–53).[122]

20 Even among proponents of positivist thinking, there is some support of the idea that *ius cogens* transcends ordinary inter-State law-making.[123] In remembrance of the academic harbinger of the modern *ius cogens* concept, the naturalist *Verdross*, *Simma* conceded that the conception of *ius cogens* will remain incomplete as long as it is not based on a philosophy of values like **natural law**.[124] *Verdross* in his groundbreaking essay 'Forbidden Treaties in International Law' of 1937 based his damnation of treaties as "immoral" and accordingly void on the ethical minimum recognized by all the States of the international community.[125] Even under the rule of the VCLT, the natural or moral foundation of fundamental rules of international law – *ie* their inherent authority – remains a popular explanation for their peremptory character.[126] The naturalists' argument, however, has its flaws as well, given that, for the purpose of the law of treaties, even moral values require widespread approval in a recognized norm-setting process in order to clarify that these values have indeed universally accepted authority.[127]

21 On the surface related to the natural law theory but nonetheless distinguishable is the **public order approach** to *ius cogens*. According to this theory, peremptory norms reflect international public policy "which lay down certain principles [. . .], respect for which is indispensable to the legal coexistence of the political

[121] *EJ Criddle/E Fox-Decent* A Fiduciary Theory of ius cogens (2009) 34 Yale JIL 331, 338.

[122] *J Sztucki* Jus cogens and the Vienna Convention on the Law of Treaties: a Critical Appraisal (1974) 97; *D Dubois* The Authority of Peremptory Norms in International Law: State Consent or Natural Law? (2009) 78 Nordic JIL 133, 148.

[123] *Cf M Byers* Conceptualizing the Relationship between jus cogens and erga omnes Rules (1997) 66 Nordic JIL 220, 222.

[124] *B Simma* The Contribution of Alfred Verdross to the Theory of Law (1995) 6 EJIL 34, 53.

[125] *Verdross* Forbidden Treaties (n 27) 574.

[126] *MW Janis* The Nature of jus cogens (1988) 3 ConnJIL 359, 361 reprinted in *L May/J Brown* (eds.) Philosophy of Law: Classic and Contemporary Readings (2010) 184–186.; *C de Visscher* Positivisme et jus cogens (1971) 75 RGDIP 5, 9.

[127] *GM Danilenko* International ius cogens: Issues of Law-Making (1991) 2 EJIL 42, 46; see also *Criddle/Fox-Decent* (n 121) 343.

units which make up the international community".[128] Contrary to the natural law approach, the public order theory fathoms public policy norms as a body of peremptory rules embedded in the international legal system[129] and indispensable for its existence and the operation (international *ordre public*).[130]

> The German Federal Constitutional Court acknowledged in the *East German Expropriation Case*: "[T]he Basic Law also adopts the gradual recognition of the existence of mandatory provisions, that is, provisions that are in the individual case not open to disposition by the states (*ius cogens*). These are rules of law which are firmly rooted in the legal conviction of the community of states, which are indispensable to the existence of public international law, and the compliance with which all members of the community of states may require."[131]

Kolb objects to the perception that norms of peremptory character are limited to **22** fundamental rules constituting the international public order.[132] According to his innovative but still isolated approach, *ius cogens* is neutral to values and necessities but not to **public interests** (*utilitas publica*).[133] Protecting the latter, *ius cogens* is a formal device for the international community to prevent the normative fragmentation of public international law into different legal regimes and relationships *inter partes*.[134]

The latest approach aimed at explaining the peremptory status of international **23** rules has been developed by *Criddle* and *Fox-Decent*. Their **fiduciary theory** of *ius cogens* draws upon *Immanuel Kant*'s first part of the 'Metaphysics of Morals', the 'Doctrine of Rights' (1797).[135] By relying on a moral idea of dignity flowing from the fiduciary State–subject relationship, *Criddle* and *Fox-Decent* argue that States must honor peremptory norms as basic safeguards of human dignity because of the fiduciary character of State sovereignty. This theory necessarily concentrates on the *ius cogens* character of international human rights norms.[136]

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[128]ICJ *Convention Governing the Guardianship of Infants* (separate opinion *Moreno-Quintana*) (n 19) 106.

[129]*Verdross* Forbidden Treaties (n 27) 572; *Orakhelashvili* (n 9) 28; *McNair* 213–214.

[130]*Orakhelashvili* (n 9) 29; ICJ *Convention Governing the Guardianship of Infants* (separate opinion *Moreno-Quintana*) (n 19) 106–107.

[131]Federal Constitutional Court (Germany) *'East German Expropriation Case'* 112 BVerfGE 1, para 97 (2004) (official translation); see also Federal Constitutional Court (Germany) 18 BVerfGE 441 (1965), translation of the relevant parts in *SA Riesenfeld* Jus dispositivium and jus cogens in International Law: in the Light of a Recent Decision of the German Supreme Constitutional Court (1966) 60 AJIL 511, 513.

[132]*R Kolb* Théorie du ius cogens international (2001) 172.

[133]*Ibid* 183.

[134]*Ibid* 29.

[135]*Criddle*/*Fox-Decent* (n 121) 347.

[136]*Ibid* 387.

D. Elements of Article 53

24 The **legal definition** of "peremptory norm of general international law" provided for in the second sentence of Art 53 aims at facilitating the identification of peremptory norms without illustrating them.

I. For the Purpose of the Convention

25 Loyal to the VCLT's overall consensual approach, the definition of the term "peremptory norm of general international law" starts with a caveat ("For the purpose of the Convention [. . .]"): Non-States Parties to the Convention may champion a different idea of what constitutes *ius cogens*, and justifiably so.[137] However, the Convention's apparent self-restriction disguises the fact that the definition itself raises a **claim of universality** given that it links peremptory norms to the approval of the "international community of States as a whole" (→ MN 26–29), which necessarily embraces all Non-States Parties to the Convention.

II. International Community of States as a Whole

26 The second sentence of Art 53 introduces a hitherto unknown **international actor**[138]: the "international community of States as a whole". The first of several unsolved problems associated with the 'international community' is its legal nature. Within the framework of the VCLT, it appears to be a body distinct from the single States constituting it,[139] a body endowed with **top-level law-making function** ('pouvoir législatif supérieur'[140]) whose community-based consensus must be considered a **separate source of international law** (→ MN 35–37).[141] This idea – neither rejected nor supported by the wording of Art 53[142] – is academically appealing if not revolutionary.[143] It has its flaws, though. First, the 'international

[137] *Hannikainen* (n 2) 3 rightly proceeds on the premise that today, the definition set out in Art 53 is universally accepted.

[138] But see also Art 33 ILC Articles on State Responsibility.

[139] *H Mosler* International Legal Community (1984) 7 EPIL 309, 311.

[140] *PM Dupuy* Le juge et la règle générale (1989) 93 RGDIP 569, 592.

[141] For an in-depth analysis of the existence of a *ius cogens* source *sui generis,* see *R Kolb* The Formal Source of ius cogens in Public International Law (1998) 53 ZÖR 69.

[142] Not in conformity with the wording: *Kolb* (n 132) 140; supported by the wording: *Orakhelashvili* (n 9) 110–111.

[143] In favour of an autonomous source: *R Monaco* Observations sur la hiérarchie des sources du droit international in *R Bernhardt et al* (eds) Festschrift Mosler (1983) 599, 606; *NG Onuf/RK Birney* Peremptory Norms of International Law: Their Sources, Their Function and Future (1974) 4 Denver Journal of International Law and Policy 187, 193; *Orakhelashvili* (n 9) 108; *Janis* (n 126) 361.

community of States as a whole' is a rather vague legal fiction. Second, the negotiating records of the Vienna Conference support the view that Art 53 ties in with the traditional perception of international law-making.[144] In order not to jeopardize the universal acceptance of *ius cogens*, the term 'international community of States as a whole' should be understood as a **quantitative yardstick** rather than as an autonomous actor of uncertain composition and loose procedures.

27 The term '**international community**' – already mentioned by the PCIJ in 1927 ("la communauté internationale"[145]) – describes a feature of modern international order: community interests have led to a basic legal integration in fields of law fundamental to all members constituting the international legal community.[146]

28 With regard to the addition '**of States**', it is debatable whether States alone constitute the international legal community, excluding **international organizations** and possible **future subjects of international law with law-making capacity**. Interestingly enough, Art 53 VCLT II does not revisit the denomination as to broaden the circle of subjects capable of creating peremptory norms, even though the VCLT II makes it clear that peremptory norms of international law apply to international organizations as well as to States.[147] When drafting Art 53 VCLT II, the ILC decided not to unnecessarily modify the predecessor norm since "in the present state of international law, it is States that are called upon to establish or recognize peremptory norms."[148] Furthermore, it was argued that deleting the annex "of States" had "the drawback of needlessly placing organizations on the same footing as States."[149] Today, this outdated approach requires a special justification in order to be valid in the context of *ius cogens*. In this regard, one could rightly argue that a great many decision-making organs of international organizations are composed of a limited number of States, such as the UN Security Council or the NATO Council. Given that *ius cogens*-related practice of international organizations does not replace but complements the practice of States, the risk to distort the ***ius cogens* creation process** is negligible. The opposite is true, however, in the context of ***ius cogens* modification processes**, especially when the **UN Security Council** acts under Chapter VII. Still, rather than depriving the United Nations of its influence on *ius cogens* matters, special attention should be paid to the verbal reaction of UN Member States.

29 Whereas the qualifier "of States" is negligible, the appendix "**as a whole**" is of central importance. Its insertion by the Drafting Committee provoked inquiries.[150]

[144] *GM Danilenko* Law-Making in the International Community (1993) 225.

[145] PCIJ *SS 'Lotus'* PCIJ Ser A No 10, 16 (1927).

[146] Cf *H Mosler* International Society as a Legal Community (1974) 140 RdC 1, 11–14.

[147] UNCLOTIO II 39 para 2.

[148] *Ibid*.

[149] *Ibid*.

[150] See the statements by the representatives of Chile and Ghana UNCLOT I 472 para 11, 472 para 14.

The explanation of the Chairman of the Drafting Committee, *Yasseen*,[151] reflects today's prevailing academic perception[152]: the phrase denotes **universality** without requiring all States (and other international actors with law-making capacity) to explicitly or implicitly accept and recognize a rule as peremptory. Following *Yasseen*, it is enough if a **very large majority** does so, provided that this majority represents **essential elements** of the international community and is evenly spread on a **worldwide scale**. Scattered **dissenters** cannot prevent a customary rule from obtaining a peremptory character within the international legal system (see also → MN 51–53).[153] The same is valid *prima facie* if a single dissenter has a **dominant position** within the international community, subject to evidence to the contrary.[154]

III. Norm of General International Law

1. Traditional Sources of International Law

30 There is a strong tendency in academia to equate 'general international law'[155] with customary international law.[156] The preparatory work, however, advocates a broad understanding of 'general international law'.[157] It serves as a **generic term** that embraces all formal sources of international law that produce generally accepted legal rules.[158] This, however, does not imply that all sources of international law are equally satisfactory as sources of *ius cogens*.

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[151]UNCLOT I 472 para 12; see also the statement by the representative of Libya UNCLOT II 106 para 63.

[152]*B Simma* From Bilateralism to Community Interest (1994) 250 RdC 217, 290–291; *G Gaja* Jus cogens beyond the Vienna Convention (1981) 172 RdC 283; *AJJ de Hoog* The Relationship between jus cogens, Obligations erga omnes and International Crimes: Peremptory Norms in Perspective (1991) 42 ZÖR 183, 187.

[153]*Yasseen* (Chairman of the Drafting Committee) UNCLOT I 471 para 7: "no individual State should have the right of veto".

[154]See the statement by the representative of the United States UNCLOT II 102 para 22: "absence of dissent by any important element of the international community".

[155]*M Koskenniemi* Report of the Study Group of the ILC on Fragmentation of International Law (2002) UN Doc A/CN.4/L.682, 254: "no well articulated or uniform understanding of what this might mean".

[156]For references, see *GI Tunkin* Is General International Law Customary Law Only? (1993) 4 EJIL 534, 535 n 5; this understanding dates from times when no international treaty had truly universal character, see *E de Vattel* Le droit des gens (1758) book I Introduction § 24 (*CG Fenwick* translation (1916) 8): "As it is clear that a treaty binds only the contracting parties the conventional Law of Nations is not universal, but restricted in character." See also *H Kelsen* Principles of International Law (1952) 188: "General international law is, as a matter of fact, customary law."

[157]*Bartoš* [1963-I] YbILC 214 para 72.

[158]In favour of a limitation to international customary law *S Verosta* Die Vertragsrechts-Konferenz der Vereinten Nationen 1968/69 und die Wiener Konferenz über das Recht der Verträge (1969) 29 ZaöRV 654, 686; *K Parker*/*LB Neylon* Jus cogens: Compelling the Law of Human Rights (1989) 12 Hastings International and Comparative Law Review 411, 417.

a) Customary Law

General customary international law that binds all States except those explicitly and constantly dissenting in the creation of specific customary rules (**persistent objectors**; but see for *ius cogens* → MN 51–53) is the most important and the best qualified source of law in the context of Art 53.[159] Only few voices question its suitability for the purpose of creating peremptory norms.[160] Admittedly, even without the weight of peremptoriness, the customary law concept suffers from several uncertainties with regard to method and content. Speaking of '**general practice**', Art 38 para 1 lit b ICJ Statute requires for the establishment of ordinary customary rules a **uniform** and **extensive** practice of States in terms of **representativeness**. Above all, those States must participate in the practice whose interests are specially affected.[161] Taking the form of *ius cogens,* it is 'the international community of States as a whole' that takes an interest in the existence and observance of the customary rule (→ MN 26–29).[162] Although all-encompassing universal practice is still not required, the threshold is high enough to constitute a methodological breaking point for the creation of customary international law (→ MN 36). **31**

b) Multilateral Treaties

In order to pass as a source of 'general' international law proper for the generation of peremptory rules, **multinational treaties** must be ratified by a vast majority of States on a worldwide scale, even though truly universal participation is not required.[163] **32**

[159]*Hannikainen* (n 2) 227.

[160]*G Schwarzenberger* The Concept of jus cogens in Report of the Conference on International Law Organized by the Carnegie Endowment for International Peace, Lagonissi April 1966 (1967) 88; *Janis* (n 126) 360; *Orakhelashvili* (n 9) 125.

[161]ICJ *North Sea Continental Shelf (Germany v Denmark, Germany v Netherlands)* [1969] ICJ Rep 3, para 74; ILA, Committee on Formation of Customary Law, Final Report 2000, 26, Rule 14 commentary e.

[162]See *eg* ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, para 190 where the ICJ deduced from statements of both parties that the prohibition to use force constitutes a peremptory rule and that the prohibition is recognized by both parties as customary law.

[163]*Yasseen* (Chairman of the Drafting Committee) UNCLOT I 472 para 12; statement of the representative of the United States UNCLOT II 102 para 22; *P de Visscher* Cours général de droit international public (1972) 136 RdC 1, 107; *A Gómez Robledo* Le ius cogens international: sa genèse, sa nature, ses fonctions (1981) 172 RdC 9, 96 *et seq*; accepting only multilateral treaties to create ius cogens according to Art 53: *Schwarzenberger* (n 160) 88.

c) Decisions of International Organizations

33 Decisions of international organizations deriving from multilateral treaty law (*ie* constituent instruments) or applying multilateral treaty law may have an impact on the interpretation of the multilateral treaty norm (or customary law) whose peremptory character is recognized and accepted according to Art 53. Art 53, however, does not address the question whether the decision itself has a peremptory character in terms of causing the voidness of conflicting treaty obligations of Member States.[164] This possible effect has to be determined on the basis of the constituent instrument alone.

d) General Principles of Law

34 General principles of law recognized *in foro domestico*[165] appear to be an eligible source for rules of international law having *ius cogens* character given that down to the present day some scholars consider Art 38 para 1 lit c ICJ Statute the last stronghold of naturalist thinking.[166] However, even if Art 38 para 1 lit c ICJ Statute is meant to guarantee that international law conforms to "the legal conscience of civilized nations",[167] it has been stressed by the ICJ that moral principles can only be taken into account in so far as they are given "a sufficient expression in legal form".[168]

2. Autonomous Source of International Law?

35 By referring to "general international law", Art 53 apparently avoids any commitment to a specific source of international law,[169] especially one of the traditional sources listed in **Art 38 para 1 ICJ Statute**. Indeed, if 'source of international law' is defined with special emphasis on the formal processes, which create legally binding norms of international law, one could argue that the **international**

[164]For decisions or non-binding resolutions as evidence for the acceptance and recognition of a peremptory norm by the international community skeptical *K Wolfke* Jus cogens in International Law (Regulation and Prospects) (1974) 6 Polish YIL 145, 154; less dismissive *Kadelbach* (n 11) 201–202.

[165]*B Vitanyi* Les positions doctrinales concernant le sens de la notion de 'principes généraux de droit reconnus par les nations civilisées (1982) 86 RGDIP 48, 96–102 gives an overview of doctrinal approaches identifying general principles recognized *in foro domestico*.

[166]For an early view, see *A Verdross* Les principles généraux du droit dans la jurisprudence internationale (1935) 52 RdC 195, 204–206.

[167]*Baron Dechamps* in Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee (16 June–24 July 1920) with Annexes (1920) 310.

[168]ICJ *South West Africa (Ethiopia v South Africa, Liberia v South Africa)* (Second Phase) [1966] ICJ Rep 6, para 49; see also *A Pellet* in *Zimmermann/Tomuschat/Oellers-Frahm* (eds) ICJ Statute (2006) Art 38 MN 252.

[169]*Bartoš* [1963-I] YbILC 214 para 72.

community's acknowledgment of norms of general international law with prevailing and invalidating force forms an **autonomous source of international law**.[170]

> The US Court of Appeals for the 9th Circuit noted in the *Siderman* case: "While *jus cogens* and customary international law are related, they differ in one important respect. [...] Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II."[171]

36 The idea is fueled by the methodological 'crisis' of customary law due to inconsistent or lacking practice. As a way out of the impasse, it is argued that **general principles of law recognized internationally** belong to the formal sources of international law.[172] Even though no customary rule of law can (yet) be found due to a lack of general and uniform State practice, *Simma* and *Alston* identify "the express articulation of principles in the first instance, *ab initio* or progressively being 'accepted and recognized' as **binding and peremptory** by the 'international community of States as a whole'."[173] The approach to determine general principles through **articulated** (but not yet practiced) **State consensus** melts together the process of creating norms of general international law with the process of adding a peremptory character to that norm, making use of the fact that Art 53's phrase "accepted and recognized" stresses the subjective element – *ie opinio iuris* – of the law-making process (→ MN 45–46).[174]

37 Even though the idea of *ius cogens* emanating from an autonomous source of international law has a special appeal, the question remains why the law-making requirements set on rules with invalidating legal effects are less strict than those valid for ordinary customary law. If the 'international community as a whole' is understood as a quantitative yardstick within established international law-making procedures (→ MN 26), the legally binding character of the peremptory norm is linked to the procedural requirements attached to the creation of "general international law". The ordinary law-making process is not addressed by Art 53, whereas the 'ennobling' consensus of the international community ("accepted and recognized"),

[170] With different lines of reasoning *Wolfke* (n 164) 154; *Orakhelashvili* (n 9) 109.

[171] US Court of Appeals for the 9th Circuit (United States) *Siderman de Blake v Argentina* 965 F2d 699, 103 ILR 454 (1992) (certiorari denied 507 US 1017).

[172] *MC Bassiouni* A Functional Approach to 'General Principles of International Law' [1990] 11 Michigan JIL 768, 772; *S Kadelbach/T Kleinlein* Überstaatliches Verfassungsrecht (2006) 44 AVR 235, 255; *N Petersen* Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation (2008) 23 AmUILR 275, 308.

[173] *B Simma/P Alston* The Sources of Human Rights Law: Custom, jus cogens, and General Principles (1988–1989) 12 AYIL 81, 104 (emphasis added).

[174] See the statement by the representative of Cyprus UNCLOT I 473 para 24.

which generates specific invalidating and prevailing effects of that rule is governed by Art 53 (**double consent**).[175]

IV. Peremptory in Character

1. No Derogation Permitted

38 Art 53 defines peremptory norms as norms from which no derogation is permitted. The prohibition to derogate is at the very heart of *ius cogens*: the disregard of the proscription renders the conflicting treaty void (→ MN 57) and triggers the responsibility of all parties to the void 'treaty' irrespective of whether implementing acts have in fact breached obligations under the substantive command of the peremptory norm (→ MN 62).[176]

39 By imposing a ban, Art 53 turns against the destructive effects of **relativism** and **consensualism** on the international community's essential normative commitments (→ MN 1): the international legal system is characterized by a **multitude of 'competing' lawmakers**, at present 193 States plus international organizations having law-making capacity (→ Art 6 MN 26–31), *ie* the capacity to contribute actively to the creation of rules belonging to one of the sources of international law (Art 38 ICJ Statute). These international lawmakers do not only differ in legal nature but also in their respective composition when creating international legal rules: Already, a consensus of two can modify the legal landscape in their bilateral relations. Therefore, within the international legal order, derogation is the rule rather than the exception. VCLT addresses the issue in Art 30 by adopting the traditional conflict rule *lex posterior derogat legi priori*. In this context, '*derogat*' means, 'prevailing' in the sense of 'non-application' of the conflicting prior law (→ Art 30 MN 35). Even though the legal validity of the prior law is not affected, the conflicting rule remains 'dormant' as long as it conflicts with the subsequent rule (**rule of precedence**[177]). The same is valid for special treaty provisions in relation to general ones (*lex specialis derogat legi generali*) even though the VCLT does not address these kinds of conflict (→ Art 30 MN 2).[178] Given that derogation from a peremptory norm is not permitted, Art 53 rejects the possibility to invoke these traditional conflict rules in order to justify the non-compliance with *ius cogens*.

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[175] *Kolb* (n 141) 81; *Rozakis* (n 12) 74; *U Linderfalk* The Effect of jus cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences? (2007) 18 EJIL 853, 862; *M Akehurst* The Hierarchy of the Sources of International Law (1974–1975) 47 BYIL 285; *Kadelbach* (n 11) 196.

[176] *E Suy* Droit des traités et droits de l'homme in *R Bernhardt et al* (eds) Festschrift Mosler (1983) 935, 938.

[177] *Koskenniemi* Report (n 155) para 365.

[178] PCIJ *The Mavrommatis Palestine Concessions* PCIJ Ser A No 2, 32 (1924); ICJ *Ambatielos Case (Greece v United Kingdom)* (Jurisdiction) [1952] ICJ Rep 28, 44.

2. Restrains in Modification Process

Even though it is the very purpose of Art 53 to safeguard fundamental rules of the international legal order, **legal stagnation** is not prescribed.[179] The modification process, however, is hampered by the requirement that the subsequent norm modifying *ius cogens* must have *ius cogens* character itself. On closer inspection, the modification rule envisaged in Art 53 gives rise to considerable problems. Peremptory customary rules are **never permissive** (*eg* the right to exercise jurisdiction), **seldom prescriptive** (*eg* the command to release a people from colonial rule) but **predominantly proscriptive** (*eg* the prohibition to use force or to torture). Consequently, rules that modify established peremptory rules either **expand** or **limit** the scope of the prohibition or the duty to act. Whereas expansion does not cause any dogmatic problems, limitation does: in the unlikely event that the international community as a whole accepts the *ius cogens* character of a newly established prescriptive rule that conflicts with the traditional *ius cogens* prohibition, the prerequisite of the modification rule stipulated by Art 53 is fulfilled. If, however, the subsequent rule **allows the formerly illegal conduct** (*eg* a new justification to use armed force in inter-State relations), Art 53 requires that the **modifying rule of allowance** has *ius cogens* character, *ie* it shall invalidate proscriptive treaties that 'conflict' with the rule of allowance. **40**

What appears at first sight as a lack of conclusiveness can be justified as a willful frustration of any attempts to limit the scope of a peremptory norm. In this case, the international community would be confronted with **perpetual *ius cogens***, given the *ex lege* invalidity of modifying acts without *ius cogens* quality.[180] However, the vivid debate on humanitarian intervention as a nascent exception to the peremptory prohibition to use force indicates that perpetual *ius cogens* is beyond international realities. **41**

There is a case for a practical solution: the modification requirement envisaged in Art 53 can be interpreted as a reference to the fact that *ius cogens* is subject to changes approved by the international community as a whole.[181] *Desuetudo* or the multilateral treaty provision conflicting with *ius cogens* must verify the **42**

[179] *Waldock* (Expert Consultant) UNCLOT I 328 para 82; *Waldock* II 53; [1963-II] YbILC 199 para 4; Final Draft, Commentary to Art 50, 248 para 4; *contra* statement by the representative of Tanzania UNCLOT I 321 para 2.

[180] *Hannikainen* (n 2) 265–266; *Onuf/Birney* (n 143) 192; *V Paul* The Legal Consequences of Conflict between a Treaty and an Imperative Norm of General International Law (jus cogens) (1971) 21 ZÖR 19, 43.

[181] *Rozakis* (n 12) 85 *et seq*; *Kadelbach* (n 11) 180; *Waldock* II 53; [1963-II] YbILC 199 para 4; Final Draft, Commentary to Art 50, 248 para 4 (even if focusing on a general multilateral treaty as the most probably modification tool); *contra Hannikainen* (n 2) 267; *AJJ van Hoof* Rethinking the Sources of International Law (1983) 166–167.

international community's acceptance and recognition that these acts are **valid modifications** of the formally peremptory command (***actus contrarius***).[182]

3. Hierarchically Superior Rule?

43 National legal systems usually establish a hierarchy of norms based on varying considerations such as the fundamental value of the superior rules for the polity,[183] the legal authority of the superior rule with regard to the legal validity of inferior rules[184] or the power of the lawmaker (*eg* the *pouvoir constituant originaire*) to create rules legally binding to other lawmakers (*eg* the *pouvoir constituant dérivé* and the *pouvoir législatif*) and its rules respectively. From a comparative perspective, it can be said that it exclusively depends on the respective national legal system whether the superior norm has invalidating effects on the conflicting inferior rule (*lex superior derogat legi inferiori*).[185]

44 The idea of a hierarchy of norms within the international legal order has never been undisputed, especially with reference to the **sovereign equality of States** as the relevant lawmakers.[186] However, the invalidating effect of *ius cogens* on conflicting treaties envisaged in Art 53 is commonly regarded as a rule of hierarchy *sensu stricto*.[187] This perception can be justified with a view to the legal authority of *ius cogens* (invalidating effect), the legal authority of the lawmaker by virtue of quantity or quality (international community as a whole in contrast to particular lawmakers) or the fundamental values protected by peremptory rules.[188] Nonetheless, the hierarchy discourse does not contribute to solving any problem associated with the *ius cogens* concept. Given that the international community as a whole must accept and recognize the invalidating effect of *ius cogens* on conflicting treaties concluded between individual members of this community, the hierarchy argument simply illustrates the competence of all members of this community to regulate their individual law-making activities. If, however, the legal authority

[182] *Magallona* (n 1) 521, 532; for a different view, see *Hannikainen* (n 2) 267; *G Abi-Saab* in Report of the Conference on International Law Organized by the Carnegie Endowment for International Peace, Lagonissi April 1966 (1967) 11.

[183] *D Shelton* Normative Hierarchy in International Law (2006) 100 AJIL 291.

[184] *A Merkl* Prolegomena einer Theorie des rechtlichen Stufenbaues in *A Verdross* (ed) Festschrift Kelsen (1931) 251, 276; and furthermore *R Walter* Der Aufbau der Rechtsordnung (1964) 62 *et seq*.

[185] *E Vranes* Lex superior, lex specialis, lex posterior – zur Rechtsnatur der 'Konfliktlösungsregeln' (2005) 65 ZaöRV 391, 403.

[186] *PM Dupuy* Droit international public (2nd edn 1993) 15–16; *P Weil* Towards Relative Normativity in International Law? (1983) 77 AJIL 413, 423.

[187] *Koskenniemi* Report (n 155) para 365; *Simma* (n 152) 289 *et seq*; *C Tomuschat* Obligations Arising for States Without or Against Their Will (1993) 241 RdC 195, 306; for US jurisprudence, see *Siderman de Blake v Argentina* (n 171); US Court of Appeals for the District of Columbia Circuit (United States) *Committee of United States Citizens Living in Nicaragua et al v Reagan* 859 F2d 929, 85 ILR 248, 260 [940] (1988); *Princz v Germany* 26 F3d 1166.

[188] For a different view, see *Kolb* (n 132) 81; *id* (n 141) 103.

of *ius cogens* is considered valid even for those persistently objecting the rule or its authority, the hierarchy argument illustrates the overcoming of a strictly consent-based account of international law without providing suitable justification for this approach (→ but see MN 51–53).

V. Accepted and Recognized as *ius cogens*

Art 53 describes the *ius cogens*-relevant procedure with two verbs: "accept" and "recognize". The provision borrows from Art 38 para 1 ICJ Statute according to which general practice must be *accepted* as law (lit b) and general principles of law must be *recognized* by civilized nations (lit c).[189] Since Art 53 VCLT rearranges the terms in a different context, Art 38 ICJ Statute cannot, however, contribute to their interpretation. **45**

> According to the *travaux préparatoires,* the term 'recognized' was introduced by a US proposal referring to general principles of law having peremptory character: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory rule of general international law which is recognized in common by the national and regional legal systems of the world and from which no derogation is permitted."[190] Supporting the US proposal, France considered the term 'recognized' an objective criterion on the basis of which the peremptory character of a rule can be determined.[191] Even though the US proposal was finally rejected, the term 'recognized' found its way into the final draft by way of a proposal of Finland, Greece and Spain.[192] On the basis of the final version, Cyprus classified the term 'recognized' as subjective in character.[193]

The phrase "accepted and recognized by the international community of States as a whole" is commonly regarded as an indication that the VCLT follows a positivist *ius cogens* approach.[194] **46**

1. Peremptory Character of Customary Rules

In view of the international rules so far acknowledged as *ius cogens* (→ MN 81), it is safe to say that all of them belong to the corpus of **international customary law**. If general custom is established according to the requirements of **Art 38 ICJ Statute**, the rule obtains legally binding force on the international plane (*consuetudo est servanda*). The rule's peremptory character, however, requires an **additional consensus** of the international community of States as a whole (double consent test, → MN 37)[195]: apart from creating a rule of customary international **47**

[189] *Yasseen* (Chairman of the Drafting Committee) UNCLOT I 471 para 4.

[190] UNCLOT III 174 (UN Doc A/CONF.39/C.1/L.302).

[191] See the statement by the representative of France UNCLOT I 309 para 33.

[192] UNCLOT III 174 (UN Doc A/CONF.39/C.1.L.306, Add.1 and 2).

[193] See the statement by the representative of Cyprus UNCLOT I 473 para 24.

[194] *Gómez Robledo* (n 163) 105; *van Hoof* (n 181) 158; *Rozakis* (n 12) 75.

[195] *Rozakis* (n 12) 74; *Linderfalk* (n 175) 862; *Akehurst* (n 175) 285; *Kadelbach* (n 11) 196.

law, the international community must **accept and recognize** the special legal effect of the rule.[196] Both "recognized" and "accepted" clarify that a customary rule derives its peremptory character first and foremost from the ***opinio iuris*** of States, *ie* their conviction that according to international law, no derogation from the customary rule is permitted and its modification must meet higher standards (→ MN 36). Given that the peremptory character of a rule manifests itself in the prohibition to derogate and its invalidity power, **verbal acts** of States such as policy statements, protests, objections and comments of State representatives are of central importance, conflating the expression of belief (*opinio iuris*) with the formal act of practice (*consuetudo*). In contrast, **physical acts** such as executive or judicial decisions declaring the voidness of an international treaty (or national act) due to its conflict with a peremptory norm are less common.

2. Peremptory Character of Multilateral Treaty Provisions

48 The terms "recognized" and "accepted" assume a specific meaning in the process of creating **conventional *ius cogens***. It goes without saying that parties to an (almost) universal treaty – forming the international community of States as a whole in quantity and regional distribution (→ MN 32) – may explicitly, implicitly or subsequently attach a 'peremptory character' to certain provisions. To this end, **no withdrawal** from the treaty (Art 56 para 1), **no suspension** of the treaty (Art 59 para b), **no *inter partes* derogation** of peremptory provisions (Art 41 lit b) and **no reservation** to these provisions (Art 19 lit a) are permitted.

49 At first glance, the option of contracting parties to safeguard fundamental provisions of their multilateral treaty in such ways would render unnecessary provisions like Art 53. It could be argued, however, that it is Art 53's prominent function to overcome the *pacta tertiis nec nocent nec prosunt* principle (Art 35). In light of the free consent rule (Preamble MN 7), another line of reasoning is less exposed to criticism:[197] taking note of Art 38, the most important function of multilateral treaties in the context of Art 53 is to evidence the existence of **parallel rules of customary international law,** which are, according to the international community as a whole, legally binding as general customary law and which have, on top of that, peremptory character outside of the respective treaty regime.[198] On the other hand, a multilateral treaty may easily destroy the fiction that the international community of States as a whole attributes *ius cogens* character to customary rules mirroring substantive treaty provisions. If the multilateral treaty allows States Parties to **unilaterally withdraw** from the treaty regime, strong evidence is

[196] Skeptical *Kadelbach* (n 11) 178.

[197] See also Art 5 MN 19.

[198] *Orakhelashvili* (n 9) 111 *et seq*; *Hannikainen* (n 2) 225–226; *JA Barberis* La liberté de traiter des États et le jus cogens (1970) 30 ZaöRV 19, 45; *J Sztucki* (n 122) 107; *HB Reimann* Ius cogens im Völkerrecht: Eine quellenkritische Untersuchung (1970) 50–51; *Wolfke* (n 164) 151 *et seq*; for a different view, see *J Martensen* Ius cogens im Völkerrecht: Gibt es bindende Normen des Völkerrechts, die durch völkerrechtliche Verträge nicht aufgehoben werden können? (1971) 102.

required to support the view that the international community as a whole prohibits the derogation of its customary equivalent.

3. Peremptory Character of General Principles of Law

Due to their "natural law flavor",[199] **general principles of law recognized *in foro domestico*** are a popular starting point for generating *ius cogens*, at least for those who challenge a strictly positivist understanding of Art 53.[200] The majority of participants to the Vienna Conference, however, was suspicious of general principles of law having *ius cogens* character as a result of which the related US proposal was rejected (→ MN 45). In the light of the present Art 53 VCLT, general principles of law recognized *in foro domestico* cannot be considered peremptory in character just because most domestic legal systems honor them. Instead, the peremptory character requires a positive act of 'recognition' and 'acceptance' performed by the international community of States as a whole in order to attribute peremptory character to the general principles of law. **50**

4. Dissenters and Persistent Objectors

One major challenge of customary peremptory norms is the **persistent objector**: a State or a group of States is persistently and openly dissenting (a) from the *ius cogens* concept in general,[201] or (b) from a particular customary rule irrespective of its peremptory character, or (c) from the conviction that a particular customary rule has peremptory character. All categories raise the same legal question: does international law permit *ius cogens* dissenters to the effect that, for them, a customary rule of peremptory character does not negatively affect their treaty relations? The prevailing opinion considers peremptory norms universally binding irrespective of explicit and constant objections by isolated actors.[202] **51**

[199] *Simma/Alston* (n 173) 107.

[200] *Hannikainen* (n 2) 242.

[201] Turkey *eg* has strongly opposed Art 53 because it regarded the *ius cogens* concept a progressive development not reflected in international law; see the statement by the representative of Turkey UNCLOT I 300 paras 1, 8.

[202] See the statements against the permissibility of persistent objection at the Vienna Conference by the representatives of Ghana and Czechoslovakia UNCLOT I 301 para 19, 318 para 25, by the representative of Libya UNCLOT II 106 para 63, and by *Yasseen* (Chairman of the Drafting Committee) UNCLOT I 471 para 7; in literature: *Hannikainen* (n 2) 214; *I Brownlie* Principles of Public International Law (7th edn 2008) 12 n 56; *M Bos* The Identification of Custom in International Law 25 GYIL (1982) 9, 42 *et seq*; *id* The Methodology of International Law (1984) 246; *McNair* 215; *U Scheuner* Conflict of Treaty Provisions with a Peremptory Norm of General International Law (1969) 29 ZaöRV 28, 30; *Reimann* (n 198) 12; *Rozakis* (n 12) 77 *et seq*; *WT Gangl* The jus cogens dimensions of Nuclear Technology (1980) 13 Cornell ILJ 63, 76 *et seq*, 81 *et seq*; *H Lau* Rethinking the Persistent Objector Doctrine in International Human Rights Law (2005) 6 Chicago JIL 495, 498; *RF Unger* Völkergewohnheitsrecht – objektives Recht oder Geflecht bilateraler Beziehungen, seine Bedeutung für einen 'persistent objector' (1978) 98

> In the written pleadings in the *Fisheries Jurisdiction* case before the ICJ, the UK government submitted: "It is enough to say that the right of a State to dissent from a customary rule cannot be regarded as absolute. There is universal agreement that a new State has no option but to adhere to generally accepted customary law. In addition, where a fundamental principle is concerned, the international community does not recognize the right of any State to isolate itself from the impact of the principle."[203]

52 The reasoning (scarcely supplied) depends on the respective perception of *ius cogens*: natural law foundation, morality or *ordre public* approach detract *ius cogens* from the requirement of consensus and thus do not bother with objections. If the focus is on *ius cogens* as an autonomous source of international law, it is possible to argue that dissent is not legally relevant in the framework of this source, comparable with general principles of law.

> The Inter-American Commission on Human Rights held in the *Domingues* case: "More particularly, as customary international law rests on the consent of nations, a state that persistently objects to a norm of customary international law is not bound by that norm. Norms of jus cogens, on the other hand, derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence."[204] The United States asserted a persistent objector defense against allegations that its use of the juvenile death penalty violates international customary law.[205]

53 From the perspective of **classical voluntaristic positivism**, it is difficult to argue the legal impact of persistent objection away,[206] even though it has little to no practical relevance for universal customary law. Today, 40 years after the conclusion of the VCLT, the *ius cogens* concept as such does not provoke any objections (*eg* by the former opponents Turkey and France). Newly emerging States would not benefit from the persistent objector rule, neither with regard to the *ius cogens* concept as such nor with regard to recognized peremptory rules: it is generally accepted that international law does not provide for a '**subsequent objector**

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et seq; *MK Yasseen* Réflexions sur la détermination du 'jus cogens' in *Societé Française pour le droit international* (ed) Colloque de Toulouse, L'élaboration du droit international public (1975) 204, 207; *P Ziccardi* Il contributo della Convenzione di Vienna sul Diritto dei Trattati alla determinazione del diritto applicabile dalla Corte Internazionale di Giustizia (1975) 14 Comunicazioni e studi 1043, 1065; *N Ronzitti* La disciplina dello jus cogens nella Convenzione di Vienna sul Diritto dei Trattati (1978) 15 Comunicazioni e studi 241, 255 *et seq*.

[203]Reply of the United Kingdom, 28 November 1950, ICJ *Fisheries Case (United Kingdom v Norway)* [1951-II] ICJ Pleadings 291, 426.

[204]IACHR *Domingues v United States* Case 12285 Report No 62/02, 22 October 2002, para 49.

[205]See for the persistent objection of the US government in the UN Commission on Human Rights subsequent to the decision of the Inter-American Commission on Human Rights [2003] Digest of United States Practice in International Law 306.

[206]Only few authors accept persistent objection as a valid defense: *Kadelbach* (n 11) 209; *Wolfke* (n 164) 149; *Magallona* (n 1) 528–529; also skeptical *TL Stein* The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law 26 Harvard ILJ (1985) 457, 481.

rule'.[207] Furthermore, an isolated dissenter cannot prevent the emergence of *ius cogens* (→ MN 29). Given that the creation of a customary rule and the acceptance of its peremptory character are both processes of gradually increasing decidedness, the rigid requirements for a legally valid opting-out – immediate, explicit and permanent objection[208] – are hard if not impossible to meet in the field of peremptory norms of universal customary law. But even from a voluntarist's perspective, the **inadmissibility of persistent objection** against customary rules generally accepted as *ius cogens* can be justified on the basis that today it is the prevailing opinion among States and other relevant actors that – in supplement of the definition provided for in Art 53 – a peremptory norm of customary international law is a norm accepted and recognized by the international community as a whole as a norm **whose binding force and invalidating effects allow no objection** and from which **no derogation is permitted**. As all relevant actors have agreed on these two essential *ius cogens* prerequisites, they have abandoned the persistent objector rule in the event of a verifiable international community consensus on *ius cogens*.

VI. Normative Conflict

54 According to *Jenks,* a normative conflict arises when "[a] party to the two treaties cannot simultaneously comply with its obligations under both treaties".[209] This perception, however, is too restrictive given that a treaty provision may allow a conduct that is prohibited by another treaty provision. Considering that it is the very purpose of normative conflict resolutions to clarify which of two rules governs the conduct in a specific situation, it is of no significance whether these rules are permissive, prescriptive or proscriptive. Consequently, there is a normative conflict if the operation of one rule impedes the operation of another rule.[210] Inasmuch as peremptory rules are either proscriptive or prescriptive (→ MN 40), a normative conflict arises if a treaty provision either allows a conduct proscribed by *ius cogens* or prohibits a conduct prescribed by *ius cogens*. The same is valid if parties agree in their *inter se* relations that a specific peremptory rule is not applicable.[211]

55 The question of whether there is a normative conflict between a treaty provision and *ius cogens* must be decided by way of **interpretation** of both rules pursuant to Art 31. Even though the violation of a peremptory norm triggers the responsibility of the contracting States (→ MN 62) and – as the case may be – the criminal

[207] ILA, Committee on Formation of Customary Law, Final Report 2000, 27, Rule 15 commentary b.

[208] ICJ *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, 131 (recognizing the principle that a State may contract out of a custom in the process of formation).

[209] *CW Jenks* The Conflict of Law-Making Treaties (1953) 30 BYIL 401, 426; see also *Czapliński/Danilenko* (n 1) 12.

[210] *A Orakhelashvili* State Immunity and Hierarchy of Norms (2008) 18 EJIL 955, 957; see also *E Vranes* The Definition of 'Norm Conflict' in International Law and Legal Theory (2006) 17 EJIL 395, 418.

[211] *Orakhelashvili* (n 9) 138.

responsibility of its agent acting contrary to *ius cogens* (→ MN 75), the peremptory rule does not necessarily prescribe the duty of other States to take legal action against the infringing State or its agents and therefore does not necessarily conflict with immunity treaties and customary rules respectively (→ MN 78–79). 'ECJ style' ***effet utile* interpretation** of *ius cogens* so as to maximize its normative force and effectiveness is unknown to international law so far.

> In its contested *Al-Adsani* judgment, the European Court of Human Rights reasoned: "Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. In particular, the Court observes that none of the primary international instruments referred to [Art 5 UDHR, *etc*] relates to civil proceedings or to State immunity."[212]
>
> In *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* (2006), Lord *Bingham of Cornhill* reasoned: "To produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged. Such a rule may be desirable and, since international law changes, may have developed. But [...] it is not *entailed* by the prohibition of torture."[213]

VII. At the Time of the Treaty's Conclusion

56 The phrase "at the time of its conclusion" determines the relevant point in time when the normative conflict must occur so that the treaty falls within the scope of Art 53. At the Vienna Conference, the US delegation proposed the phrase in order to clothe the ILC's opinion in words that *ius cogens* should **not have retroactive effect** on prior treaties (→ Art 64 MN 5).[214] The 'conclusion' of the treaty does not require the entry into force of the treaty contrary to *ius cogens* (Art 24) but points at the **mutual consent to be bound by the treaty** (Art 11). However, the invalidation effect of *ius cogens* hits even earlier: for the unlikely event that *ius cogens* emerges in the period between signature (Art 10 lit b) and ratification (Art 14), it goes without saying that no pre-contractual obligation arises under Art 18.

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[212]ECtHR *Al-Adsani v United Kingdom* (GC) App No 35763/97, 123 ILR 42, para 61. For a different view, see the dissenting opinion of Judges *Rozakis*, *Caflisch*, *Wildhaber*, *Costa*, *Barreto* and *Vajić*, 123 ILR 50, para 3 (2001): "The acceptance [...] of the *ius cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in the case, those of State immunity), to avoid the consequences".

[213]House of Lords (United Kingdom) *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya As-Saudiya (the Kingdom of Saudi Arabia) et al* [2006] UKHL 26, para 45 (emphasis original).

[214]See the statement by the representative of Argentina UNCLOT I 308 para 24; UNCLOT III 68 para 6.

E. Legal Consequence

I. Voidness of the 'Treaty'

In case of a normative conflict between *ius cogens* and a treaty provision (→ MN 54) that does not amount to a legally valid modification of *ius cogens* (→ MN 40–42), the **entire treaty** – not only its provisions conflicting with *ius cogens* – is **void** according to the first sentence of Art 53 in conjunction with Art 44 para 5. The invalidity of the treaty is **absolute**, *ie* the treaty does not legally exist on the international plane, neither for the parties involved nor for other international actors (but see → MN 60). **57**

II. *Ab initio*

A treaty conflicting with *ius cogens* is void *ab initio, ie* it has not come into legal existence on the international plane ('absolute nullity').[215] Being a 'nullity',[216] it has **no legal force** by virtue of the law (→ Art 69 MN 11, 13). Consequently the maxim *pacta sunt servanda* (Art 26) does not apply to a void treaty at any time.[217] **58**

III. Procedure

The fear of instability of treaty relations caused by the abuse of the *ius cogens* argument led to the procedural requirement predetermined in Arts 65 and 66 (→ Art 65 MN 19). Even though the dispute settlement procedure for asserting the invalidity of a treaty triggered by a violation of *ius cogens* has proved to be practically irrelevant, it has to be observed by all parties to the VCLT, provided they have not made a legally valid reservation. **59**

> Being a compromissory clause (Art 36 para 1 ICJ Statute), Art 66 provoked a wealth of reservations, see *eg* the reservation of Algeria: "The Government of the People's Democratic Republic of Algeria considers that the competence of the International Court of Justice cannot be exercised with respect to a dispute such as that envisaged in article 66(a) at the request of one of the parties alone. It declares that, in each case, the prior agreement of all the parties concerned is necessary for the dispute to be submitted to the said Court." Above all, European States could not accept that reservation: "The Belgian State will not be bound by articles 53 and 64 of the Convention with regard to any party which, in formulating a reservation concerning article 66(a), objects to the settlement procedure established by this article." (see also the identical reactions of Denmark and Finland).

[215] Final Draft 247 para 6; *S Rosenne* The Settlement of Treaty Disputes under the Vienna Convention of 1969 (1971) 31 ZaöRV 44, 52–53.

[216] *Lauterpacht* I 147.

[217] *Cf* the statement by the representative of Bolivia UNCLOT I 154 para 27.

60 The procedural requirements imposed by Arts 65 and 66 challenge the idea of the *ex lege* absolute nullity of any treaty contrary to *ius cogens*.[218] To avoid any inconsistency of these rules and Art 53, the latter should be interpreted as proceeding from the **apparent validity of a treaty,** which needs to be eradicated through a declaratory procedure.

> For a different, pre-VCLT approach, see Judge *Schücking*'s separate opinion in the *Oscar Chinn Case* before the PCIJ (1934): "I can hardly believe that the League of Nations would have already embarked on the codification of international law if it were not possible, even to-day, to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by some only of their number any act adopted in contravention of that undertaking would be automatically void."[219]

F. Further Legal Consequences

I. Remedial Action

61 The nullity of the conflicting treaty entails the **positive duty** of its parties to erase – if possible – all traces of the treaty and its implementing acts as stipulated by Art 71 para 1 (→ Art 71 MN 12–21).

II. State Responsibility

62 As a rule, the law of State responsibility[220] applies to any act contrary to *ius cogens* – irrespective of its legal nature and effects – given that such an act is necessarily an internationally wrongful act (Art 1 ILC Articles on State Responsibility) and under no circumstances justifiable (Art 26 ILC Articles on State Responsibility).[221] The **consequential obligations** of the responsible State are owed to the international community as a whole (Art 33 para 1 ILC Articles on State Responsibility, Art 71 VCLT).

63 Whereas the general legal regime of State responsibility does not provide for any legal obligations of **third States in response** to an internationally wrongful act, Art 41 ILC Articles on State Responsibility does so in cases of a "serious breach by

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[218] *R Jennings* Nullity and Effectiveness in *DW Bowett et al* (eds) Essays in Honour of Lord McNair (1965) 64, 67.

[219] PCIJ *Oscar Chinn* (separate opinion Schücking) (n 26) 149.

[220] For an overview of all proposed Draft Articles on State Responsibility dealing with *ius cogens* issues, see *K Kawasaki* International ius cogens in the Law of State Responsibility in *C. Focarelli et al* (eds) Le nuove frontiere del diritto internazionale (2008) 145.

[221] For an incidental reference to Art 26 ILC Articles on State Responsibility, see ICSID *CMS Gas Transmission Company v Argentina* ARB/01/8, 12 May 2005, para 325.

a State of an obligation arising under a peremptory norm of general international law" (Art 40 para 1 ILC Articles on State Responsibility).[222]

> Art 41:
> "1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
> 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."[223]

Countermeasures in response to an internationally wrongful act must not affect any *ius cogens* obligation (Art 50 lit d ILC Articles on State Responsibility). Art 50 in connection with Art 26 ILC Articles on State Responsibility illustrates the predominant legal conception that – beyond Art 53 – a peremptory norm cannot be derogated from by unilateral action or omission regardless of whether legal and factual in nature (**self-defense**, **countermeasures**, ***force majeure***, **distress** and **necessity**).[224] Given that factual actions or omissions elude legal voidness, the legal consequences of Arts 26 and 50 ILC Articles on State Responsibility is the **persistent illegality** of 'countermeasures' that infringe *ius cogens*.[225] **64**

III. Reservations to Peremptory Treaty Provisions

Art 19 does not explicitly address the invalidity of a reservation to a treaty whereby the reserving State purports to exclude or to modify the legal effect of a *ius cogens* provision. Nonetheless, the invalidating effect of *ius cogens* on conflicting reservations is widely undisputed although prompted by different considerations.[226] Reservations lead to **modified *inter se* contractual relations** as between the reserving State and other States Parties to the treaty (Art 19) which fall comfortably within the scope of Art 53.[227] In addition, it is argued that the invalidating effect of *ius cogens* extends to conflicting unilateral statements such as reservations (Art 2 para 1 lit d).[228] And lastly, it is likely that a reservation attempting to modify or **65**

[222]The German Federal Constitutional Court in the 2004 *Expropriation Case* (n 131) para 122 referred to Art 41 ILC Articles on State Responsibility.

[223]For the ILC Commentary on Arts 40 and 41 ILC Articles on State Responsibility for internationally wrongful acts, see [2001-II/2] YbILC 1 112–116.

[224][2001-II/2] YbILC 132 para 9.

[225]*Kawasaki* (n 220) 151.

[226]For a critical discussion of all arguments see *A Pellet* 10th Report on Reservations to Treaties, Addendum, 14 June 2005, UN Doc A/CN.4/558/Add.1 paras 131–145.

[227]*P Reuter* Solidarité et divisibilité des engagements conventionnels in *Y Dinstein et al* (eds) Essays in Honour of Shabtai Rosenne (1999) 625, 630–631; see also *G Teboul* Remarques sur les réserves aux conventions de codification (1982) 86 RGDIP 679, 690.

[228]*Pellet* (n 226) para 135; but note that reservations, which require acceptance to produce legal effects, do not fall within the category of unilateral acts as referred to by the ICJ in the *Nuclear Tests* case (→ MN 71).

exclude a *ius cogens* treaty provision must be regarded as incompatible with the object and purpose of that treaty (Art 19 lit c).[229]

> The ICJ judgment in the *North Sea Continental Shelf* case provoked several clarifying statements. Judge *Nervo* stated in his separate opinion: "Customary rules belonging to the category of *jus cogens* cannot be subjected to unilateral reservations."[230] Judge *Tanaka* dissented: "However, if a reservation were concerned with the equidistance principle, it would not necessarily have a negative effect upon the formation of customary international law, because in this case the reservation would in itself be null and void as contrary to an essential principle of the continental shelf institution which must be recognized as *jus cogens*."[231] Judge *Sørensen* indirectly agreed: "Provided the customary rule does not belong to the category of *jus cogens*, a special contractual relationship of this nature is not invalid as such."[232]
>
> In a concurring opinion, Judge *de Meyer* of the European Court of Human Rights stated: "It is difficult to see how reservations can be accepted in respect of provisions recognising rights of this kind. It may even be thought that such reservations, and the provisions permitting them, are incompatible with the *ius cogens* and therefore null and void, unless they relate only to arrangements for implementation, without impairing the actual substance of the rights in question."[233]

66 The question whether the voidness of the reservation excludes the reserving party from the entire treaty must be answered on the basis of the treaty text and its objective (→ Art 19 MN 114–120).

IV. Decisions of International Organizations

67 Decisions of international organizations contrary to *ius cogens* are null and void on the basis of two considerations: first, decisions of international organizations derive from the constituent instrument of the organization, *ie* the treaty establishing the organization. In order to prevent the latter's voidness pursuant to Art 53, the constituent instrument must be interpreted as not authorizing decisions or actions of organs contrary to *ius cogens*, the latter of which accordingly must be regarded as absolutely ***ultra vires***. Second, international organizations as international legal persons have rights and obligations stemming not only from their constituent instruments but also from general international law, including non-derogable *ius cogens*. In this respect, the legal position of international organizations is quite similar to that of States: the invalidating force of *ius cogens* affects not only international organizations' treaty relations (Art 53 VCLT II) but also their

[229] Human Rights Committee, General Comment No 24, 4 November 1994, para 8.

[230] ICJ *North Sea Continental Shelf (Germany v Denmark, Germany v Netherlands)* (separate opinion *Padilla Nervo*) [1969] ICJ Rep 86, 97.

[231] ICJ *North Sea Continental Shelf (Germany v Denmark, Germany v Netherlands)* (dissenting opinion *Tanaka*) [1969] ICJ Rep 171, 182.

[232] ICJ *North Sea Continental Shelf (Germany v Denmark, Germany v Netherlands)* (dissenting opinion *Sørensen*) [1969] ICJ Rep 241, 248.

[233] ECtHR *Belilos v Switzerland* (concurring opinion *de Meyer*) App No 10328/83 (1988).

unilateral legal acts (→ MN 71). The same is true for factual actions or omissions of agents contrary to *ius cogens* but nonetheless attributable to the organization (**persistent illegality**, *cf* → MN 64). Even the UN Security Council acting under Chapter VII has no special position in both political and legal terms in the field of *ius cogens* obligations.[234]

The European Court of First Instance (now General Court) ruled in its famous *Kadi* judgment (set aside on appeal[235]): "[T]he Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible."[236]

In the *Tadić* case, the Appeals Chamber of the ICTY observed: "[I]t is open to the Security Council – subject to respect for peremptory norms of international law (*jus cogens*) – to adopt definitions of crimes in the Statute which deviate from customary international law."[237]

In a separate opinion to an order of the ICJ in the *Genocide* case (1993), Judge *Lauterpacht* clarified: "The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*."[238]

V. Customary Law

68 It is undisputed that the invalidating force of *ius cogens* extends to ordinary international customary law, regional or universal, either because *ius cogens* is regarded as being at the very top of the hierarchy of international norms (*lex superior derogat legi*

[234]*A Reinisch* Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions (2001) 95 AJIL 851, 859; for a different view, see *B Martenczuk* The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie? (1999) 10 EJIL 517, 545–546.

[235]ECJ (CJ) *Kadi and Barakaat v Council and Commission* C-402/05, C-415/02 P [2008] ECR I-6351.

[236]ECJ (CFI) *Kadi v Council and Commission* T-315/01 [2005] ECR II-3649, para 226; see the similar wording in *Yusuf and Al Barakaat International Foundation v Council and Commission* T-306/01 [2005] ECR II-3533, para 277; *Hassan v Council and Commission* T-49/04 [2006] ECR II-5, para 92; *Ayadi v Council* T-253/02 [2006] ECR II-2139, para 116; all judgments have been annulled on appeal.

[237]ICTY *Prosecutor v Tadić* (Appeals Chamber) IT-94-1-A, 15 July 1999, para 296; endorsed by *Prosecutor v Akayesu* (Appeals Chamber) ICTR-96-4-A, 1 June 2001, para 465 n 845.

[238]ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Further Requests for the Indication of Provisional Measures) (separate opinion *Lauterpacht*) [1993] ICJ Rep 407, para 100.

inferiori) or because, in the interest of the international community, the prohibition to derogate *ius cogens* outlaws any inconsistent legal act or situation.[239]

> In the *Genocide* case (1993), ICJ Judge *Lauterpacht* stated succinctly: "The concept of *jus cogens* operates as a concept superior to both customary international law and treaty."[240]

69 At least in the field of time-honored universal customary law, the legal effect of *ius cogens* is less invalidating than modifying, given that both rules stem from identical sources of law (→ MN 31). If, however, a newly emerging rule of universal customary law conflicts with an established norm of *ius cogens*, the process makes a strong case for an ongoing modification of the peremptory norm under pressure (→ MN 40–42).

VI. General Principles of Law Recognized *in foro domestico*

70 Proceeding from the understanding that the general principles of law are recognized by civilized[241] nations (Art 38 para 1 lit c ICJ Statute), a normative conflict between a general principle and *ius cogens* points at serious methodological flaws in the identification of either the general principle or the peremptory norm. Besides, the **unlikelihood of a normative conflict** follows from the main function of general principles of law, namely filling legal gaps and interpreting legal rules.[242]

VII. Unilateral Acts of States

71 According to the ILC, a unilateral act of a State is an unequivocal expression of will, which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization.[243] Irrespective of whether this definition is generally accepted, the **legal effects** produced by the unilateral act on the international plane are the starting point for a possible invalidating force of *ius*

[239] *Orakhelashvili* (n 9) 206; *EP Nicoloudis* La nullité de jus cogens et le développement contemporain du droit international public (1974) 123, 134.

[240] ICJ *Genocide Convention* (separate opinion *Lauterpacht*) (n 238) para 100.

[241] Understood as "domestic legal systems most representative of different conceptions of law", see *F Capotorti* Cours général de droit international public (1994) 248 RdC 9, 118; *FO Raimondo* General Principles of Law in Decisions of International Criminal Courts and Tribunals (2008) 54.

[242] *Raimondo* (n 241) 44.

[243] *V Rodríguez Cedeño* 5th Report on Unilateral Acts of States [2002-II/1] YbILC 91, 102 para 81, 4 April 2002, UN Doc A/CN.4/525, para 81; international jurisprudence clarifies that intention, and communication of that intention to the intended recipient, is the decisive element making valid a unilateral act, see ICJ *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, para 43.

cogens. As a rule, unilateral acts can cover the assumption of obligations (*eg* by promise, waiver) and the affirmation of rights and situations (*eg* by recognition).[244] However, unilateral acts are unqualified for the **acquisition of rights** given that the declaring States are legally barred from imposing new obligations on other actors without the latter's consent; no legal effects whatsoever are produced by such a declaration: *ex iniuria ius non oritur* (*eg* acquisition of territory).[245] On top of that, one could argue that the unilateral acquisition of rights, being an internationally wrongful act, produces no legal effects for a second reason: the acquisition is null and void because it breaches *ius cogens* (*eg* the **prohibition of annexation**)[246] or is inherently connected[247] with the unlawful use of force or other violations of *ius cogens*.

A **normative conflict**[248] between a unilateral act that produces legal effects and **72**
ius cogens is not logically impossible[249] but exceptional. In the Advisory Opinion on the Kosovo's **declaration on independence** (2010), the ICJ analyzed the practice of the Security Council when condemning declarations of independence and concluded:

> "[T]he illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)."[250]

Given that the Security Council considered such declarations "invalid",[251] it is safe to say that unilateral declarations of independence (and other unilateral acts) conflict with *ius cogens* if they **directly profit** from and **perpetuate** the *ius cogens* violation (inherent connection → MN 71). In case of a normative conflict, it is broadly agreed that the unilateral act is invalid *ab initio* and therefore cannot be invoked by either the declaring entity or State or by other States.[252]

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[244] *AP Rubin* The International Legal Effects of Unilateral Declarations (1977) 71 AJIL 1, 5.

[245] *V Rodríguez Cedeño* 3rd Report on Unilateral Acts of States, [2000-II/1] YbILC 247, 253 paras 48–49, 17 February 2000, UN Doc A/CN.4/505, paras 48–49; *K Skubiszewski* Unilateral Acts of States in *M Bedjaoui* (ed) International Law: Achievements and Prospects (1991) 221, 230.

[246] *J Dugard* International Law: A South African Perspective (2005) 100.

[247] *Cf* ICJ *Kosovo* (n 6) para 81; for the necessity of a direct and inherent connection between the declaration of independence and the ius cogens violation see *C Pippan* The International Court of Justice's Advisory Opinion on Kosovo's Declaration of Independence: an Exercise in the Art of Silence (2010) Europäisches Journal für Minderheitenfragen 145, 156.

[248] In case of non-treaty acts, the prohibition to derogate from *ius cogens* stipulated in Art 53 must be understood as the prohibition to violate *ius cogens*, *Hannikainen* (n 2) 7.

[249] This argument is put forward by *P Weil* Le droit international en quête de son identité (1992) 237 RdC 9, 261.

[250] ICJ *Kosovo* (n 6) para 81.

[251] For the declaration of independence of the "Turkish Republic of North Cyprus", see SC-Res 541 (1983) 4th recital; for the declaration of independence of Southern Rhodesia see SC Res 217 (1965) para 3.

[252] *Orakhelashvili* (n 9) 208.

See *eg* Art 5 ILC Draft Articles on the Invalidity of Unilateral Acts: "A State may invoke the invalidity of a unilateral act [. . .] 6. If, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law".[253]

VIII. National Law

73 As a rule, the invalidating force of *ius cogens* operates first and foremost within the **international legal system**, from which the invalidating rule emanates. Beyond that, *ius cogens* may invalidate national legal acts if the respective national legal system gives effect to the invalidating force of *ius cogens*.

In a decision of 1993, the Hungarian Constitutional Court addressed the relationship between international law and the domestic law of Hungary: "The constitutional question must be raised and answered by considering that article 7 § (1) of the Constitution mandates that alongside with the domestic law, another legal system, certain rules of international law, must concurrently be given effect. [. . .] Through the penal power of the Hungarian state it is, in fact, the penal power of the international community which is given effect within the framework of conditions and guarantees provided by international law. [. . .] No domestic law confronted with a conflicting and express peremptory rule of international law (*jus cogens*) may be given effect."[254]

In the light of the US Constitution, the US Court of Appeal for the District of Columbia Circuit pointed out: "Such basic [peremptory] norms of international law as the proscription against murder and slavery may well have the domestic legal effect that appellants suggest. That is, they may well restrain our government in the same way that the Constitution restrains it. If Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals, that policy might well be subject to challenge in domestic court under international law."[255]

74 If the domestic legal system does not recognize the invalidating effect of international *ius cogens* on national legislation or domestic acts, the latter remain in **force as a matter of national law**. However, from the international law perspective, other States and international organs are obliged not to recognize the foreign legal situation contrary to *ius cogens* as lawful and not to give effect to the respective national laws and acts within their jurisdiction (*cf* Art 41 ILC Articles of State Responsibility).

In the case of *Prosecutor v Furundžija*, the Trial Chamber of the ICTY stated in an *obiter dictum*: "It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture

[253] *V Rodríguez Cedeño* 3rd Report on Unilateral Acts of States, UN Doc A/CN.4/505 para 167, [2000-II/1] YbILC 247, 263 para 167

[254] Constitutional Court (Hungary) Decision No 53/1993, 13 October 1993, para V.2 (unofficial translation), published in [1993] Magyar Közlöny No 147 (Hungarian).

[255] US Court of Appeals for the DC Circuit *Committee of US Citizens Living in Nicaragua v Reagan* (n 187) 85 ILR 261, 859 F2d 941; for the 1996 Decision of the Swiss Federal Council that a popular initiative is invalid if the proposed legislation would violate *ius cogens* see *E de Wet* The Prohibition of Torture as an International Norm of jus cogens and its Implication for National and Customary Law (2004) 15 EJIL 97, 101.

> would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. [. . .] Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act."[256]

IX. Individual Criminal Responsibility

75 Even though many customary rules of *ius cogens* character are regarded as rules whose violation triggers individual criminal responsibility under international law, it is false to say that peremptory norms necessarily have that effect. On the other hand, a range of international crimes under general international law ('core crimes') are recognized as *ius cogens*. It is, however, difficult to verify the legal obligations of States flowing from the *ius cogens* character of core crimes, *eg* the **duty to prosecute** or extradite, the **non-applicability of domestic laws** limiting the criminal responsibility or prosecution for such crimes (**amnesty**)[257] and the **universality of (mandatory) jurisdiction** (→ MN 80). Not only that State practice not supports the ambitious academic perceptions in all their aspects,[258] most arguments in favour of a broad set of State obligations reflect the desire for **maximum effectiveness of international criminal law**.[259] The *ius cogens* nature of international core crimes is believed to generate all legal obligations necessary to bring to justice persons who are guilty of these crimes.[260]

> In the case of *Prosecutor v Furundžija*, the Trial Chamber of the ICTY advocated this broad interpretation: "[A]t the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treatymaking power of

[256]ICTY *Prosecutor v Furundžija* (Trial Chamber) IT-95-17/1-T, 10 December 1998, para 155 (footnotes omitted).

[257]*A Cassese* International Criminal Law (2003) 316; *A Gattini* To What Extent Are State and Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages? (2003) JICJ 348.

[258]Admitted by *MC Bassiouni* International Crimes: jus cogens and obligatio erga omnes in *MC Bassiouni/C Joyner* (eds) Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights (1998) 133, 134 who strongly advocates a broad set of State obligations attached to *ius cogens* core crimes; for a critical review of State practice with regard to the duty to prosecute, see *WN Ferdinandusse* Direct Application of International Criminal Law in National Courts (2006) 185.

[259]For a critique of the arguments, see *A Seibert-Fohr* Prosecuting Serious Human Rights Violations (2009) 250–254.

[260]See ICJ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (dissenting opinion *Al-Khasawneh*) [2002] ICJ Rep 95, para 7.

sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad."[261]

Judge *Merkel* stated in the *Nulyarimma v Thompson* case (1999) before the Australian Federal Court: "[I]t is not disputed that the acceptance under international law of a universal crime which has attained the status of *jus cogens* obliges a nation state to punish an offender or to extradite that offender, who is within its territory, to a state that will punish the offender."[262]

76 Rightly or wrongly, the ICJ has refuted the maximum effectiveness argument by ruling that international criminal responsibility, domestic criminal jurisdiction and jurisdictional immunity are different concepts that do not imply one another (→ MN 79).[263] Proceeding from the Court's conservative approach, law enforcement obligations tied to *ius cogens* core crimes must still be anchored in customary law or treaty law (*eg* the Rome Statute).

In the *Prosecutor v Sesay, Kallon and Gbao* case, the Special Court for Sierra Leone argued: "Under international law, states are under a duty to prosecute crimes whose prohibition has the status of *jus cogens*. It is for this reason that the Special Representative of the United Nations Secretary-General asserted the UN's Understanding of Art IX of the Lomé Agreement as excluding [from amnesty] the international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. Furthermore, at the time of the Special Court Agreement, Sierra Leone concurred with the position of the UN that the amnesty was not applicable to international crimes."[264]

X. Individual Civil Liability

77 In the light of judicial State practice, it is safe to say that national courts do not consider the civil liability of persons for the commission of acts contrary to *ius cogens* a peremptory legal consequence flowing from the *ius cogens* character of the rule infringed. Instead, the civil liability is associated with obligatory human rights norms and other international law obligations, *eg* international humanitarian law.[265] A wealth of US judgments under the **Alien Tort Claims Act** illustrates

[261]ICTY *Prosecutor v Furundžija* (n 256) para 156 (footnotes omitted).

[262]Federal Court (Australia) *Nulyarimma v Thompson* [1999] FCA 1192, para 141.

[263]ICJ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3, paras 59–60.

[264]Special Court for Sierra Leone *Prosecutor v Gbao* (Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court) (Appeals Chamber) SCSL-2004-15-AR72(E), para 10 (2004).

[265]US Court of Appeals for the 9th Circuit (United States) *Doe v Unocal Corp* 248 F3d 915, n 15 (2001): "We stress that although a *jus cogens* violation is, by definition, 'a violation of "specific, universal, and obligatory" international norms' that is actionable under the ATCA, any 'violation of "specific, universal, and obligatory" international norms' – *jus cogens* or not – is actionable under the ATCA." See also the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147, 16 December 2005, UN Doc A/RES/60/147, para 15.

that the *ius cogens* argument is mainly put forward to justify **universal civil jurisdiction** and the **limitation of immunity**.[266] Nonetheless, under US legislation, judgments have been rendered imposing civil liability for the commission of acts contrary to *ius cogens* (*eg* genocide, war crimes, crimes against humanity and torture).[267]

XI. Immunity

78 The impact of *ius cogens* on the jurisdictional immunity plea of States and their (former) agents before foreign national courts is one of the ongoing controversies in international law, fueled by a series of contradictory international and national judgments.[268] Some authors and courts identify a **normative conflict** between customary rules on jurisdictional immunities and substantive peremptory norms to the effect that the latter invalidates the former (→ MN 55). Others point at the **hierarchical superiority** of *ius cogens*, the consequence of which is that it trumps all rules that hinder the protection of values that must be considered fundamental to the international community.[269] Or it is argued that, as a fact of international law, a State **implicitly waives** its sovereign immunity by violating the *ius cogens* norms.[270]

> In the *Pinochet* case (No 3) before the House of Lords (1999), Lord *Millett* stated: "International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose."[271]
>
> In the *Kalogeropoulou* case (2002), the European Court of Human Rights did "not find it established [. . .] that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in

[266]For a detailed analysis, see *PJ Stephens* A Categorical Approach to Human Rights Claims: jus cogens as a Limitation on Enforcement? 22 Wisconsin ILJ 245.

[267]*See eg* US Court of Appeals for the 2nd Circuit (United States) *Kadić et al v Karadžić* 70 F3d 232 (1995) (genocide, war crimes, torture, summary execution); US Court of Appeals for the 9th Circuit (United States) *In re Estate of Ferdinand Marcos* 25 F3d 1467 (1994) (torture, summary execution, disappearances); US District Court for the District of Massachusetts *Xuncax et al v Gramajo* 886 FSupp 162 (1995) (torture, summary executions, prolonged arbitrary detentions, disappearances); US Court of Appeals for the 9th Circuit *Doe v Unocal* (n 265) (forced labor).

[268]For an analysis of the case law concerning State immunity, see *M Potestà* State Immunity and jus cogens Violations: The Alien Tort Statute against the Backdrop of the Latest Developments in the 'Law of Nations' (2010) 28 Berkeley JIL 571.

[269]Court of Cassation (Italy) *Ferrini v Germany* 128 ILR 658 (2004); see also *A Bianchi* Immunity v Human Rights: The Pinochet Case (1999) 10 EJIL 237, 265.

[270]Dissenting opinion of Judge *Wald* in US Court of Appeals for the DC Circuit *Princz v Germany* (n 187) 1176; along this line is the judgment of the Supreme Civil and Criminal Court (Greece) *Prefecture of Voiotia v Germany* Case No 11/2000, 4 May 2000; the judgment was reversed in Supreme Special Court (Greece) *Germany v Miltiadis Margellos*, Case No 6/2002, 17 September 2002.

[271]House of Lords (United Kingdom) *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 3)* 119 ILR 136, 232 (1999).

another State for crimes against humanity. [. . .] This is true at least as regards the current rule of public international law, as the Court found in the aforementioned case of *Al-Adsani*, but does not preclude a development in customary international law in the future."[272]

In the *Mantelli* case (2008) the Italian Court of Cassation denied the jurisdictional immunity of Germany before Italian courts on the basis of the *ius cogens* hierarchy argument but admitted that it operates in a sphere of legal uncertainty: "[T]he decision in the *Ferrini* case, the joint dissenting opinion in the case of *Al-Adsani* [. . .] and an *obiter dictum* in the case of *Kalogeropoulou* [. . .], both decided by the European Court of Human Rights [. . .], evidenced the emergence of a customary rule denying immunity where the defendant state was accused of crimes against humanity."[273]

79 With regard to the immunity of State organs in criminal proceedings before foreign national courts, the ICJ judgment in the *Arrest Warrant* case is commonly regarded a major setback for the *ius cogens* argument against jurisdictional immunity of State organs.[274]

XII. Universal Jurisdiction

80 In the *Arrest Warrant* judgment, the ICJ was not asked to rule on the issue of universal jurisdiction. However, several judges raised the topic in their dissenting or separate opinions; none of them inferred from the *ius cogens* character of the international crimes listed in the international arrest warrant (grave beaches of the Geneva Conventions, crimes against humanity) that Belgium could rightly claim universal jurisdiction. Indeed, the admissibility of the exercise of universal or extraterritorial jurisdiction is commonly deduced from the customary international crime or from treaty law that make the crime a punishable offense under international law.[275]

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[272]ECtHR *Al-Adsani v United Kingdom* (n 212); *Kalogeropoulou et al v Greece and Germany* App No 59021/00, 12 December 2002, (references omitted); along this line Ontario Superior Court of Justice (Canada) *Bouzari v Iran* [2002] OJ No 1624 paras 63–73.

[273]Court of Cassation (Italy) *Germany v Mantelli et al* (Preliminary Order on Jurisdiction) Case No 14201/2008, para 11 (references omitted); *Ferrini v Germany* (n 269); ECtHR *Al-Adsani v United Kingdom* (n 212); *Kalogeropoulou et al v Greece and Germany* (n 272).

[274]ICJ *Arrest Warrant* (n 263) para 58; *cf D Akande* International Law Immunities and the International Criminal Court (2004) 98 AJIL 407, 414.

[275]ILC commentary to Draft Code of Crimes against Peace and Security of Mankind, UN Doc A/51/10, 29; [1996-II/2] YbILC 1, 29 para 8: "The Commission considered that [the extension of national court jurisdiction] was fully justified in view of the character of the crime of genocide as a crime under international law for which universal jurisdiction existed as a matter of customary law for those States that were not parties to the Convention and therefore not subject to the restriction contained therein." See also *C Kress* Völkerstrafrecht und Weltrechtspflege im Blickfeld des Internationalen Gerichtshofs (2002) 114 Zeitschrift für die gesamte Strafrechtswissenschaft 818, 828; *LF Damrosch* Connecting the Threads in the Fabric of International Law in *S Macedo* (ed) Universal Jurisdiction (2004) 91, 95; for a different view, see *C Bassiouni* Universal Jurisdiction for International Crimes: Historical Perspective and International Practice (2001) 42 VaJIL 81, 96–97.

For a different approach, see Lord *Browne-Wilkinson* who stated in the *Pinochet* case (No 3) (1999): "The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any state because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution'."[276]

In the *Aguilar Diaz v Pinochet* case (1998), the Brussels Tribunal of First Instance concluded: "For these reasons we find that, as a matter of customary law, or even more stronger as a matter of *jus cogens*, universal jurisdiction over crimes against humanity exists, authorizing national judicial authorities to prosecute and punish the perpetrators in all circumstances."[277]

G. Substantive Norms of *ius cogens*

While general international norms may easily be called peremptory to give weight to various legal arguments, only few norms were mentioned in **national and international jurisprudence**: the prohibition of **use of force**,[278] the principle of **non-intervention**,[279] the prohibition of **torture**,[280] murder (**extrajudicial killing**)[281] **81**

[276]House of Lords (United Kingdom) *Ex parte Pinochet* (n 271), 149.

[277]Tribunal of First Instance of Brussels (Belgium) *Aguilar Diaz et al v Pinochet*, 6 November 1998, reprinted in [1998] Revue de droit pénal et de criminologie 278, 288, translated in *L Reydams* Universal Jurisdiction (2003) 112, 115.

[278]ICJ *Military and Paramilitary Activities in and against Nicaragua* (Merits) (separate opinion *Nagendra Singh*) [1986] ICJ Rep 151, 153; and the ICJ itself when quoting the ILC commentary to Draft Art 50, para 1 declaring "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*" in *Military and Paramilitary Activities in and against Nicaragua* (Merits) [1986] (n 162) para 190; US Court of Appeals for the DC Circuit *Committee of US Citizens Living in Nicaragua v Reagan* (n 187) 859 F2d 949; ICJ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (separate opinion *Elaraby*) [2004] ICJ Rep 246, 254.

[279]ICJ *Military and Paramilitary Activities in and against Nicaragua* (Merits) (separate opinion *Sette-Camara*) [1986] ICJ Rep 192, 199–200.

[280]ICTY *Prosecutor v Furundžija* (n 256) paras 144, 153 *et seq*; *Prosecutor v Delalić et al* (Trial Chamber) IT-96-21-T, 16 November 1998, para 454; *Prosecutor v Kunarac et al* (Trial Chamber) IT-96-23-T, IT-96-23/1-T, 22 February 2001, para 466; *Prosecutor v Simić* (Trial Chamber) (Sentencing Judgment) IT-95-9/2-S, 17 October 2002, para 34; *Prosecutor v Naletilić and Martinović* (Trial Chamber) IT-98-34-T, 31 March 2003, para 336; *Prosecutor v Delalić et al* (Appeals Chamber) IT-96-21-A, 20 February 2001, para 172 (n 225); ECtHR *Al-Adsani v United Kingdom* (n 212) para 61; US Courts: *Siderman de Blake v Argentina* (n 171) 965 F2d 715, 717, 103 ILR 471, 473; *Committee of US Citizens Living in Nicaragua v Reagan* (n 187) 859 F2d 949; US Court of Appeals for the 9th Circuit (United States) *In re Estate of Ferdinand Marcos* 978 F2d 493, para 20 (1992) (certiorari denied 508 US 972); House of Lords (United Kingdom) *R v Bow Street Metropolitan Stipendiary Magistrate et al ex parte Pinochet Ugarte (No 3)* [2000] Appeal Cases 147.

[281]US District Court for the Southern District of Florida (United States) *Alejandre v Cuba* 996 FSupp 1239, 121 ILR 603, 616 (1997).

and **slavery** (including **sexual slavery**[282]),[283] the right to **self-determination**,[284] the right to a **fair trial**[285] including the right of any person arrested or detained to be brought, promptly, before a judge,[286] **crimes against humanity** and **genocide**,[287] as well as most norms of international humanitarian law, in particular those prohibiting **war crimes**.[288] In *Prefecture of Voitia v Germany*, a Greek court also identified the rights of family honor, life, private property and religious conviction, enshrined in **Art 46 Hague Regulations**, as operative *ius cogens*.[289]

[282]Special Court for Sierra Leone *Prosecutor v Sesay, Kallon and Gbao* (Trial Chamber) SCSL-04-15-T, 2 March 2009, para 157.

[283]See US Court of Appeals for the 9th Circuit (United States) *United States v Matta-Ballesteros* 71 F3d 754, 764 n 5 (1995); *Siderman de Blake v Argentina* (n 171) 965 F2d 714–715, 103 ILR 471–471; US District Court for the District of New Jersey (United States) *Iwanowa v Ford Motor Co* 67 FSupp2d 424 (1999); US Court of Appeals for the DC Circuit *Committee of US Citizens Living in Nicaragua v Reagan* (n 187) 85 ILR 269, 859 F2d 949.

[284]ICJ *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, para 29: "The principle of self-determination of peoples [. . .] is one of the essential principles of contemporary international law." See also *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (New Application 1962)* (Second Phase) (separate opinion *Ammoun*) [1970] ICJ Rep 286, 304, 312: principles in the Preamble of the UN Charter are *ius cogens*, right to self-determination and independence, principle of equality and non-discrimination on racial grounds are imperative rules of international law.

[285]ICTY *Prosecutor v Tadić (Allegations of Contempt Against Prior Counsel, Milan Vujin)* (Appeals Chamber) IT-94-1-A-AR77, 27 February 2001, 3: "Considering moreover that Article 14 of the International Covenant reflects an imperative norm of international law to which the Tribunal must adhere".

[286]Special Tribunal for Lebanon (Pre-Trial Judge) Order Setting a Time Limit for Filing an Application by the Prosecutor in Accordance with Rule 17(B) of the Rules of Procedure and Evidence CH/PTJ/2009/03, 15 April 2009, para 14.

[287]ICJ *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v Rwanda)* [2006] ICJ Rep 6, para 64; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, para 161; ICTR *Prosecutor v Kayishema and Ruzindana* (Trial Chamber) ICTR-95-1-T, 21 May 1999, para 88; ICTY *Prosecutor v Jelisić* (Trial Chamber) IT-95-10-T, 14 December 1999, para 60; *Prosecutor v Kupreškić et al* (Trial Chamber) IT-95-16-T, 14 January 2000, para 520; *Prosecutor v Krstić* (Trial Chamber) IT-98-33-T, 2 August 2001, para 541; *Prosecutor v Stakić* (Trial Chamber) IT-97-24-T, 31 July 2003 para 500; *Prosecutor v Brđanin* (Trial Chamber) IT-99-36-T, 1 September 2004, para 680; *Prosecutor v Blagojević and Jokić* (Trial Chamber) IT-02-60-T, 17 January 2005, para 639; ECtHR *Jorgić v Germany* App No 74613/01, 12 July 2007, para 68; IACHR *Roach and Pinkerton v United States* Case No 9647, 27 March 1987, para 55.

[288]ICTY *Prosecutor v Kupreškić* (n 287) para 520; ICJ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 79.

[289]Court of First Instance of Leivadia (Greece) *Prefecture of Voiotia v Germany* Case No 137/1997, translated in *M Gavouneli* War Reparation Claims and State Immunity (1997) 50 Revue hellénique de droit international 595.

H. Relation to *erga omnes*

Coincidence or not, one year after the Vienna Conference agreed on the invalidating effect of *ius cogens* on conflicting treaties, the ICJ in its famous ***Barcelona Traction*** **judgment** (1970) referred for the first time to the *erga omnes* concept, mentioning *ius cogens* prohibitions such as aggression and genocide as examples for obligations *erga omnes*.[290] However, it is evident from the judgment that it is the **extension of the scope of possible claimants,** which is, according to the Court, the essence of *erga omnes*, not the invalidating force.[291] Even if both concepts, *erga omnes* and *ius cogens*, have **variant legal effects**, they pursue **identical goals**, namely to improve the compliance with and the protection of fundamental rules of international law, accepted and recognized as such by the international community as a whole. **82**

The coincidence of both safeguard mechanisms – *ius cogens* and *erga omnes* – appears to be natural considering the 'weight' of the rules recognized so far as being worthy of protection beyond the normal level.[292] However, the question remains of whether both concepts necessarily accompany each other.[293] It is a popular perception that all rules with *ius cogens* character apply *erga omnes*.[294] National courts, for example, often call both concepts in one breath when justifying their claim of universal jurisdiction over core international crimes (→ MN 75, 80). In contrast, it is suggested that *erga omnes* obligations may extend to rules that do not have *ius cogens* character.[295] **83**

Whereas it is beyond doubt that there is a substantive overlap between rules having peremptory character and rules creating obligations *erga omnes*, the inference from *ius cogens* to *erga omnes* and *vice versa* is a methodological shortcut; the burdensome search for the international community's vision is replaced by logical conclusion: why should the international community on the one hand consider a treaty contrary to *ius cogens* as absolute void, if the *ius cogens* obligation is not owed to the international community as a whole (*cf* Art 48 para 1 lit b ILC Articles **84**

[290]ICJ *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, paras 33–34.

[291]*M Byers* The Relationship between ius cogens and erga omnes Rules (1997) 66 Nordic JIL 211, 238; but see the separate opinion of Judge *Ammoun* in *Barcelona Traction* (n 284) who addresses *ius cogens* nature of rules under the headline of *erga omnes* obligations: ICJ *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (Second Phase) (separate opinion *Ammoun*) [1970] ICJ Rep 286, 325.

[292]*J Frowein* The Reaction of Not Directly Affected States to Breaches of Public International Law (1994) 248 RdC 345, 405–406.

[293]*B Simma* Bilateralism and Community Interests in the Law of State Responsibility in *Y Dinstein/M Tabory et al* (eds) International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne (1999) 821, 825.

[294]*Byers* (n 291) 236; *C Tams* Enforcing Obligations erga omnes in International Law (2005) 151; for international core crimes see *Bassiouni* (n 258) 134.

[295]*Byers* (n 291) 237; *T Meron* Human Rights Law-Making in the United Nations (1986) 187.

on State Responsibility, but see → Art 66 MN 16)?[296] On the other hand, the extension of standing has the primary function to reveal and remedy unlawful acts even if the injured State has no interest in doing so. The claim of unlawfulness, however, does not necessarily embrace the claim of voidness (*cf* Art 48 para 2 lit a ILC Articles on State Responsibility).

I. Regional *ius cogens* and *ius cogens inter partes*

85 By referring to the "international community as a whole", the VCLT focuses on universal *ius cogens* without precluding the existence of regional *ius cogens* or *ius cogens* binding a group of States (*ius cogens inter partes*).[297] It is not legally impossible that **regional communities of States** recognize certain rules – *eg* provisions of regional treaties or rules of regional customary law – as peremptory for this community.[298] The legal effect is limited to the community's members, whose membership results from mutual acceptance (*eg* as parties to regional human rights treaties). The **persistent objection** of a State belonging to the regional community is legally irrelevant only if the regional community defines regional *ius cogens* in that way (→ MN 51–53). *Ius cogens inter partes* does not bind States that have rejected either the international rules or its *ius cogens* character as legally binding.

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[296] *Tams* (n 294) 151.

[297] *Kadelbach* (n 11) 203.

[298] *Gaja* (n 152) 289.

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Section 3
Termination and Suspension of the Operation of Treaties

Article 54

Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty; or
(b) at any time by consent of all the parties after consultation with the other contracting States.

Contents

A. Purpose and Function

I. Section 3 in General

Part V of the VCLT on invalidity, termination and suspension of the operation of treaties sets out **exceptions to the general rule *pacta sunt servanda*** (Art 26).[1] It consists of five sections. Section 3 (Arts 54–64) deals with the termination of treaties and the suspension of their operation. It both systematically and logically follows Section 2, which regulates the invalidity of treaties (Arts 46–53), for only valid treaties can be terminated or suspended *pro futuro* (Arts 70 and 72), whereas invalid treaties are void *ab initio* (Art 69). Thus, the two sections overlap at no point, but thematically interlock where treaties come into conflict with a peremptory norm of general international law *(ius cogens)*: in this case the treaty will be void according to Section 2 (Arts 53 and 71), if such a conflict existed already at the time of its conclusion; whereas the later emergence of a conflicting *ius cogens* norm automatically terminates the treaty under Section 3 (Arts 64 and 71). **1**

[1] *R Jennings/A Watts* Oppenheim's International Law Vol I Parts 2–4 (9th edn 1992) 1296.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
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2 Section 3 must always be read **in conjunction with the other sections of Part V**:

- The general provisions of Section 1 (→ Arts 42–45) determining the exhaustive character of the grounds for terminating, withdrawing from or suspending the operation of a treaty as listed in the VCLT; reserving the obligations to which States are subject under international law apart from the terminated or suspended treaty; regulating the (in)separability of treaty provisions and determining the conditions on which a right to invoke a ground for terminating, withdrawing from or suspending the operation of a treaty will be lost.
- The rules of Section 4 (→ Arts 65–68 and Annex) on the procedures to be followed by a State when invoking a ground for terminating, withdrawing from or suspending the operation of a treaty as well as the settlement of disputes, which may arise concerning the application or interpretation of any article in Part V.
- And finally the rules of Section 5 (→ Arts 69–72) on the legal consequences which arise when a treaty is rightly terminated or its operation suspended in relation to one or all of its parties.

3 Pursuant to Art 5, the provisions in Part V, Section 3, as all the other provisions of the VCLT, also apply to treaties between States which form the constituent instruments of international organizations. On the other hand, they are inapplicable to any treaty of which at least one party is an international organization.[2] For such treaties, almost identical rules are laid down in Arts 54–64 VCLT II, which has not yet entered into force. Where appropriate, the parallel provisions of the VCLT II will be mentioned *infra* alongside those of the VCLT.

4 Most of the norms of Section 3 state expressly that they are residuary in nature,[3] which means that they will be superseded by any applicable provision of the treaty concerned, be it explicit or implicit. This is an instance of the *lex specialis* rule. At the same time, the provisions in Section 3 are *ius dispositivum*, with the obvious exception of Art 64. This is confirmed by the relevant procedural rules of Section 4, which, with the notable exception of Art 71 para 2, authorize the parties to the respective treaty to resolve situations where one party invokes a ground for termination, withdrawal or suspension in a way on which they can all agree (Art 70, Art 72 para 1).

5 When interpreting and applying the provisions of Part V of the VCLT, one must keep in mind that it was the most controversial part of the whole Convention which "nearly wrecked the Vienna Conference".[4] The drafters in the ILC and later the Vienna Conference tried to strike a **balance between two opposing interests**: on the one hand, the stability of treaties as an important aspect of legal certainty, and on the other hand, the necessity of allowing for a certain amount of flexibility in the

[2] Or, for that matter, any other Non-State subject of international law (*cf* Art 2 para 1 lit a, Art 3).

[3] Art 54 lit a, Art 55, Art 56 para 1, Art 57 lit a, Art 58 para 1 lit a, para 2, Art 60 para 4.

[4] *S Rosenne* Vienna Convention on the Law of Treaties (2002) 4 EPIL 1308, 1312.

interest of avoiding petrifaction and maintaining justice. In Section 3, the provisions most threatening to the stability of treaties are obviously Art 60 (termination for material breach) and Art 62 (*clausula rebus sic stantibus*) whereas Art 56 (non-terminability) may seem to favour treaty stability too rigidly.

Pursuant to the non-retroactivity rule of Art 4, the VCLT applies only to treaties which are concluded by States after the Convention has entered into force for them. As currently only 108 of the 192 UN Member States have become parties to the VCLT,[5] a considerable number of treaties, or rather treaty relationships,[6] is still beyond the scope of the VCLT, including all those in which France, India, Indonesia, the Koreas, Pakistan, South Africa, Turkey or the United States participate. Therefore the reference in Art 4 to the rules to which non-VCLT treaties would be subject under international law independently of the VCLT is of considerable practical relevance. In many cases, relevant provisions of the VCLT will thus not be directly applicable but only to the extent in which they codify rules of international law that are binding on the parties to the respective treaty for other reasons. This of course refers primarily to customary international law and the general principles of law.[7] According to the Preamble 7th recital, the VCLT achieves both "the codification and progressive development of the law of treaties". This indicates that at least some of its provisions go beyond the current state of general international law. Accordingly, whoever invokes a provision of the VCLT with regard to a treaty not falling under the Convention must show that it codifies an otherwise binding rule of customary international law or a general principle of law in the sense of Art 38 para 1 ICJ Statute. The subsequent comments on Arts 54–64 VCLT will therefore have to explain to what extent these provisions codify existing rules of international law that are universally applicable irrespective of whether the specific treaty to be terminated or suspended in its operation comes within the scope of the VCLT. **6**

The **compromise** established in Part V **consists of five elements**: (1) prescribing a certain procedure to be followed, culminating in obligatory dispute settlement (→ Arts 65–68 plus Annex); (2) defining instances in which a State loses its right to invoke the most dangerous grounds for terminating or suspending the operation of a treaty (→ Art 45); (3) emphasizing a State's continuing obligations under international law independent of the treaty, which was terminated or suspended in operation (→ Art 43); (4) postulating a presumption of the continuance in force and operation of a treaty, which is rebuttable only for the reasons exhaustively enumerated in Section 3 and defined as precisely and narrowly as possible[8] **7**

[5] As of July 2011, the current number of UN Member States is 193.

[6] See the negative answer given to the question whether Art 4 functions as a clause *si omnes* with regard to multilateral treaties by *F Dopagne* in *Corten/Klein* Art 4 MN 14–15. If Art 4 is not a clause *si omnes,* the VCLT applies to a multilateral treaty even if not all its parties had already been parties to the VCLT, but it will then only cover the treaty relationships between those parties that had.

[7] See Art 38 para 1 lit b and c ICJ Statute.

[8] Cf ICJ Gabčíkovo-Nagymaros Project (Hungary v Slovakia) [1997] ICJ Rep 7, para 47.

(→ Art 42)[9]; (5) as a rule – unless the treaty otherwise provides –, placing the onus of establishing any of those grounds for termination *etc* on the State which invokes it.[10]

II. Article 54 in Particular

8 The two reasons for terminating or withdrawing from a treaty listed in Art 54 are rather straightforward and unproblematic. Both concern the **consensual termination of treaty relationships**, a possibility which is well established in customary international law. Art 54 embodies an adaptation of, rather than an exception to, the general rule *pacta sunt servanda*.[11]

9 The first reason in Art 54 lit a, referring to the special provisions agreed on when the treaty to be terminated was concluded (prior consent), states the obvious.[12] One may therefore wonder whether lit a is superfluous even if one takes the above-mentioned rule of exhaustive enumeration of the reasons for treaty termination in the VCLT into account (Art 42). For the general provision of Art 42, para 2 already states that the termination of a treaty, its denunciation or the withdrawal of a party may take place first and foremost as a result of the application of the provisions of that same treaty. For reasons of clarity, however, it seemed advisable to include that reference once more in the initial provision of the special Section 3.[13] However, Art 54 lit a has no independent regulatory importance of its own.

10 This stands in contrast to the second reason for terminating or withdrawing from a treaty mentioned in lit b. Whereas the termination or withdrawal under lit a is legitimized by the prior consent of all parties, which has been embodied in the treaty itself, lit b gives equivalent force to the subsequent consent of all parties. It confirms the status and power of the contracting parties as '**masters of their treaty**' according to customary international law.

11 'Mastership' in that sense means the power to amend any treaty and undo any treaty relationship established by the parties if they all agree, any implicit or explicit treaty provision to the contrary notwithstanding, be that provision procedural or substantive.[14] This **amendment and derogation power jointly held by the parties** to any treaty had to be expressly confirmed in Section 3, in view of the rule in Art 42 para 2. Although the VCLT is itself subject to that power which could be exercised also with regard to Art 42 para 2, legal clarity and certainty as well as the codificatory purpose of the VCLT favoured the inclusion of Art 54 lit b. Otherwise, in each case

[9] Art 42 must of course be read in the light of Art 73 VCLT, which indicates that the international legal rules on State succession, State responsibility and outbreak of hostilities between States may provide additional grounds for terminating a treaty relationship (*Sinclair* 163).

[10] *Aust* 277.

[11] *V Chapaux* in *Corten/Klein* Art 54 MN 2–3.

[12] This was also remarked by some governments which commented on an earlier version drafted by *Waldock* who in response referred to the 'code' concept of the ILC's work (*Waldock* V 25).

[13] *V Chapaux* in *Corten/Klein* Art 54 MN 4.

[14] Whether this 'mastership' is without exception remains to be seen (→ MN 47–48).

of subsequent consensual termination of a specific treaty, an implicit derogation from Art 42 para 2 would have to be constructed, bringing the intricate rule of Art 41 para 1 lit b into play with regard to the VCLT unless that other treaty was concluded by all the parties to the VCLT (→ Art 41).

A provision parallel to Art 54, regarding the suspension of the operation of a treaty under its provisions or by subsequent consent of all the parties, can be found in Art 57 (→ Art 57). **12**

B. Historical Background and Negotiating History

A classical example of the rule that a treaty relationship can be terminated or changed (only) by virtue of the consent of all the parties is the London Declaration of 1871: **13**

> "Les Plénipotentiaires de l'Allemagne du Nord, de l'Autriche-Hongrie, de la Grande-Bretagne, de l'Italie, de la Russie et de la Turquie [. . .] reconnaissent que c'est un principe essential du droit des gens qu'aucune Puissance ne peut se délier des engagements d'un Traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des Parties Contractantes, au moyen d'une entente amicable."[15]

The present Art 54 was part of the **ILC's Final Draft** of 1966 where it had been numbered Art 51. Leaving aside some minor linguistic changes, only one important addition to the ILC's Draft Art 51 was made by the Vienna Conference. It consists of the procedural requirement at the end of lit b, to the effect that the termination of a treaty or the withdrawal of a party may take place only after consultation with the other contracting States in the sense of Art 2 para 1 lit f. **14**

After the substance of the two alternatives of Art 54 had already been treated in the second report by SR *Fitzmaurice*,[16] it was taken up by **SR *Waldock*** in his own second report.[17] *Waldock*'s Draft Art 15 covered the substance of present lit a while his Draft Art 18 included the present lit b, both in a much more elaborate form. *Waldock* had proposed that in the case of a treaty drawn up by an international conference or by an international organization, the consent of a two-thirds majority of the States that had participated in drawing up the treaty, including all those that had later become parties to the treaty, should be necessary for the termination of that treaty by subsequent agreement. After the lapse of a period of time since the date of the adoption of the treaty, whose exact length was yet to be determined, only **15**

[15] Annex to 1871 Protocol No 1 of the London Conferences (*GF de Martens* Nouveau recueil général de traités Ser 1 Vol 18 (1873) 278). See *DJ Bederman* The 1871 London Declaration, rebus sic stantibus and a Primitivist View of the Law of Nations (1988) 82 AJIL 1–40, who provides the following translation (*ibid* 3): "[I]t is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Parties by means of an amicable arrangement."

[16] *Fitzmaurice* II 25 *et seq*.

[17] *Waldock* II 36 *et seq*.

the agreement of the States party to the treaty should be necessary to terminate it. In a later version, *Waldock* specified that the time period was to be 6 years.[18]

16 The ILC discussed but ultimately denied the question of whether and how to involve in the consensual termination of a treaty those States which were still entitled to become parties but had not yet formally done so. The Commission appreciated that these States had a certain interest in the matter. It concluded, however, that the inclusion of a relevant provision might introduce an undesirable complication into the operation of the rule regarding consensual termination of treaties. Moreover, that question had never given rise to difficulties in practice.[19]

17 The issue was reintroduced in the **Vienna Conference** by the Netherlands, which submitted an amendment to lit b to the effect that the consent of all the contracting States should be required.[20] This went much further than *Waldock*'s Draft Art 18 para 1 lit a. By way of compromise, the Drafting Committee thereupon adopted the present text of lit b, which merely adds an obligation to consult the contracting States.[21]

C. Elements of Article 54

I. Two Alternatives: Termination or Withdrawal

1. Use of Terms: Terminological Inconsistency

18 Art 54 regulates two alternatives of how treaty relationships can end: the termination of a treaty and the withdrawal of a party. It does not expressly mention the denunciation, which appears separately, *eg* in Art 42 para 2, Art 43, Art 44 para 1, Art 56 and Art 70 para 2, but not *eg* in Art 44 para 2, Art 45, Art 60 para 1, Art 62 paras 1 and 3 either. This **terminological inconsistency**, which had already been apparent in the Final Draft and was criticized by several States at the Vienna Conference,[22] has nevertheless been preserved in the final text for

[18] *Cf* Draft Art 40, *Waldock* V 28 *et seq*.

[19] Final Draft, Commentary to Art 51, 249 para 4.

[20] UNCLOT III 176. See also the explanation given by the representative of the Netherlands UNCLOT I 335.

[21] UNCLOT III 176.

[22] See *eg* the statements by the representatives of Norway and Australia UNCLOT I 335 paras 9–11. See also *SE Nahlik* The Grounds for Invalidity and Termination of Treaties (1971) 65 AJIL 736, 749 *et seq*.

no identifiable reason. The term 'denunciation' or its derivatives have also been used as technical terms in a considerable number of other treaties until quite recently,[23] even though their ordinary meaning may have a condemnatory undertone.[24]

Denunciation in the technical sense can be defined as a unilateral declaration by which a party terminates its participation in a treaty.[25] Whereas a bilateral treaty will necessarily terminate if one of the parties validly denounces it, a multilateral treaty will normally continue, the denunciation amounting to a withdrawal of one party only,[26] putting an end to the withdrawing State's status as a party or, in other words, terminating its treaty relationships with each of the other parties.[27] On this background, a denunciation will always be covered by one of the two alternatives set forth in the introductory clause of Art 54. **19**

2. Termination of a Treaty

In the headline of Section 3 of Part V as well as in the headline of Part V of the Convention, '**termination**' is obviously used in the wider sense, as a generic term covering both the termination of a treaty and the termination of a State's status as a party to a treaty (withdrawal). In the introductory clause of Art 54, both variants are then appropriately distinguished. The first variant (termination in the narrower sense) applies to bilateral and multilateral treaties. **20**

As the formulation ("termination [...] may take place") indicates, the first variant does not necessarily require an activity by one or more parties such as a denunciation; it also includes **automatic termination**, *eg* through the expiration of a fixed term for which the treaty was concluded.[28] **21**

The **partial termination** ***ratione materiae*** of a treaty, *ie* its termination with regard to only one or more severable provisions, is covered by Art 54 read together with Art 44 para 1.[29] Art 54 also extends to the partial termination *ratione personae* **22**

[23] *Cf eg* Art 58 ECHR as amended by Protocol No 11 ETS 155; Art 12 of the 1966 Optional Protocol to the ICCPR 999 UNTS 171; Art 31 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment 1465 UNTS 85; Art 33 of the 2002 Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, 18 December 2002, UN Doc A/RES/57/199.

[24] *Aust* 277 who therefore suggests that the term should be avoided.

[25] *Ibid.*

[26] See Art 38 paras 2 and 3 of the ILC Draft Articles of 1963 ([1963-II] YbILC 188, 199). But see Art 28 of the 1936 Montreux Convention Regarding the Regime of the Straits 173 LNTS 229 according to which this multilateral treaty will be terminated if denounced by one party only.

[27] *Jennings/Watts* (n 1) 1296.

[28] *Cf eg* Art 97 of the 1951 Treaty Establishing the European Coal and Steel Community 261 UNTS 140.

[29] *Aust* 288; *Villiger* Art 54 MN 4. An example is Art 28 Montreux Convention Regarding the Regime of the Straits (n 25) which provides for a fixed (but prolongable) duration of twenty years with the proviso that the principle of freedom of transit and navigation affirmed in Art 1 of the

of a multilateral treaty, *ie* its termination with regard to only one or some of its parties. Instances coming under Art 54 lit a are the expulsion clauses in the statutes of several international organizations[30] pursuant to which the membership of individual States Parties can be terminated.[31] Art 60 para 2 lit a cl i shows that the Convention contemplates such a **partial termination *ratione personae*** for cases of material breach. There is no reason why in cases coming under Art 54, but not under Art 60, the Convention should be understood to allow complete termination only. However, in the absence of an explicit treaty provision to this effect, Art 54 lit b requires the consent of all the parties for a partial termination *ratione personae*. Art 54 does not permit the termination between some of the parties on the basis of a mere *inter se* agreement, but such an *inter se* termination can be accomplished by virtue of Art 41 para 1 lit b, termination being an instance of modification.[32]

3. Withdrawal of a Party

23 The second variant mentioned in the introduction of Art 54 applies to multilateral treaties only because a bilateral treaty will necessarily be terminated in the sense of the first variant when one of the parties withdraws. Distinguishing the two variants thus only makes sense with regard to multilateral treaties. The withdrawal of a State from a multilateral treaty puts an end to that State's status as a party or, in other words, terminates its treaty relationships with each of the other parties (→ MN 18 *et seq*).

24 The **partial withdrawal *ratione materiae*** of a State is conceivable either in the form of its discarding certain treaty obligations or of its renouncing certain rights accruing to it under the treaty, and both alternatives are covered by Art 54 in conjunction with Art 44 para 1.[33] Excluding a partial withdrawal from the purview of Art 54 would compel the party to withdraw completely and try to re-accede with a relevant reservation. Even assuming that this would not amount to a belated reservation, impermissibly circumventing Art 23 para 2,[34] it would interrupt that party's treaty membership and can therefore not be considered as an equivalent alternative. The partial withdrawal should therefore be brought under Art 54. If it is not foreseen in the treaty in the sense of lit a, but effectuated by consent of all the parties in the sense of lit b, it amounts to an amendment to the treaty, giving one of the parties a special status characterized by either fewer obligations or fewer rights.

25 The **partial withdrawal *ratione personae*** of a State in the sense of this State terminating its treaty relationship only *vis-à-vis* one or several, but not all of the

Convention shall continue without limit of time. One can also imagine transitional regulations in a treaty that are to expire after a fixed period of time.

[30]By virtue of Art 5, the VCLT applies to constituent instruments of international organizations.

[31]*Cf eg* Art 6 of the 1945 UN Charter and Art 8 of the 1949 Statute of the Council of Europe ETS 1.

[32]*F Capotorti* L'extinction et la suspension des traités (1971) 134 RdC 417, 511–512.

[33]Art 58 para 4 ECHR and Art 37 para 2 of the 1961 European Social Charter 529 UNTS 89 provide examples of the first alternative, and Art 41 para 2 ICCPR should be treated analogously.

[34]See *Aust* 305.

other parties, is also conceivable and covered by Art 54. International practice provides examples of anticipatory mechanisms preventing the establishment of treaty relations between certain parties to a multilateral treaty.[35] There is no reason why the subsequent achievement of that result should not be permitted, provided the narrow conditions of either lit a or lit b of Art 54 are met.

II. Conditions for Permissible Termination or Withdrawal

Art 54 lit a and b regulate two kinds of permissible terminations or withdrawals: those already anticipated in the treaty (lit a); and those subsequently permitted by all the other parties (lit b). **26**

1. Conformity with Treaty Provisions (lit a)

Termination or withdrawal in conformity with the provisions of a treaty amounts to termination or withdrawal with the **anticipated consent of all the parties**, which is laid down in the treaty. Art 54 lit a contemplates express provisions on termination or withdrawal in the treaty, but does not exclude implicit rules in this respect (→ Art 56 MN 22–25). Attempts at terminating, or withdrawing from a treaty that are not in complete conformity with the provisions of that treaty will be of no effect under Art 54. They can only accomplish their aim on the basis of the much more restrictive provisions of Arts 60, 61 or 62. Otherwise they will have no legal consequences so that the State continues to be bound by the treaty. **27**

Treaty practice provides us with an **infinite diversity of termination or withdrawal clauses**.[36] Some of them are utterly plain, setting a (more or less) clear termination date (expiry clause)[37] or unconditionally permitting every party to withdraw from (denounce) the treaty, normally requiring a written notification, usually to be sent to the depositary, and setting a certain period of notice.[38] Where a treaty includes, among others, provisions which determine a frontier between two States, the presence of a termination clause will not make that determination provisional. According to the ICJ, the **establishment of a boundary** "is a fact **28**

[35] *Cf eg* Art XIII of the 1994 WTO Agreement 1867 UNTS 154. See also the fairly common declarations made by Arab States when acceding to multilateral treaties that their accession should not establish any treaty relationship with Israel. These declarations amount to reservations *ratione personae*. See *eg* the declarations made by Morocco and Syria when acceding to the VCLT and the Israeli reaction thereto (Israel not yet having become a party to the VCLT).

[36] See the many examples provided by *Blix/Emerson* 96 *et seq* and *Aust* 278 *et seq*.

[37] *Cf eg* the clear expiry clause of Art 97 ECSC Treaty (n 28). The expiry clause in Art 14 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 is less clear.

[38] *Cf eg* Art 21 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination 66 UNTS 195: one year period of notice.

which, from the outset, has had a legal life of its own, independently of the fate" of the treaty establishing it:

> "Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court. [...] A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy."[39]

29 Especially in human rights treaties, termination clauses often expressly provide that denunciations shall not have **retroactive effect** so that the respective party will not be released from the treaty obligations with respect to any violation committed prior to the effective date of denunciation.[40] Other treaties define a resolutory condition whose effect will automatically terminate either the whole treaty or the treaty membership of a certain party.[41] Still others, especially international commodity agreements, authorize a treaty body to decide on the termination.[42]

30 Other termination clauses are more complex, combining an initial fixed duration of the treaty with the right of unilateral withdrawal thereafter.[43] Sometimes, they provide for automatic extensions either indefinitely or by further fixed periods, but mitigate their effect by according a right of prior denunciation.[44] Some treaties, primarily in the **disarmament and non-proliferation sector**, subject the right of unilateral withdrawal to restrictive conditions. One example is Art X para 1 of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT)[45]:

> "Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests."

31 It is questionable if these clauses refer the determination of whether the restrictive conditions are fulfilled to the unfettered discretion of the withdrawing party.[46]

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[39] ICJ *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, paras 72 *et seq*.

[40] *Cf eg* Art 58 para 2 ECHR; Art 78 para 2 of the 1969 American Convention on Human Rights OASTS 36.

[41] *Cf eg* Art XV of the Genocide Convention (n 36), according to which the Convention will cease to be in force when, as a result of denunciations, the number of parties falls below 16; Art 58 para 3 ECHR (according to which a party who ceases to be a member of the Council of Europe automatically also ceases to be a party to the Convention.

[42] See *eg* Art 52 paras 3 and 4 of the 2001 International Coffee Agreement 261 UNTS 312; Art 63 paras 4 and 5 of the 2001 International Cocoa Agreement [2002] OJ L 342, 2.

[43] *Cf eg* Art 13 of the 1949 North Atlantic Treaty 34 UNTS 241.

[44] *Cf eg* Art 14 Genocide Convention (n 36).

[45] 729 UNTS 161. See also, among others, the parallel provision in Art XVI para 2 of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction 1974 UNTS 45.

[46] But see *LR Helfer* Exiting Treaties (2005) 91 VaJIL 1579, 1598.

However, as none of the relevant treaties establishes compulsory dispute settlement procedure, those restrictive conditions are difficult to implement.

> Based on the aforementioned Art X para 1 NPT, the Democratic People's Republic of Korea (DPRK) gave notice of withdrawal from the NPT in 1993, alleging that the United States threatened it with nuclear war by engaging in military exercises. The depositaries of the NPT (Russia, the United Kingdom and the United States) in a joint statement doubted whether the DPRK's notice met the conditions of Art X para 1 NPT and the UN Security Council called upon it to reconsider its notice.[47] The DPRK and the United States thereupon held talks and then jointly announced shortly before the end of the three-month period of notice that the DPRK had decided unilaterally to suspend as long as it considered necessary the effectuation of its withdrawal. Ten years thereafter, in 2003, the DPRK notified the Security Council of its immediate withdrawal in view of the hostile policy of the United States.[48] A further three years later, after the DPRK had allegedly conducted a nuclear test, the Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1718 (2006).[49] In it, the Council condemned the nuclear test, deplored the DPRK's announcement of withdrawal from the NPT, demanded that it immediately retract it and return to the NPT and underlined the need for all States party to the NPT to continue to comply with their treaty obligations. While the Security Council did not expressly reproach the DPRK with a violation of the NPT (but only of the relevant Security Council resolutions), it treated North Korea as if it continued to be a party to the NPT. Otherwise it would have demanded that the DPRK re-accede to the treaty and it would have spoken of all the *other* States Parties' treaty obligations. Accordingly, the official treaty register of the German Federal Government still lists the DPRK as a party to the NPT, thus practically treating the DPRK's withdrawal as invalid.[50] The most recent relevant Resolution 1874 (2009)[51] repeats the formulations of Resolution 1718 (2006).

32 The **North Korean case** as well as a potential future Iranian denunciation of the NPT pose the question whether a State's withdrawal from a treaty in conformity with its provisions, as provided in Art 54 lit a VCLT, could as such be qualified by the UN Security Council as a threat to the peace in the sense of Art 39 UN Charter and used as a ground to impose sanctions on that State.[52] This is indeed possible, as measures based on **Chapter VII of the UN Charter** do not presuppose that their addressee committed any internationally wrongful act. The exercise of international legal rights in certain circumstances might well give rise to a threat to the peace.[53]

33 The termination of a treaty "in conformity with the provisions of the treaty" can also occur in the absence of an explicit provision to this effect, where the treaty

[47]UNSC Res 825 (1993), 11 May 1993, UN Doc S/RES/825 (1993).

[48]See *Aust* 282.

[49]UNSC Res 1718 (2006), 14 October 2006, UN Doc S/RES/1718 (2006).

[50]Bundesministerium der Justiz (ed.), Bundesgesetzblatt 2011 Teil II: Fundstellennachweis B (as of 31 December 2010), 592.

[51]UNSC Res 1874, 12 June 2009, UN Doc S/RES/1874. S Harnisch, Der UN-Sicherheitsrat im koreanischen Nuklearkonflikt (2010) Vereinte Nationen 157. See also S Talmon, Security Council Treaty Action, (2009) 62 Revue Hellénique de droit international 100 et seq.

[52]*O Dörr* Codifying and Developing Meta-Rules: The ILC and the Law of Treaties (2006) 49 GYIL 129, 151 *et seq.*

[53]*JA Frowein/N Krisch* in *Simma* Art 39 MN 9.

implicitly lays down conditions for its termination, which have been met. One example is the **complete execution of the treaty's object**, but only if the treaty's continuance in force would clearly serve no further useful purpose because nothing is left which could be performed by the parties in good faith (Art 26).[54] Such a termination by virtue of an **implicit agreement** of the parties in the original treaty should not be lightly presumed, however, for even after the execution of its immediate object, a treaty may be intended to have further continuing, even permanent, effects. Thus, *eg*, an agreement on disarmament may, after the required destruction of military hardware has completely been performed by all the parties, serve the further purpose of restricting future re-armament. A treaty on the transfer of territory will not be extinguished by the transferee's acquisition of title but will continuously legitimize that transfer.[55] Another (rather theoretical) example would be a treaty imposing obligations on one party only and then only according rights to the other party. If the latter unilaterally renounces all its rights, the treaty will be terminated, unless the other party has a legitimate interest in maintaining the treaty relationship, in which case its consent will be required to extinguish that treaty.[56]

34 A treaty provision permitting the withdrawal of individual parties at will can become ineffective by way of **desuetude**, where the conduct of the parties demonstrates their consent to abandon it. However, this cannot be assumed lightly, and not even the denunciation clause in Art 58 European Convention on Human Rights has become **inoperable**.[57] Furthermore, States Parties can be subject to a legal obligation arising from a treaty not to exercise a right of denunciation guaranteed in another treaty. Thus, EU Member States are implicitly prohibited by the EU Treaty from denouncing the European Convention on Human Rights. Such a contrary obligation will, however, make the denunciation only illegal *vis-à-vis* the other EU Member States and not invalid.

35 Where a multilateral treaty prohibits denunciations explicitly or implicitly, a State could make a **reservation** in order to secure such a right for itself. The reserving State would purport to exclude the explicit or implicit treaty provision denying denunciation or withdrawal in its application to that State. Provided that such a **reservation** is permissible according to Art 19 VCLT, it will modify the treaty relationships between the reserving State and all the other States Parties pursuant to Art 21 VCLT to the effect that the reserving State can withdraw from the treaty.[58] If the reserving State makes use of this possibility, its withdrawal will take place in conformity with the provisions of the treaty in the sense of Art 54 lit a VCLT.[59]

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[54] *R Plender* The Role of Consent in the Termination of Treaties (1986) 57 BYIL 133, 136 *et seq*; *Aust* 306.

[55] *G Dahm/J Delbrück/R Wolfrum* Völkerrecht Vol I/3 (2nd edn 2002) 720.

[56] *Ibid* 727 *et seq*.

[57] *C Feist* Kündigung, Rücktritt und Suspendierung von multilateralen Verträgen (2001) 209 *et seq*.

[58] For the non-objecting States, this follows from Art 21 para 1 VCLT, for the objecting States, from Art 21 para 3 VCLT.

[59] An example is the US reservation when acceding to the WHO, which was unanimously approved by the World Health Assembly (see *K Widdows* The Unilateral Denunciation of Treaties

Declarations pursuant to **Art 36 para 2 ICJ Statute**, by which States recognize as compulsory the jurisdiction of the ICJ, are not treaties but unilateral engagements. On the other hand, they establish a network of bilateral reciprocal engagements with other States accepting the same obligation of compulsory jurisdiction.[60] This is why the ICJ treated those declarations, by analogy, according to the law of treaties.[61] In view of the **principle of good faith**, the Court insisted on two points concerning termination of such declarations: that a period of notice voluntarily attached to its declaration by a State is binding and that a declaration with indefinite duration is not terminable with immediate effect but only subject to a **reasonable period of notice**.[62] The latter standard, which was taken from the law of treaties, also applies to terminations of or withdrawals from treaties, which do not expressly state a period of notice. What is 'reasonable' must be determined with regard to the circumstances of each individual case. **36**

2. Consent After Consultation (lit b)

a) Subsequent Consent of All Parties

Where the consent of the parties with regard to termination or withdrawal has not already been embodied in the treaty in the form of prior consent, it can be brought about subsequently and *ad hoc*. In substance, such subsequent consent amends the original treaty (Art 39). Art 54 lit b applies where the treaty either does not include provisions on termination or withdrawal at all or lays down conditions for the exercise of those rights which are not met in a given case. In both alternatives, the subsequent consent constitutes a new ground for termination or withdrawal beyond the original treaty. It is based on the contracting parties' joint power of disposal under customary international law as '**masters of their treaty**'. They can at any time agree to cancel a treaty altogether or to permit one of them to withdraw from it, any *lacuna* or even contrary provision in that treaty notwithstanding. As the termination (in the wider sense) necessarily deprives all parties of (some of) their treaty rights other than under the provisions of the treaty, the consent of all of them is indispensable. The ILC ultimately agreed on this unanimity requirement after some discussion as to whether their draft should not, for the sake of flexibility, progressively develop the existing customary international law to the effect that the subsequent consent of a majority of States Parties would suffice to terminate a treaty.[63] **37**

In the view of the ILC, international law does not accept any **theory of the '*acte contraire*'**, as it is found in some national laws, according to which the cancellation **38**

Containing no Denunciation Clause (1983) 53 BYIL 83, 100 *et seq*. See also *Waldock* II 69; *T Christakis* in *Corten/Klein* Art 56 MN 67 *et seq*.

[60]ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, para 60.

[61]*Ibid* para 63.

[62]*Ibid* paras 61, 63.

[63]*V Chapaux* in *Corten/Klein* Art 54 MN 8.

of a legal act must take the same form as that act.[64] Therefore, the consent of all the parties to terminate a treaty does not have to be established in the same form as the original treaty. Rather, the States Parties are free under international law to choose any form they please, although some of them may be subject to certain formal requirements pursuant to their national constitutional law. Although international law does not require that the subsequent consent of all the parties to terminate a treaty be expressed in a certain form, that consent must be established beyond doubt, which may be difficult if it was brought about too informally. On the other hand, Art 65 para 2 VCLT provides that where one party has notified the other parties in writing of its intention to withdraw from a treaty and none of them raises any objection within 3 months, the first party can carry out its withdrawal. The silence of the other parties is treated as consent.

39 Where a treaty creates an obligation or a right for a third State in accordance with Arts 35 and 36, its termination otherwise than under its provisions may, pursuant to Art 37, require the consent of the third State.[65] This is because the termination necessarily amounts to a revocation of this State's obligation or right under the treaty. The same applies if the parties agree to permit one of them to withdraw if such withdrawal amounts to a **modification of the third State's obligation or right** under the treaty in the sense of Art 37. If a treaty expressly prescribes that its termination shall be subject to the consent of a non-party, which is thereby made an external guarantor of the treaty, Art 37 para 2 VCLT will apply.[66]

40 Art 54 lit b does not state that the consent of the parties must be established explicitly. In view of the fact that they are left free to choose the form of their agreement to terminate the treaty, it will normally suffice if some or all of the parties **implicitly consent to the termination or withdrawal**.[67] However, there are two caveats: first, the consent of each and every party must be established beyond doubt, which can be difficult if it is not clearly expressed. The conclusion of an incompatible later treaty with no explicit abrogation clause does not cogently prove the implicit consent of all the parties to terminate their earlier treaty (Art 59, Art 30 para 3), nor does the emergence of an incompatible new rule of customary international law (→ Art 62 MN 43),[68] nor the simple reciprocal non-compliance by

[64] Final Draft, Commentary to Art 51, 249 para 3.

[65] *Capotorti* (n 31) 494 *et seq*; *Sinclair* 184.

[66] *See Dahm/Delbrück/Wolfrum* (n 54) 724 *et seq*. The 1919 and 1920 treaties on the protection of minorities which they cite as examples, however, do not make consensual termination by the parties dependent on the consent of the League of Nations as an external guarantor. Only the *unilateral* modification by the territorial State in which the minorities lived was made subject to the assent of a majority of the League Council (see *eg* Art 12 of the 1919 Treaty of Peace between the United States, the British Empire, France, Italy, and Japan, and Poland 13 AJIL Supp 423 (1919).

[67] *Capotorti* (n 31) 496 *et seq; Villiger* Art 54 MN 7.

[68] *V Chapaux* in *Corten/Klein* Art 54 MN 26 (referring to the 1978 continental shelf arbitration between the United Kingdom and France). If a subsequent rule of customary law does not bring about the termination of the earlier treaty pursuant to Art 54 lit b VCLT, the *lex posterior* rule will come in (in analogy to Art 30 para 3 VCLT).

the parties of a bilateral treaty (Art 60).[69] Second, allowing implicit consent of the parties to terminate a treaty or effectuate a withdrawal must not thwart the prior consultation of the other contracting States (→ MN 42 *et seq)*.[70] It will thus only be possible where there are no other contracting States or where these also implicitly consent to the termination or withdrawal.

On this background, Art 54 lit b covers **obsolescence or desuetude** as a ground of termination of a treaty, meaning treaty-related conduct of the parties from which one can imply their consent to abandon it. The ILC therefore found it unnecessary to include desuetude as a distinct ground of termination of treaties.[71] Some publicists have doubted that desuetude always coincides with implied consent to terminate and suggested that it rather amounts to the abrogation of a treaty by a subsequent norm of customary law.[72] The technical classification of desuetude does not concern us here. If ever a case arose, however, which could definitely not be solved pursuant to Art 54 lit b VCLT, one could not simply draw upon the customary international rules on desuetude.[73] Although the last paragraph of the Preamble of the VCLT provides that the rules of customary international law continue to govern such questions not regulated by the Convention, this only refers to questions not regulated at all, *ie* neither positively nor negatively. However, Art 42 para 2 VCLT is a negative regulation, explicitly stating that no grounds for terminating a treaty beyond those mentioned in the Convention shall be applied.[74] **41**

The **dissolution of the League of Nations** after the United Nations had commenced to exercise its functions provides an example of desuetude based on the implicit consent to terminate. It was effectuated by a simple resolution, adopted by the Assembly of the League of Nations on 18 April 1946,[75] which reflected the consent of all the remaining Member States that the League should be terminated and its functions and assets be transferred to the United Nations.[76] A more recent example is the declaration by Austria in 1990 that certain provisions of the Austrian State Treaty of 1955 had become obsolete which was expressly

[69]ICJ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, para 114.

[70]See also *V Chapaux* in *Corten/Klein* Art 54 MN 12, 25.

[71]Final Draft, Commentary to Art 39, 237 para 5.

[72]*Capotorti* (n 31) 516 *et seq*; *Sinclair* 163 *et seq*. But see *Plender* (n 53) 138 *et seq*. See also *B Simma* Termination and Suspension of Treaties (1978) 21 GYIL 74, 93 *et seq*.

[73]This is what *Capotorti* (n 31) 519 *et seq* suggests. MG Kohen Desuetude and Obsolescence of Treaties, in: E Cannizzaro (ed.), The Law of Treaties Beyond the Vienna Convention (2011), 350 *et seq*.

[74]However, see *N Kontou* The Termination and Revision of Treaties in the Light of New Customary International Law (1994) 135 *et seq*, who argues that the VCLT was not intended to regulate the relationship between conventional and customary rules. Excepting customary grounds of termination from Art 42 para 2 VCLT would, however, render that provision obsolete. See also *Plender* (n 53) 139 *et seq*.

[75]Société des Nations, Journal Officiel, Supplément Spécial No 194 (1946) 269 (English translation in *F Knipping/H von Mangoldt/V Rittberger* (eds) The United Nations System and Its Predecessors Vol II (1997) 213 *et seq*).

[76]See ICJ *International Status of South West Africa* (Advisory Opinion) (separate opinion *Read*) [1950] ICJ Rep 167.

accepted by the other parties.[77] Another example is the similar declaration by Finland on the obsolescence of certain provisions of the Peace Treaty of 1947 to which no other party raised any objection.[78]

b) Prior Consultation with Other Contracting States

42 The requirement that the other contracting States be consulted before the parties undertake the consensual act of termination of or withdrawal from a treaty was added by the Vienna Conference (→ MN 13 *et seq*). For the purposes of Art 54 lit b, "contracting States" are those that have already consented to be bound by the respective treaty but for which that treaty has not yet entered into force, making them "parties" (Art 2 para 1 lit f and g). This **intermediate status of contracting State**, but not yet party (which must be distinguished from that of a mere negotiating State in the sense of Art 2 para 1 lit e) will occur only in rare cases and even then be of short duration. However, it will give the States concerned a vested interest in the fate of the treaty, which the Conference felt could not be disregarded, although it should not be connected with a veto either.[79] The practical importance of the consultation requirement will presumably be minimal.

43 The question of involvement of contracting States was intensively discussed in the ILC and again at the Vienna Conference and ultimately settled in the form of a compromise. This suggests that the **consultation requirement is not part of customary international law**, all the more since there seems to be no relevant State practice.[80] However, the requirement was also included in Art 54 lit b VCLT II.[81]

44 As the *travaux préparatoires* of the Convention do not disclose any special notion of "consultation", the term must be understood in the ordinary sense in which it is used in international legal discourse. There being no universally agreed definition, however, everything depends on the context in which the term is used.[82] In accordance with the **principle of good faith** which pervades international treaty relationships (Preamble 3rd recital), consultation in the context of Art 54 lit b means that the contracting States must be informed in good time of the intention to terminate the treaty or withdraw from it.

45 This duty to inform is incumbent primarily on the State Party initiating the process of consensual termination or withdrawal pursuant to Art 65 para 1 and Art 67 para 1,

[77] *Aust* 306 *et seq*. For the text of the declaration and the response notes of the other parties *cf* (1990) 51 ZaöRV 520 *et seq*.

[78] *Jennings/Watts* (n 1) 1297. For the text of the declaration *cf* (1990) 51 ZaöRV 524 *et seq*. However, see *Dörr* (n 51) 153, who assumes that these were *clausula* cases (Art 62).

[79] *Cf* UNCLOT I 476.

[80] *V Chapaux* in *Corten/Klein* Art 54 MN 5, 10 *et seq*.

[81] Not yet in force.

[82] *Cf MF Dominick* Consultation (1992) 1 EPIL 776 *et seq*.

but secondarily the other parties are also obliged to see to it. In analogy to Art 65 para 2, the **advance notice period** can normally be set at 3 months. This alone will render the consultation requirement moot in most cases because the contracting State will have become a party during that period so that its consent will now be necessary. If not, the reaction of a mere contracting State is not binding,[83] but all the parties are obliged to take it into consideration when deciding on whether or not to give their own consent.

Any disregard of the consultation requirement amounts to a **procedural error**, which makes the termination or withdrawal illegal *vis-à-vis* the contracting State concerned, but not invalid. Having been injured by an internationally wrongful act, the contracting State can claim compensation and satisfaction but **not restitution in kind** because that would involve a disproportionate burden for the States Parties.[84] **46**

c) Possible Exceptions to the Consent Rule of lit b

Art 54 lit b is an expression of the contracting parties' joint power under customary international law to dispose of their treaty at will. That power not being inalienable, it is theoretically conceivable that the States Parties to a certain treaty explicitly or implicitly **exclude the application of Art 54 lit b *inter se*** with regard to that treaty. However, such an intention should not be assumed lightly. Not even the TEU and the TFEU provide practical examples. Although both have been concluded for an "unlimited period",[85] this alone does not necessarily prohibit the Member States from all agreeing to dissolve the Union entirely or to release one of them from its membership,[86] especially since the respective duration clauses could themselves be abrogated by a formal amendment.[87] **47**

The States Parties can, of course, always agree that their contractual relationship shall not be governed by international law at all and thus remove their agreement entirely from the scope of the VCLT.[88] This will usually be the case where heretofore independent States unite to form a **new federal State**, which will as a general rule be indissoluble. They thereby establish a relationship of a constitutional and not an international character among themselves. Perhaps, the European Union provides a relevant example because the process of European integration was **48**

[83] *Cf* Art 67 paras 2 and 3, which indicate that only parties can raise objections with suspensive effect.

[84] *Cf* Arts 35–37 ILC Articles on Responsibility of States for Internationally Wrongful Acts (UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83, Annex), which are declaratory of customary international law.

[85] Art 53 TEU; Art 356 TFEU.

[86] See Art 50 TEU added by the Treaty of Lisbon that entered into force on 1 December 2009.

[87] *C Eckes* in *H Smit*/*PE Herzog* (eds) The Law of the European Union Vol 1 (2007) Art 51 TEU MN 73.03.

[88] See Art 2 para 1 lit a.

intended to be irreversible and has established a quasi-federal body with a *sui generis* character.[89]

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Article 55

Reduction of the parties to a multilateral treaty below the number necessary for Its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Contents

A. Purpose and Function

The article embodies a rather **plain residuary** rule to avoid uncertainty concerning the survival of a multilateral treaty that has been abandoned by a critical number of parties and does not contain a provision clarifying the legal effects of that diminution in participation. **1**

Whereas the denunciation of a bilateral treaty by one of the parties will necessarily extinguish that treaty, a multilateral treaty can theoretically continue to be in force even with a dramatically reduced number of parties, in the extreme case with only two.[1] However, multilateral treaties usually expressly **require a certain number of ratifications or accessions** before they enter into force.[2] Then the question arises what their fate will be, if, due to withdrawals after their entry into force, the number of remaining parties drops below that figure. **2**

On the one hand, one could interpret the specified number of necessary parties as a continuing requirement of **minimum participation**, which applies to both the entry into force of the treaty and its maintenance in force. This would lead to the conclusion that the treaty will automatically be terminated once participation falls short of that minimum figure. **3**

On the other hand, one could draw a conclusion *a contrario* from the treaty's expressly conditioning its entry into force on the existence of a specified number of ratifications or accessions, but not providing for its termination in the reverse case. **4**

For the sake of the **stability of treaties**, Art 55 favours the *a contrario* conclusion in this situation of ambiguity. The ILC based its proposal of the provision mainly on two arguments: (1) that "if the negotiating States had intended the **5**

[1] *G Dahm/J Delbrück/R Wolfrum* Völkerrecht Vol I/3 (2nd edn 2002) 731 insist on a minimum of three remaining parties because otherwise the treaty could no longer be called 'multilateral' (a somewhat conceptualistic argument).

[2] See *eg* Art 84 para 1 VCLT: 35; Art 308 para 1 UNCLOS: 60; Art 126 para 1 of the 2001 Rome Statute of the International Criminal Court 2187 UNTS 90: 60.

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minimum number of parties [. . .] to be a continuing condition for the maintenance in force of the treaty, it would have been both easy and natural for them so to provide"; (2) that the remaining parties, if unwilling to maintain the treaty in operation among themselves, could easily either join together to terminate it or separately exercise their own right of denunciation or withdrawal.[3]

6 Art 55 VCLT II is identically formulated.

B. Historical Background and Negotiating History

7 The rule of Art 55 was originally included in Draft Art 15 para 4 of ***Waldock's*** second report,[4] dealing extensively with denunciation of or withdrawal from multilateral treaties. Draft Art 15 para 4 lit b stated that a treaty terminates when the number of its parties falls below a minimum number laid down in the treaty as necessary for its continuance in force. Draft Art 15 para 4 lit c added the rule that now appears in Art 55 VCLT.

8 Art 38 para 3 lit b of the 1963 ILC Draft united the two clauses in one subparagraph of a provision that also included what is now laid down in Art 54 lit a. In Art 52 Final Draft, the successor provision of *Waldock*'s Draft Art 15 para 4 lit b was deleted, its substance being already covered by the general rule of Draft Art 51 lit a (which has become Art 54 lit a VCLT). *Waldock*'s Draft Art 15 para 4 lit c remained as a separate article (Art 55) to dispel doubts with regard to the effect which a provision on the treaty's entry into force could have on its continuance in force.[5]

9 The final line of Art 52 Final Draft read "the number of the parties falls below the number *specified in the treaty as* necessary for its entry into force".[6] Based on an amendment submitted by the United Kingdom during the **Vienna Conference**, the Drafting Committee deleted the italicized words because the number of parties necessary for the entry into force of a treaty might conceivably be unspecified by the treaty itself,[7] but otherwise agreed by the negotiating States (Art 24 para 1) or not regulated at all (Art 24 para 2). The amended version was unanimously adopted at the second session of the Conference.[8]

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[3]Final Draft, Commentary to Art 52, 250 para 2.

[4]*Waldock* II 36 *et seq*.

[5]See the compilation of the *travaux préparatoires* by *RG Wetzel/D Rauschning* The Vienna Convention on the Law of Treaties: travaux préparatoires (1978) 387 *et seq*. See also the intervention by *Rosenne* [1966-I/1] YbILC 42 para 71.

[6]Emphasis added.

[7]See UNCLOT I 476 para 8.

[8]UNCLOT II 108.

C. Elements of Article 55

The rule embodied in Art 55 is straightforward. It refers to a type of provision common in multilateral treaties, which makes their entry into force contingent on a minimum number of ratifications or accessions.[9] If due to the withdrawal by one or more parties, the actual number of remaining parties later falls below that ceiling, this alone will **not automatically terminate the treaty**. The aforementioned type of treaty clause is to be interpreted as establishing only a suspensive condition and not a resolutory condition. **10**

As the introductory clause of Art 55 makes clear, the provision functions only as a **residual rule**, which applies unless the treaty otherwise provides. Some (not many) treaties, usually dating back at least to the 1960s, indeed expressly state that they shall cease to be in force if the number of parties falls below the number originally required for its entry into force.[10] Some other treaties set the number of necessary remaining parties at a somewhat lower figure.[11] Provisions of this kind are **termination clauses**, so that the introductory part of Art 55 refers back to Art 54 lit a.[12] **11**

In accordance with my comments on Art 54 lit a concerning implicit termination clauses (→ Art 54 MN 33), it is theoretically conceivable that a treaty implicitly conditions its maintenance in force on a minimum participation. This would have to be determined by interpretation in accordance with Arts 31–33. However, as the purpose of Art 55 is to avoid uncertainty, such an **implicit resolutory condition** can be assumed only **in exceptional cases**, *eg* in a case where the object and purpose of a treaty can be obviously no longer attained after its having been abandoned by too many parties. **12**

Art 55 does not cover cases where the entry into force of a multilateral treaty is made contingent on its ratification by one or several particular States[13] and one or more of these States later withdraw. It is a matter of interpretation of such a treaty whether **participation by all those particular States** is so important for obtaining the treaty's object and purpose, that the treaty cannot survive the withdrawal by one of them.[14] If the answer is in the affirmative, the termination of the treaty will take place in accordance with Art 54 lit a. **13**

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[9] See the examples given in n 2.

[10] Art VI para 1, Art VIII para 2 of the 1953 Convention on the Political Rights of Women 193 UNTS 135; Art 35 para 2, Art 37 para 1 cl 2 of the 1961 European Social Charter 529 UNTS 89. Art M of the 1996 Revised Social Charter 2151 UNTS 277 does not include such a provision anymore.

[11] 1948 Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 came into force after the first 20 instruments of ratification or accession were deposited (Art XIII para 2). It will cease to be in force if the number of parties drops below 16 (Art XV).

[12] *V Chapaux* in *Corten/Klein* Art 55 MN 5.

[13] See *eg* Art X para 3 of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons 729 UNTS 161 which requires ratification by the three States the governments of which are designated depositaries in Art X paras 2 and 40 other States signatory to the NPT.

[14] See also *Villiger* Art 55 MN 7.

14 The question has been raised whether Art 55 embodies a rule of customary international law and denied in view of the total lack of relevant States practice.[15] Assuming that the provision indeed formulates a new rule which does not apply as such outside the scope of application of the VCLT, the abovementioned problem concerning the impact of a minimum participation clause with regard to a treaty's entry into force on its continuance in force must be solved with the ordinary methods of treaty interpretation. Then the general interest in the **stability of treaties**, as manifested in the **customary rule of *pacta sunt servanda***, will most likely lead to the assumption that in case of doubt, the treaty will remain in force. In other words, the result will practically always be the same, regardless of whether Art 55 is declaratory of customary international law. This is why the original proposal was so readily accepted as reasonable within the ILC and among the States.

[15] *V Chapaux* in *Corten/Klein* Art 55 MN 3 *et seq*. However, see *Villiger* Art 55 MN 8.

Article 56

Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Contents

A. Purpose and Function

The provision supplements Art 54 VCLT. Where a treaty is silent as to termination or withdrawal, the question arises if individual parties have an implied right of unilateral withdrawal in the sense of Art 54 lit a, or if their withdrawal requires the consent of all the other parties, as provided by Art 54 lit b. Art 56 lays down a **rebuttable presumption** in favour of the latter variant,[1] giving great weight to **1**

[1] *R Plender* The Role of Consent in the Termination of Treaties (1986) 57 BYIL 133, 147.

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pacta sunt servanda, a principle which would be undermined if withdrawal at will were too easy.[2] The provision thereby implicitly rejects the interpretation maxim ***in dubio mitius***,[3] advocated by adherents of State sovereignty so as to preserve States' freedom of action as far as possible.

2 The rebuttable presumption embodied in Art 56 represents a reasonable compromise between a strict version of *pacta sunt servanda*, allowing parties to withdraw from a treaty only when it "is provided for in the treaty or consented to by all other parties",[4] and a strict version of sovereignty, assuming that States retain an implied power of withdrawal unless expressly renounced in the treaty.[5] The provision tries to steer a **middle course** between extreme inflexibility, restricting a State to extraordinary rights of withdrawal (Arts 60–62) when unable to secure the consent of all the other parties, and exaggerated flexibility, which devalues treaty commitments voluntarily entered into by allowing any party to withdraw at any time.

3 While the majority of treaties contain provisions on termination and/or withdrawal,[6] a number of important ones, including law-making conventions and constitutions of international organizations, do not.[7] There is no obvious reason such as topic, category, *etc* to explain which treaty falls on which side of the line. The **problem of silence** that Art 56 attempts to regulate is therefore of considerable practical importance. However, recent treaties are much more likely to include such provisions, probably due to the belief that their presence will persuade more States to accede.[8] Denunciation clauses function as an insurance policy against uncertain future developments whose presence enables States to accept more expansive or deeper treaty commitments.[9] In view of the fact that treaties nowadays routinely

[2] *G Dahm/J Delbrück/R Wolfrum* Völkerrecht Vol I/3 (2nd edn 2002) 717.

[3] "In case of doubt, international obligations should be interpreted restrictively" (see *R Bernhardt* Interpretation in International Law in (1995) 2 EPIL 1416, 1421); *R Jennings/A Watts* Oppenheim's International Law Vol I Parts 2–4 (9th edn 1992) 1278 *et seq*.

[4] See *eg* Art 34 cl 1 Harvard Draft 664, for the commentary *cf* Harvard Draft 1173.

[5] See *eg* Art 17 of the 1928 Inter-American (Havana) Convention on Treaties (1935) 29 AJIL Supp 1205. See also *E Jiménez de Aréchaga* International Law in the Past Third of a Century (1978) 159 RdC 1, 70; *Plender* (n 1) 145 *et seq*.

[6] See *eg* the four 1949 Geneva Conventions for the Protection of War Victims 75 UNTS 31, 85, 135, 287; Art 58 ECHR; Art 317 UNCLOS (in contrast to the Geneva Conventions on the Law of the Sea of 1958 which it supersedes); Art 25 of the 1992 UN Framework Convention on Climate Change 1771 UNTS 107; Art XV of the 1994 WTO Agreement 1867 UNTS 154; Art 31 of the 2000 Constitutive Act of the African Union 2158 UNTS 3; Art 127 of the 2001 Rome Statute of the International Criminal Court 2187 UNTS 90.

[7] See *eg* the 1945 UN Charter, the VCDR, the ICCPR, the ICESCR, the VCLT, the 1979 Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13, the 1981 African Charter of Human and Peoples' Rights 21 ILM 58, the VCLT II (not yet in force), the 1990 Second Optional Protocol to the CCPR Aiming at the Abolition of the Death Penalty 1642 UNTS 414; the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses 36 ILM 700 (not yet in force).

[8] *T Christakis* in *Corten/Klein* Art 56 MN 3.

[9] *LR Helfer* Exiting Treaties (2005) 91 Virginia LR 1579, 1591.

contain termination and/or withdrawal clauses, their absence from a specific treaty is most likely not an accident but an intentional omission.[10]

B. Historical Background and Negotiating History

I. Second Report by *Fitzmaurice* (1957)

Referring to the London Declaration of 1871, which had stressed that consent among the contracting parties was necessary for liberating any of them from the engagements of a treaty,[11] SR *Fitzmaurice* in his second report of 1957 stated as the clear general rule that the absence of any provision for termination in a treaty "means, in principle, no termination except by general consent".[12] However, he added that there may be two exceptions: (1) some general inference as to duration might be drawn from the treaty as a whole; (2) certain sorts of treaties, unless entered into for a stated period or expressed to be in perpetuity, were "by their nature such, that any of the parties to them must have an implied right to bring them to an end or to withdraw from them".[13] *Fitzmaurice* mentioned treaties of alliance and commercial or trading agreements as examples of the second exception and added that it only applied to treaties whose very nature imposed such an implication as a necessary characteristic of the type of obligation involved. **4**

II. Second Report by *Waldock* (1963)

In his own second report of 1963, SR *Waldock* elaborated on *Fitzmaurice*'s general rule and exceptions, drafting a long and detailed Art 17 on the duration of bilateral as well as multilateral treaties containing no provision regarding their duration or termination, whose relevant paragraphs were as follows[14]: **5**

> "2. In the case of a treaty whose purposes are by their nature limited in duration, the treaty shall not be subject to denunciation or withdrawal by notice, but shall continue in force until devoid of purpose.
> 3. (a) In cases not falling under paragraph 2, a party shall have the right to denounce or withdraw from a treaty by giving twelve months' notice [. . .] when the treaty is –
> (i) a commercial or trading treaty, other than one establishing an international régime for a particular area, river or waterway;

[10] *T Christakis* in *Corten/Klein* Art 56 MN 4.

[11] *GF de Martens* Nouveau recueil général de traités Ser 1 Vol 18 (1873) 278. It reacted to a unilateral denunciation of certain clauses to the peace settlement after the Crimean War and was intended to preserve the balance between the great European Powers.

[12] *Fitzmaurice* II 38.

[13] *Ibid* 39.

[14] *Waldock* II 64 *et seq*.

(ii) a treaty of alliance or of military co-operation, other than special agreements concluded under article 43 of the [UN] Charter;
(iii) a treaty for technical co-operation in economic, social, cultural, scientific, communications or any other such matters, unless the treaty is one falling under sub-paragraph (b);
(iv) a treaty of arbitration, conciliation or judicial settlement.

(b) In the case of a treaty which is the constituent instrument of an international organization, unless the usage of the organization otherwise prescribes, a party shall have the right to withdraw from the treaty and from the organization by giving such notice as the competent organ of the organization [. . .] shall decide to be appropriate. [. . .]

4. A treaty shall continue in force indefinitely with respect to each party where the treaty –
(a) is one establishing a boundary between two States, or effecting a cessation of territory or a grant of rights in or over territory;
(b) is one establishing a special international régime for a particular area, territory, river, waterway, or airspace;
(c) is a treaty of peace, a treaty of disarmament, or for the maintenance of peace;
(d) is one effecting a final settlement of an international dispute;
(e) is a general multilateral treaty providing for the codification or progressive development of general international law;

provided always that the treaty [. . .] is not one entered into merely for the purpose of establishing a *modus vivendi*.

5. In the case of any other treaty not covered by paragraphs 2–4, the duration of the treaty shall be governed by the rule in paragraph 4, unless it clearly appears from the nature of the treaty or the circumstances of its conclusion that it was intended to have only a temporary application.

6. Notwithstanding anything contained in the foregoing paragraphs, a treaty which is silent as to its duration or termination but supplements or modifies another treaty shall be of the same duration as the treaty to which it relates."

6 *Fitzmaurice*'s general rule is almost hidden in *Waldock*'s Draft Art 17 para 5, together with an exception that combines both of *Fitzmaurice*'s exceptions. Technically, the rule is transformed into a **rebuttable presumption against the admissibility of unilateral withdrawals**, qualified by a relatively high standard of proof ("unless it clearly appears"). It was positioned at the end of Draft Art 17 because *Waldock* considered it as a basic residuary rule only.[15] He opted for what he considered to be the traditional rule "[m]ore from respect for the authorities than from any deep conviction" because he thought that in a rapidly changing world "a case [could] equally well be made out for formulating the residuary rule in the reverse way".[16]

7 A detailed version of *Fitzmaurice*'s second ('sorts of treaties') exception is included in *Waldock*'s Draft Art 17 para 3 lit a and b, formulating an (almost) irrebuttable presumption in favour of a right of denunciation with regard to five classes of treaties, while a **counter-exception**, turning the general presumption

[15] *Ibid* 67.

[16] *Ibid* 69 *et seq*. This case was indeed made most forcefully by *E Giraud* Modification et terminaison des traités collectifs – exposé préliminaire (1961) 49-I AnnIDI 5, 73 *et seq*: "A notre avis, en l'absence d'une prévision concernant la dénonciation, les conventions générales peuvent être dénoncées à tout moment".

against a right of denunciation into an irrebuttable one, is added by Art 17 para 4 with regard to five other classes of treaties. Art 17 para 2 appears to be a specific case of *Fitzmaurice's* first ('general inference') exception. *Waldock* here thought of treaties whose purposes are of a transient character, such as "an agreement to arbitrate a particular dispute or to co-operate on a particular occasion or in the performance of a particular task".[17]

Only in cases not covered by paras 2–4 should the residuary rule of para 5 come in. If its application would lead to the conclusion that no right of denunciation at will existed, a State should still be able to withdraw unilaterally by showing cause. Therefore, *Waldock*'s Draft Art 17 para 1 reserved the right of withdrawal in reaction to a material breach (now Art 60 VCLT), the supervening impossibility or illegality of performance (now Arts 61 and 64 VCLT) or a fundamental change of circumstances (now Art 62 VCLT). If neither variant applied, the consent of all the parties would be required to terminate the treaty as a whole or the treaty relationships of one of them (now Arts 54 and 59 VCLT). **8**

III. Debates in the ILC (1963–1966)

While opinion in the ILC was split on the issue, a consensus emerged against *Waldock's* detailed provision.[18] The **compromise ultimately found**, which focuses entirely on the intention of the parties, entered into Art 39 of the 1963 Draft: **9**

> "A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of a denunciation or withdrawal. In the latter case, a party may denounce or withdraw from the treaty upon giving to the other parties or to the depositary not less than twelve months' notice to that effect."[19]

Most governments that commented on the draft approved of the general rule it expressed. However, there were discussions as to whether "**the character of the treaty**" should be considered as a subsidiary means for establishing the intention of the parties or rather an objective element, independent of the parties' intentions.[20] The ILC ultimately decided to drop the specific reference to the "character", conditioning the right of denunciation entirely on the intentions of the parties. The reason given was that the character of a treaty was only one element from which to determine the intention of the parties and that all the circumstances of the case should be taken into consideration.[21] Moreover, the provision was divided into **10**

[17] *Ibid* 67.

[18] *K Widdows* The Unilateral Denunciation of Treaties Containing No Denunciation Clause (1982) 53 BYIL 83, 88 *et seq*.

[19] [1963-II] YbILC 200 *et seq*.

[20] *Widdows* (n 18) 90 *et seq*.

[21] Final Draft, Commentary to Art 53, 251 para 5.

two paragraphs, the period of notice requirement becoming para 2. The substantive of Art 53 para 1 Final Draft was formulated as follows:

> "A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal."

IV. Debates in the Vienna Conference (1968–1969)

11 In the first session of the Vienna Conference in 1968, the 'character' issue was brought up again by amendments submitted by both Cuba and the United Kingdom. Cuba proposed a complete reformulation of Draft Art 53,[22] abandoning any reference to the intention of the parties and **replacing it by an objective approach**, because "it was contrary to all reason to regard certain types of treaties as perpetual". A positive contribution to the progressive development of international law had to reject "the abusive practice of perpetual treaties, which for long had helped the strong to dominate the weak".[23] In contrast to this, the United Kingdom wanted to keep Draft Art 53 para 1 intact and only supplement it by a second exception referring to the "character of the treaty".[24] When the issue was put to a vote, the Cuban amendment was narrowly rejected,[25] while the UK amendment was narrowly adopted.[26]

12 A further amendment submitted jointly by Colombia, Spain and Venezuela proposed to **reverse the residuary rule**[27] so as "to make it conform more closely with the practical realities and needs of contemporary international society". Weaker States should not have "to perform indefinitely treaty obligations which

[22]UN Doc A/CONF.39/C.1/L.160, UNCLOT III 177: "A treaty which contains no provision regarding termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless the nature of the treaty, the circumstances of its conclusion or a statement by the parties admit the possibility of denunciation or withdrawal".

[23]UNCLOT I 336 *et seq*. The Cuban delegate's reference in this context to perpetual leases of territory, which "was clearly incompatible with the principle of sovereignty", obviously referred to the 1903 lease agreement between the United States and Cuba concerning Guantánamo Bay that is of indefinite duration. See also C Thiele, Der völkerrechtliche Status der US-amerikanischen Militärbasis Guantánamo in Kuba, (2010) 48 Archiv des Völkerrechts 105, 119 *et seq*.

[24]UN Doc A/CONF.39/C.1/L.311, UNCLOT III 177: "Insert at the end of paragraph 1 the words: or unless the character of the treaty is such that a right of denunciation or withdrawal may be implied".

[25]34 votes were cast in favour and 34 against, with 24 abstentions, UNCLOT III 177.

[26]26 votes were cast in favour and 25 against, with 37 abstentions, *ibid*.

[27]UN Doc A/CONF.39/C.1/L.307, Add.1 and 2, UNCLOT III 177: "For paragraph 1 of the article substitute the following: When a treaty contains no provision regarding termination, denunciation or withdrawal, any party may denounce it or withdraw from it unless the intention of the parties to exclude the possibility of denunciation or withdrawal appears from the nature of the treaty and the circumstances of its conclusion".

had been imposed on them unjustly".[28] This amendment was rejected by a large majority.

After the ILC's Draft Art 53 had been referred to the Drafting Committee together with the UK amendment, the final version of what is now Art 56 VCLT emerged. The Committee of the Whole adopted it by 73 votes to 2, with 4 abstentions.[29] After further discussion in the plenary meeting in 1969, the article was adopted by 95 votes to none, with 6 abstentions.[30] The abstentions were based on worries that Art 56 para 1 lit b introduced an **element of uncertainty** jeopardizing the stability of international treaties.[31] **13**

V. Vienna Convention II (1986)

Art 56 VCLT II is formulated identically. The ILC commentary[32] emphasizes that it was difficult to determine which treaties were by their nature denunciable or subject to withdrawal. One class it mentions is **headquarters agreements** concluded between a State and an organization because their smooth operation presupposed special relations with the host State, which could not be maintained by the will of one party only, so that the possibility of transferring the headquarters was needed as a safety valve. Another example was agreements whose sole purpose was to implement a decision of the organization, which it had reserved the right to modify, such as an agreement between the UN and a Member State to implement a Security Council resolution on the dispatch of peace-keeping forces. When this resolution was repealed, the agreement could also be terminated. **14**

At the Vienna Conference of 1986, a proposal to eliminate Art 56 para 1 lit b VCLT II was ultimately unsuccessful.[33] **15**

C. Elements of Article 56

I. Introduction and Terminology

Art 56 is divided into two paragraphs, the first of which lays down the substantive rules, while the second sets forth a procedural requirement. Art 56 para 1 in its introductory clause formulates a **presumption against a right to denounce or withdraw** from a treaty that is conditioned by the absence of express provisions in that treaty both on termination and on denunciation or withdrawal. This presumption **16**

[28] UNCLOT I 337 *et seq*.
[29] UNCLOT III 178.
[30] UNCLOT II 108 *et seq*.
[31] *Villiger* Art 56 MN 3.
[32] [1982-II/2] YbILC 57.
[33] *T Christakis* in *Corten/Klein* Art 56 VCLT II MN 3.

can be **rebutted in two different ways**, as defined in lit a and b, which both lead to the conclusion that the treaty contains an implied right of denunciation or withdrawal. If the presumption can be rebutted, the denunciation of or withdrawal from a treaty is still subject to a period of notice under Art 56 para 2.

17 Art 56, which applies to both bilateral and multilateral treaties, **distinguishes between three terms**: the termination of a treaty, the denunciation of a treaty and the withdrawal from a treaty.[34] Termination (in the narrower sense) means the end of the treaty as a whole, releasing all the parties from any further obligation to perform the treaty (Art 70 para 1 lit a). Denunciation is a unilateral declaration by which a party terminates its participation in a treaty.[35] Whereas a bilateral treaty will necessarily terminate if one of the parties validly denounces it, a multilateral treaty will normally continue, the denunciation amounting to a withdrawal of one party only,[36] putting an end to the withdrawing State's status as a party or, in other words, terminating its treaty relationships with each of the other parties.[37] For the purposes of the VCLT, withdrawal is a synonym for denunciation, as is evident from Art 70 para 2 and also indicated by the 'or' formulation of Art 56. The Convention uses both terms interchangeably for the same State action because the terminology in international treaty practice is not uniform.[38]

18 Art 56 regulates the admissibility of the unilateral State act of denunciation or withdrawal, whereas 'termination' is not the subject of the provision. However, the absence of any provision regarding termination figures among the conditions which must be fulfilled to trigger the legal consequence ordered by Art 56 with regard to denunciation and withdrawal. Nor does Art 56 deal with the suspension of the operation of a treaty but it seems reasonable to assume that the provision can be **applied analogously to suspension** (→ Art 57 MN 12).

II. Rebuttable Presumption Against Right of Denunciation or Withdrawal (para 1)

19 Art 56 para 1 in its *chapeau* formulates a **presumption against a right of denunciation or withdrawal**, which will be triggered only if the treaty meets **two negative conditions** in the sense that it fails to regulate the issue of termination (in the wider sense). If these conditions are met, the presumption will arise, but can then still be rebutted.

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[34] On terminology → Art 54 MN 15, where the distinction between termination in the wider sense and in the narrower sense is explained. Art 56 VCLT uses the term in the narrower sense.

[35] *Aust* 277.

[36] See Art 38 paras 2 and 3 of the 1963 Draft, [1963-II] YbILC 188, 199.

[37] *Jennings/Watt* (n 3) 1296 MN 1.

[38] Whereas, *eg*, Art 58 ECHR and Art 317 UNCLOS use the term "denunciation", Art XV WTO Agreement (n 7) and Art 127 Rome Statute (n 7) speak of "withdrawal".

1. Conditions Triggering Presumption: Treaty's Failure to Regulate Termination

The presumption in Art 56 para 1 will only arise if the treaty (1) contains no provision regarding its termination and (2) does not provide for denunciation or withdrawal. If only one of these negative conditions is not met, because the treaty regulates too much, there will be no presumption. This legal consequence is easy to understand with regard to the second condition: where the treaty itself regulates the admissibility of denunciations or withdrawals, the **relevant provisions are presumed to be exhaustive**, leaving no room for any additional presumption with regard to this same issue. **20**

The first condition requires further explanation. It comes into play when a treaty says nothing about denunciation or withdrawal by individual parties, but contains a provision on its duration as a whole, such as an **expiry clause or a clause setting a resolutory condition**.[39] This first condition is based on the consideration that when a treaty fixes a specific period for its duration, even a long period, "the parties have impliedly excluded any right to denounce or withdraw from it in the meanwhile".[40] Clauses which set a terminal date as well as those defining a terminal event, (the date of) whose arrival is uncertain, fix a specific period for the duration of the treaty in the aforementioned sense, although in the second case, the exact duration is indeterminate. **21**

Technically, the effect of each of the two negative conditions prevents the rise of the presumption against the right of denunciation or withdrawal formulated in Art 56. The case will be covered only by Art 54 lit a. Whether the relevant treaty provisions on denunciation or withdrawal (second condition) are truly exhaustive and whether a duration clause (first condition) definitely excludes the possibility of unilateral denunciation or withdrawal before the expiration of the treaty is then a **matter of properly interpreting** them (→ Arts 31–33). Should they be interpreted narrowly, based on the presumption that there is no right of denunciation or withdrawal unless the contrary can be proven, and should one further assume that the treaty as a whole contains no further implicit provision on termination or withdrawal, unless the contrary can be proven? The ILC indeed formulated these two conditions in the belief that each leaves no room for further instances of unilateral liberation from treaty obligations. This should be heeded in order to avoid contradictions in valuation, as demonstrated by the following examples. **22**

Assuming that the TEU and the TFEU are (still) international agreements "governed by international law" (*cf* Art 2 para 1 lit a VCLT)[41] and not (yet) constitutional agreements governed by a distinct European legal order, and leaving aside Art 4 **23**

[39] See the examples → Art 54 MN 40, 44.

[40] *Waldock* II 65.

[41] In its 2009 judgement on the constitutionality of the Treaty of Lisbon 123 BVerfGE 267, the German Federal Constitutional Court repeatedly emphasized that the EU was based on treaties under international law, but then subjected them to so many conditions and *caveats* that its aforementioned assumption becomes questionable.

VCLT, both provide examples of the interplay between Art 56 para 1 and Art 54 lit a VCLT. None of them provides for denunciation or withdrawal, if one leaves aside for the sake of argument the recently added Art 50 TEU.[42] However, Art 53 TEU and Art 356 TFEU state in identical terms that the respective treaty "is concluded for an unlimited period". On the one hand, one can categorize these as provisions regarding the termination of the treaties because they regulate their duration, albeit *ad infinitum*. This renders the presumption of Art 56 VCLT inapplicable, referring back to Art 54 lit a VCLT. It then becomes a matter of interpreting whether each of the two treaties permits the unilateral withdrawal of individual parties.[43]

24 On the other hand, one can dispute the existence of a provision on termination in the TEU and the TFEU because neither provides a specific termination date, however defined. This gives rise to the presumption of Art 56 para 1 VCLT against a right of unilateral withdrawal, which can be rebutted pursuant to Art 56 para 1 lit a or b. Concentrating on lit a, which is the functional equivalent of Art 54 lit a VCLT, the rebuttal will only succeed if "it is established that the parties intended to admit the possibility of denunciation or withdrawal", which sets a fairly **high standard of proof** (→ MN 35). It is hardly arguable that where the presumption of Art 56 para 1 VCLT comes in because the treaty says nothing on termination or withdrawal, a right of withdrawal should be more difficult to establish than in a case where the treaty contains a provision on termination or withdrawal, so that Art 54 lit a VCLT applies, which covers also implicit rules on termination or withdrawal.

25 In other words, a **systematic interpretation** of Art 56 para 1 and Art 54 lit a VCLT suggests that in both cases, the standard of proof should be identical. Therefore, where a treaty contains a provision regarding its termination or provides for denunciation or withdrawal, thus rendering the presumption of Art 56 para 1 inapplicable, such a provision will be considered as narrow and exhaustive, unless it is established that the parties intended to allow its broad interpretation or admit further implicit grounds for withdrawal. This shows that ultimately the application of the presumption of Art 56 para 1 VCLT does not make much difference, as compared with the application of only Art 54 lit a VCLT.

2. Rebuttal Variant a: Contrary Intention of Parties (lit a)

26 The presumption against denunciation or withdrawal can be rebutted by establishing that the parties intended to admit that possibility either unconditionally or on certain conditions. The formulation of lit a, making the contrary intention of the parties an exception, shows that the **onus of establishing this exception is on the State willing to withdraw** in spite of the presumption arising from the silence of the treaty.[44] This onus is to be shouldered with the help of the ordinary rules of

[42] Art 50 TEU was added by the Treaty of Lisbon and entered into force on Dec. 1, 2009 → MN 50.

[43] According to the prevailing opinion, they do not.

[44] *Aust* 290.

treaty interpretation (Arts 31–33).[45] As termination or withdrawal clauses are a standard feature of current treaty practice, the burden of establishing the exception is much heavier with regard to recent treaties, where the absence of such clauses is much more likely to amount to eloquent silence.[46]

27 Sometimes, States add a declaration to their ratification of or accession to a treaty in which they express their understanding that they retain the right of denunciation or withdrawal. If such a declaration amounts to a **reservation**, Art 54 lit a VCLT is applicable (→ Art 54 MN 33). If it is an **interpretative declaration**, which the other parties accept without objection, it will be an important means of interpretation in determining the parties' intention in this regard.[47]

28 In its comments on Art 39 ILC Draft of 1963 (→ MN 10), the US government had proposed to insert the word "clearly" before "appears" in order to emphasize that the parties' intention to permit denunciation or withdrawal should be a clear intention. This was meant to raise the onus on the State wishing to rebut the presumption. SR *Waldock* had no objection to this extra emphasis on the need to establish the intention of the parties but remarked that the word "appears" was consistently used throughout the draft without any qualifying adverb.[48] Accordingly, his suggestion to revise the article did not include the term "clearly". When the article was referred to the Drafting Committee for reconsideration, thereby bearing in mind the view expressed by several ILC members during the discussion that the article **should be drafted in terms as narrow and restrictive as possible**, the Committee still refrained from inserting the term "clearly".[49] As the ILC was not fully satisfied with that text, the Drafting Committee changed the wording of Draft Art 39 to "unless it is established".[50] This version was finally adopted by the ILC.

29 Taking into consideration the aforementioned discussion, the rebuttal of the presumption can only succeed if the contrary intention of the parties is **established beyond reasonable doubt**. In this context, the presence of a provision on reviewing a treaty can have some relevance. A treaty which is silent on denunciations but gives individual parties the right to request a revision,[51] whose exercise will not disrupt the treaty regime as much as a denunciation, can hardly be interpreted as clearly manifesting the intention of the parties to permit denunciations.

30 If the rebuttal succeeds, the withdrawal will take place in conformity with an implied provision of the treaty in the sense of Art 54 lit a VCLT.[52] If it remains

[45] *T Christakis* in *Corten/Klein* Art 56 MN 57 *et seq*.

[46] *Ibid*.

[47] *T Christakis* in *Corten/Klein* Art 56 MN 67 *et seq*.

[48] *Waldock* V 26 *et seq*.

[49] [1966-I/1] YbILC 47, 122.

[50] UN Doc A/CN.4/L.117 and Add.1, [1966-II] YbILC 112, 120.

[51] See *eg* Art 29 ICESCR.

[52] Art 44 para 1 VCLT speaks of a right of a party "provided for in a treaty or arising under article 56" to denounce or withdraw from the treaty, but that does not preclude the assumption that a successful rebuttal of the presumption in the case of lit a amounts to a right of denunciation, *etc* implicit in the treaty.

unsuccessful, the denunciation or withdrawal will be ineffective and the respective State remains fully bound by the treaty. Where a State denounces a treaty containing no denunciation clause, asserting that the intention of the parties to admit this possibility can be established, and one or more other parties object, the VCLT provides **no compulsory dispute settlement mechanism resulting in a binding decision**.[53] In this respect, the state of the law is no different from what it was when a dispute arose in the 1970s over Senegal's denunciation of three of the four 1958 Geneva Conventions on the Law of the Sea, none of which contained a denunciation clause.[54] Where all the other parties (tacitly) accept the denunciation or withdrawal, although its legality is doubtful, it will be effective by virtue of acquiescence.[55]

3. Rebuttal Variant b: Nature of Treaty (lit b)

31 The "nature of the treaty" as a ground for implying a right of denunciation or withdrawal is the most difficult aspect of Art 56 VCLT. While the ILC had ultimately decided against any reference to it because it considered the "character of the treaty" as only one of the circumstances from which to derive the intention of the parties with regard to denunciation or withdrawal, the Vienna Conference reinserted the reference, exchanging "character" for "nature". As the "nature of the treaty" was turned into a second rebuttal variant, coequal to the intention of the parties, the relationship of lit b to lit a poses a problem.[56] In contrast to Art 39 of the 1963 ILC Draft, where the character of the treaty was mentioned as but one indicator of the parties' intention, lit b now obviously forms a **separate objective ground for rebutting the presumption** of Art 56 para 1 VCLT, entirely independent of that subjective intention.[57]

32 Strictly understood, this would require us to totally disregard the intention of the parties, deriving a right of denunciation or withdrawal from the nature of a silent treaty alone, even if it were otherwise established that the parties did not intend to admit the possibility of denunciation or withdrawal. On the other hand, the formulation "may [not: must] be implied by the nature of the treaty" leaves enough room to take indications of the **parties' contrary intentions** into account.

[53] See Art 65, Art 66 lit b VCLT in conjunction with Annex para 6: conciliation procedure resulting in a non-binding report only.

[54] *D Bardonnet* La dénonciation par le gouvernement sénégalais de la Convention sur la mer territoriale et la zone contiguë et de la Convention sur la pêche et la conservation des ressources biologiques de la haute mer en date à Genève du 29 avril 1958 (1972) 18 AFDI 123 *et seq*. See also *Widdows* (n 18) 104 *et seq*; *Plender* (n 1) 149 *et seq*; *Aust* 290.

[55] See Art 65 para 2 VCLT. See also *Dahm/Delbrück/Wolfrum* (n 2) 729.

[56] *Plender* (n 1) 148.

[57] *Elias* 105 *et seq*; *Jiménez de Aréchaga* (n 5) 71.

Art 56 para 1 lit b is based on the assumption that **certain categories of treaty are intrinsically temporary**.[58] As a distinctive criterion, one can quite generally focus on whether a treaty is limited to mere bilateral exchange relationships between the parties (temporary nature) or whether it aims at the protection and/or promotion of a community interest, especially one which is shared by other States beyond the contracting parties.[59] **33**

The VCLT does not define the term "nature of the treaty" or give any examples of treaties covered by it. It is not clear whether a list of examples, such as the one in Draft Art 17 para 3 as proposed by SR *Waldock*, is missing for reasons of brevity or because it could not be agreed upon. Drawing upon the reports of SR *Fitzmaurice* and SR *Waldock*, primarily the following categories of treaty[60] come into consideration: *modi vivendi*; treaties of alliance or of military co-operation; commercial or trading agreements; treaties of arbitration or judicial settlement; constituent instruments of international organizations (→ MN 13). This **list of 'temporary' treaties** is not exhaustive. Fitting a treaty into one of these categories does not yet permit any definite conclusion but only initiates further consideration as to what the treaty reasonably implies. **34**

Whereas with regard to the rebuttal variant in lit a, a high standard of proof must be met, lit b is formulated in very open terms ("may be implied"): not every treaty in those categories necessarily contains an implicit right of denunciation, nor is one prevented from finding such a right in a treaty which fits into none of them. This makes lit b rather indefinite and **potentially undermines the stability of treaties**, which the presumption of Art 56 para 1 VCLT was intended to protect. There is no compulsory dispute settlement mechanism leading to a binding decision where one party invokes a right of denunciation based on the nature of a treaty over the objection of one or more other parties.[61] **35**

In his Draft Art 17 para 4, SR *Waldock* listed several categories of treaties which should always continue in force indefinitely (→ MN 5). These are less relevant today because Art 56 para 1 VCLT uses a regulatory technique different from the one originally proposed by *Waldock*, in that it introduces a general presumption against a right of denunciation or withdrawal. However, one may use *Waldock*'s list as an indication that there are **categories of treaties from whose nature a prohibition on denunciation or withdrawal may be implied**. This would further raise the standard of proof for any party wishing to establish that the parties still intended to admit denunciations or withdrawals pursuant to Art 56 para 1 lit a. **36**

[58] *T Christakis* in *Corten/Klein* Art 56 MN 71.

[59] *Dahm/Delbrück/Wolfrum* (n 2) 727.

[60] *Sinclair* 187 speaks of "types of treaty".

[61] See Art 65, Art 66 lit b VCLT in conjunction with Annex para 6: conciliation procedure resulting in a non-binding report only.

37 Where a treaty is not even subject to denunciation for a fundamental change of circumstances because it establishes a boundary (Art 62 para 2 lit a), that treaty will *a fortiori* not be subject to denunciation or withdrawal under Art 56.[62]

4. Examples of Treaties Containing No Withdrawal Provision

a) Withdrawal from the United Nations?

38 The UN Charter, which (in deliberate departure from the Covenant of the League of Nations[63]) says nothing about denunciation or withdrawal, provides an example of the difficulty to determine the "nature" of a treaty for the purposes of Art 56 para 1 lit b VCLT, *ie* to **distinguish a *pro*-denunciation from a *contra*-denunciation nature**.[64] Whereas *Waldock*'s Draft Art 17 para 3 lit b listed constituent instruments of international organizations among the treaties which are subject to withdrawal unless the usage of the organization otherwise prescribes,[65] others consider them as a "category of treaty which almost certainly falls within" Art 56 para 1 lit b VCLT.[66] If one regards the UN Charter not only as the constituent instrument of a true 'world organization', counting practically every State among its members, but even as a kind of '**constitution of mankind**', one would naturally dispute that a right of denunciation or withdrawal might be implied by its nature and instead emphasize its *contra*-denunciation nature. On the other hand, the Charter subjects members to the Security Council's power of imposing military and non-military sanctions and provides that amendments will come into force for all members if ratified by two-thirds of them, including all the permanent members of the Security Council.[67] UN membership thus places such a considerable burden on national sovereignty that one might be inclined to affirm its *pro*-denunciation nature.

39 As a matter of fact, at the Conference of San Francisco to establish the UN, a proposal to include a right of withdrawal in the Charter was defeated but the relevant Committee inserted the following text in its report:

> "The Committee adopts the view that the Charter should not make express provision either to permit or to prohibit withdrawal from the Organization. [. . .] If [. . .] a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its cooperation in the Organization.

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[62] *Cf Aust* 290. In somewhat different terms, the ICJ in *Territorial Dispute* (*Libya v Chad*) [1994] ICJ Rep 6, para 73 held that "[a] boundary established by treaty [. . .] achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary".

[63] See Art 1 para 3 of the 1919 Covenant of the League of Nations [1919] UKTS 4.

[64] Formally, the VCLT does, of course, not apply to the UN Charter (Art 4 VCLT).

[65] See also *Plender* (n 1) 150 *et seq*.

[66] *Aust* 291.

[67] See Art 39 *et seq*, 108 UN Charter.

> It is obvious, particularly, that withdrawals [...] would become inevitable if [...] the Organization was revealed to be unable to maintain peace or could do so only at the expense of law and justice.
>
> Nor would a Member be bound to remain in the Organization if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept, or if an amendment duly accepted by the necessary majority [...] fails to secure the ratification necessary to bring such amendment into effect."[68]

The legal quality of this declaration is a matter of dispute.[69] In the present context, it does not say much about the '**nature' of the UN Charter**. Apart from its second paragraph, which refers to the *clausula rebus sic stantibus* (→ Art 62), one could perhaps use it to establish the intention of the parties to admit the possibility of withdrawal in the sense of Art 56 para 1 lit a VCLT in case of exceptional circumstances, such as unacceptable Charter amendments.[70] On the other hand, it is doubtful whether a declaration by a committee, although it was approved as part of its report by a plenary session of the Conference,[71] suffices to meet the heavy burden of proof with regard to the intention of the parties required by lit a.[72] **40**

When Indonesia purported to withdraw from the UN in 1964, only to return in 1966, it was not formally readmitted pursuant to Art 4 UN Charter but just resumed its participation in UN activities. Therefore, the incident was not really a case of withdrawal in the technical sense but rather of **temporary cessation of co-operation**.[73] It has therefore not yet been tested in practice if and on what conditions the UN Charter permits Member States to withdraw. **41**

b) Withdrawal from Treaties on Dispute Settlement?

Another category of treaty, which by its nature may imply a right of denunciation or withdrawal, consists of treaties on arbitral or judicial dispute settlement. *Waldock* "reluctantly" included them in this category because the practical examples available almost invariably contained termination or denunciation clauses.[74] However, this argument cuts the other way at least as well: when treaties of a certain type practically always include a denunciation clause and the relevant treaty is one of the very few which does not, then the *argumentum a contrario* suggests itself, all **42**

[68]Report of the Rapporteur of Committee I/2, 24 June 1945 (Doc 1178), (1945) 7 Documents of the United Nations Conference on International Organization 324, 328 *et seq*.

[69]*Widdows* (n 18) 99 *et seq*.

[70]See the corresponding declaration with regard to the Constitution of the WHO (quoted in [1963-II] YbILC 69). See also Art 26 para 2 Covenant of the League of Nations (n 71).

[71]Verbatim Minutes of the 9th Plenary Session, 25 June 1945 (Doc 1210) (1945) 1 Documents of the United Nations Conference on International Organization 616 *et seq*.

[72]But see *W Karl*/*B Mützelburg*/*G Witschel* in *B* Simma (ed) The Charter of the United Nations: A Commentary (2002) Art 108 MN 43–44 who state that the declaration is generally considered as authoritative.

[73]*Widdows* (n 18) 100.

[74]See *Waldock*'s Draft Art 17 para 3 lit a cl iv (→ MN 5) and his commentary thereto, *Waldock* II 68.

the more since keeping compulsory dispute settlement mechanisms intact is in the **interest of the international community as a whole**. There is, however, hardly any relevant practice either way.[75]

In the *Fisheries Jurisdiction* case, the ICJ avoided taking any position as to whether agreed compromissory clauses giving one party the right to invoke the Court's jurisdiction were inherently subject to denunciation, because in the particular case it was clear that denunciation was not permitted.[76] The ICJ decided, however, that a State's adherence to the optional clause of Art 36 para 2 of the ICJ Statute was unilaterally terminable, although the usual withdrawal proviso had been omitted.[77]

In the *Nicaragua* case, the ICJ held that a declaration under Art 36 para 2 ICJ Statute could be modified or, if its duration was indefinite, terminated because such a power was inherent in any unilateral act of a State. However, while the declaration was unilaterally terminable, the principle of good faith applied by analogy to the law of treaties, requiring that a reasonable period of notice be observed where the declaration was silent in this respect.[78] It is hardly convincing that the ICJ analogously applied only the rule embodied in Art 56 para 2 VCLT but not the rebuttable presumption laid down in Art 56 para 1 VCLT, all the more since it emphasized that a declaration under Art 36 para 2 ICJ Statute establishes a series of bilateral engagements with reciprocal obligations *vis-à-vis* other States accepting the optional clause.[79]

43 However, ultimately, it seems reasonable to assume that such a declaration should be unilaterally terminable.[80] **Unilateral terminability** makes it easier for States to submit to the ICJ's compulsory jurisdiction in the first place. Moreover, the international rule of law will be prejudiced much less by permitting the unilateral termination of such declarations than by denying that possibility to States and thereby running the risk that they will reject an ICJ decision rendered against their will.

The VCDR and the VCCR are each supplemented by an Optional Protocol Concerning the Compulsory Settlement of Disputes which establishes the compulsory jurisdiction of the ICJ, neither of them containing provisions on termination or withdrawal. After the United States had been twice found guilty of violations of the Consular Relations Convention by the ICJ in the *LaGrand* and the *Avena* cases,[81] the US Secretary of State on 7 March 2005 sent a letter to the UN Secretary-General as depositary, notifying him of the United States'

[75] *Widdows* (n 18) 97 *et seq*.

[76] ICJ *Fisheries Jurisdiction (United Kingdom v Iceland)* (Jurisdiction of the Court) [1973] ICJ Rep 3, paras 25 *et seq*.

[77] *C Tomuschat* in *A Zimmermann*/*C Tomuschat*/*K Oellers-Frahm* (eds) The Statute of the International Court of Justice: A Commentary (2006) Art 36 MN 66 *et seq*.

[78] ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, paras 61, 63; confirmed by *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening)* (Preliminary Objections) [1998] ICJ Rep 275, para 33.

[79] *Nicaragua* (n 78) paras 60 *et seq*.

[80] *T Christakis* in *Corten*/*Klein* Art 56 MN 89 who explains that otherwise a State could easily be made a victim of abuse of process by numerous other States.

[81] ICJ *LaGrand (Germany v United States)* [2001] ICJ Rep 466; *Avena and Other Mexican Nationals (Mexico v United States)* [2004] ICJ Rep 12.

withdrawal from the Optional Protocol to the VCCR.[82] There is no authoritative answer to the question whether this withdrawal notice was valid. The ICJ did not deal with the issue when rejecting Mexico's request for interpretation of the *Avena* judgement.[83] Mexico had unsuccessfully tried to use Art 60 cl 2 ICJ Statute to establish the ICJ's jurisdiction so that the United States' purported withdrawal was irrelevant. There are no known international reactions concerning the validity of the US withdrawal notice.

Some publicists who emphasize the **consensual nature of international jurisdiction** and therefore consider as admissible denunciations of general treaties for the settlement of international disputes with no withdrawal provision tend to permit the denunciation also of those optional protocols.[84] Others distinguish between general treaties and optional protocols on dispute settlement, which are so closely linked with one substantive treaty that they should be treated as a part of it and thus as terminable only together with that treaty and not separately.[85] **44**

In the case of the VCCR with no withdrawal clause of its own, the application of the rule embodied in Art 56 para 1 VCLT would lead to the denial of the possibility of withdrawal from the Convention and the Optional Protocol.[86] On the one hand, the separate denunciation of an optional protocol on dispute settlement should indeed be disfavoured because it makes it easier for a party to violate the substantive treaty with impunity. On the other hand, one cannot disregard the regulatory technique of the parties, having made dispute settlement the subject of a separate protocol with the obvious intention to disconnect it from the substantive treaty. The **denunciation of optional protocols on dispute settlement** should therefore ultimately follow the same rules as the denunciation of general treaties on dispute settlement. It should as a general rule be considered as permissible, not least because otherwise a State unwilling to submit to compulsory settlement any longer might disregard the decision of the tribunal and thereby seriously prejudice the international rule of law. **45**

c) Denunciation of the International Covenant on Civil and Political Rights?

In contrast to many other human rights treaties, the ICCPR and the ICESCR do not contain any provision on withdrawal. On the other hand, the (first) Optional Protocol to the ICCPR, which was adopted on the same day as the Covenant, permits denunciations in Art 12, and the Covenant itself provides that a State Party may withdraw a declaration made under Art 41 by which it accepted the competence of **46**

[82]Multilateral Treaties Deposited with the Secretary-General 2009, UN Doc ST/LEG/SER.E/26, Vol I 135 note 1(ch III.8).

[83]ICJ *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v United States)*, 19 January 2009.

[84]See *eg Aust* 291.

[85]*K Oellers-Frahm* Der Rücktritt der USA vom Fakultativprotokoll der Konsularrechtskonvention in *P-M Dupuy et al* (eds) Festschrift Tomuschat (2006) 563, 580 *et seq*.

[86]*Ibid*. → MN 52–53 as to whether Art 56 para 1 VCLT represents a rule of customary international law.

the Human Rights Committee to consider inter-State complaints directed against it. This clearly indicates that the States Parties deliberately omitted a denunciation clause from the Covenant and thus did not intend to admit the possibility of denunciation of or withdrawal from the Covenant in the sense of Art 56 para 1 lit a.[87]

> When the Democratic People's Republic of Korea (DPRK) on 25 August 1997 nonetheless sent a notification of withdrawal to the UN Secretary-General as the depositary, on 23 September 1997 the Secretariat forwarded an *aide-mémoire* to the North Korean government and circulated it to all States Parties in which it stated that in the opinion of the Secretary-General a withdrawal from the Covenant was not possible unless all the States Parties agreed with such a withdrawal.[88] The DPRK apparently accepted this opinion and is still listed among the parties of the Covenant.[89]
>
> In reaction to the DPRK's attempt to withdraw, the Human Rights Committee transmitted a general comment to the States Parties on **continuity of obligations** in which it stated that "it is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation. Together with the simultaneously prepared and adopted International Covenant on Economic, Social and Cultural Rights, the Covenant codifies in treaty form the universal human rights enshrined in the Universal Declaration of Human Rights, the three instruments together often being referred to as the 'International Bill of Rights'. As such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect."[90] The Committee added that the rights enshrined in the Covenant belonged to the people living in the territory of the States Parties and they cannot be divested of these rights by any subsequent action of the States Parties. The Committee was therefore firmly of the view that international law did not permit a State which had ratified or acceded or succeeded to the Covenant to denounce or withdraw from it.[91]

47 The proposition that the Covenant is not subject to denunciation has recently been criticized because it allegedly **conflicts with the democratic principle**.[92] As the Covenant lays down fundamental rights of a constitutional character, it essentially represents a kind of international 'parallel' or 'supplementary' constitution of the States Parties. In view of the fact that democracy is increasingly being recognized internationally as the only principle capable of legitimizing government, and in particular decisions of a constitutional character, the impossibility of withdrawing from a 'constitutional' treaty is said to create a conflict within the international legal order to the extent that the treaty imposes obligations, which go beyond the very core human rights. This approach suggests that, contrary to the view of the Human Rights Committee, 'constitutional' treaties should be categorized among those

[87] Human Rights Committee (61st Session) General Comment 26: Continuity of Obligations, 8 December 1997, UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1, para 2.

[88] Multilateral Treaties Deposited with the Secretary-General 2009 (n 82) Vol I 257 note 8 (ch IV.) 4.

[89] *Aust* 291.

[90] General Comment 26 (n 87) para 3.

[91] *Ibid* paras 4–5. See *Y Tyagi* The Denunciation of Human Rights Treaties (2008) 79 BYIL 86, 162 *et seq*; *B Hofmann* Beendigung menschenrechtlicher Verträge (2009) 157–160.

[92] *C Tomuschat* Pacta sunt servanda in *A Fischer-Lescano et al* (eds) Festschrift Bothe (2008) 1047 *et seq*.

which by their nature imply a right of denunciation in the sense of Art 56 para 1 lit b VCLT. Only in this way could the democratic right of the peoples to amend their constitutions be safeguarded in view of changing circumstances.

48 In my opinion this approach ignores that the Covenant lays down only minimum standards, which are themselves part and parcel of the principle of democracy and formulated in terms which are sufficiently open to be adapted to the unknown challenges of the future. The Covenant also leaves enough room for limitations by States Parties for the protection of community interests and even allows derogations in times of public emergency (Art 4 ICCPR). The considered decision of the community of States Parties to the Covenant that the **fundamental values** it embodies should for the sake of mankind be inalienable and thus not subject to the shifting opinions of political majorities has nothing undemocratic about it.

d) Withdrawal from the European Union

49 While it has always been generally assumed that the European Union could be dissolved and individual withdrawals permitted by an agreement of all the Member States (→ Art 54 MN 47–48), most publicists believed before the entry into force of the Treaty of Lisbon in 2009 that the European treaties in their Nice version did not permit unilateral withdrawals, in view of express provisions stating that these treaties were concluded for unlimited periods.[93]

> The single example so far of a withdrawal from the EC – the withdrawal by Greenland as a part of Denmark – was accordingly accomplished in the form of an agreement among all the Member States which formally amended the EC Treaty.[94]

50 The Treaty of Lisbon now ventures for the first time to introduce into the European treaties an **express provision on the right of individual Member States to withdraw** at will from the Union.[95]

III. Period of Notice (para 2)

51 The 12 months' notice period prescribed by para 2 applies only when the presumption of para 1 arises because the relevant treaty contains no provision regarding its

[93] Art 51 EU Treaty; Art 312 EC Treaty; Art 208 Euratom Treaty. But see *T Christakis* in *Corten/Klein* Art 56 MN 97. See also Federal Constitutional Court (Germany) '*Maastricht*' 89 BVerfGE 155, 190, 204 (1993).

[94] The treaty of 13 March 1984 ([1985] OJ L 29, 1) introduced Art 188 (ex-Art 136a) into the EC Treaty (now Art 204 TFEU) according to which Greenland is treated as an associated territory. *Plender* (n 1) 151 *et seq*.

[95] Art 50 TEU Treaty as amended by the Treaty of Lisbon ([2008] OJ C 115). See also Federal Constitutional Court (Germany) '*Lisbon*' 123 BVerfGE 267, 350 (2009): for constitutional reasons, Germany's integration in the EU must, in principle, be revocable (English translation available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html, last visited 21 July 2010).

termination, *etc*, but can be rebutted pursuant to lit a or b. Where the presumption does not arise from the outset because the treaty regulates its termination, *etc*, Art 54 lit a VCLT comes in. The notice period will then be defined by that treaty. If there is no provision to this effect, the 3 months' period of Art 65 para 2 VCLT will have to be observed in any case.

IV. Article 56 as Part of Customary International Law

52 The almost invariable inclusion of withdrawal clauses in recent treaties indicates that the presumption of Art 56 para 1 VCLT and its first rebuttal variant in lit a are **part of contemporary customary international law**.[96] This is also confirmed by a thorough analysis of State practice since the nineteenth century.[97] Ultimately, obligations arising from treaties which contain no termination or denunciation clause are thus assimilated with obligations arising from rules of customary international law, which are by definition not subject to denunciation.[98]

53 Whether the rather indeterminate rebuttal variant in lit b has also entered into the body of customary international law is questionable because the *travaux préparatoires* show how disputed its inclusion in the Convention was (→ MN 10–12).[99] It has been proposed to consider the **indeterminate concept of 'treaty nature'** in lit b as a reference to a customary legal concept whose inexistence would render this rebuttal variant devoid of substance.[100] However, not every unclear concept of treaty law is necessarily either a codification of an equally indeterminate rule of customary international law or obsolete. Rather, under customary international law, the 'nature' of the treaty does not provide an independent justification for denunciation or withdrawal, but can be taken into consideration when applying the ordinary means of interpretation to find out whether the parties intended to admit the possibility of denunciation or withdrawal according to the customary international law equivalent of lit a.[101]

The observation of a certain notice period is also required by customary international law, though probably not the 12 months set forth in Art 56 para 2 VCLT which the ILC laid down according to what they considered "desirable".[102] In its advisory opinion on the interpretation of the host agreement between the WHO and Egypt,[103] the ICJ found a mutual obligation to act in good faith and have reasonable regard to the interests of the

[96] *T Christakis* in *Corten/Klein* Art 56 MN 9–10.

[97] *Ibid* MN 38 *et seq*.

[98] *Ibid* MN 53.

[99] *MB Akehurst* Treaties, Termination (2000) 4 EPIL 987, 988.

[100] *T Christakis* in *Corten/Klein* Art 56 MN 12.

[101] See also *Villiger* Art 56 MN 16, who argues that Art 56 "seems to have generated a new rule of customary law".

[102] Final Draft, Commentary to Art 53, 251 para 6. *Plender* (n 1) 152 *et seq*; *T Christakis* in *Corten/Klein* Art 56 MN 15.

[103] This treaty would not be covered by the VCLT but rather by the VCLT II of 1986.

other party to the treaty, which included the duty to give a reasonable period of notice to the other party for the termination of the existing situation. The length of that period varied, depending on the requirements of the particular case and was (primarily) to be determined by the parties.[104]

In the *Nicaragua* case, the ICJ held that the principle of good faith required "a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity". The Court did not elaborate further on what reasonable period of notice would be legally required but only observed that three days were insufficient.[105]

In its judgement in the *Gabčíkovo-Nagymaros Project* case, the ICJ reported that both parties agreed that Arts 65–67 VCLT, "if not codifying customary law, at least generally reflected customary international law and contain certain procedural principles which are based on an obligation to act in good faith".[106] While the Court then only found that the six-day notice period allowed by Hungary was too short, the reference to Art 65 VCLT could indicate that it would consider the three-month period laid down in Art 65 para 2 VCLT as the residuary rule of customary international law. Hungary's notice of termination was essentially based on the rules codified in Arts 60 and 62 VCLT, but a notice period required in those cases, where there were serious grounds for terminating a treaty relationship, would *a fortiori* be obligatory in a case arising under the implicit right of withdrawal provided by Art 56 VCLT.[107]

The implicit claim by the United States that it could withdraw from the Optional Protocol to the VCCR with immediate effect, was incompatible with the notice requirements of customary international law (→ MN 43).[108]

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[104]ICJ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, paras 47, 49.

[105]*Nicaragua* (n 78) para 63.

[106]ICJ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, para 109.

[107]*T Christakis* in *Corten/Klein* Art 56 MN 19 n 34.

[108]*Oellers-Frahm* (n 85) 578.

Article 57

Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(a) in conformity with the provisions of the treaty; or
(b) at any time by consent of all the parties after consultation with the other contracting States.

Contents

A. Purpose and Function

This provision for the suspension of the operation of a treaty parallels the provisions of Art 54 relating to the termination of a treaty. This raises the question why Art 57 was necessary on top of Art 54. As the suspension of the operation constitutes a lesser interference with the fate of a treaty, it should at first glance be possible *a fortiori* and as a matter of course where termination as the greater interference is permitted. However, this conclusion is deceptive because the **suspension of a treaty creates a more complex relation than termination**.[1] According to Arts 57 and 72, suspension means a temporary release from treaty obligations, which may affect either all or only some parties, perhaps only one of them, leaving their (and the other parties') treaty relations otherwise intact, and it prohibits the parties from obstructing the resumption of the operation of the treaty. This can create such a difficult situation that treaty provisions on termination or withdrawal cannot easily be interpreted as also permitting suspension. Furthermore, in view of the general rule of Art 42 para 2 cl 2, clarity advised that a specific provision on suspension be included along with Art 54. **1**

The purpose of suspending the operation of, instead of terminating, a treaty consists in providing the parties with **additional flexibility**. They are enabled to react to temporary obstacles preventing the proper implementation of the treaty, **2**

[1] *Waldock* V 28.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
DOI 10.1007/978-3-642-19291-3_60,

including instances of material breach by one of them, without destroying or jeopardizing the treaty as a whole.[2] Conversely, the more flexible the treaty provisions, the less necessary it will become to suspend their operation.[3]

3 Apart from the two variants of Art 57, in which the suspension is based on the (normally explicit) consent of all the parties,[4] the **VCLT recognizes five further situations in which the operation of a treaty can be suspended**: Art 58 (regulating only suspension) and Arts 59–62 where suspension is regulated alongside termination. Of all these, only Art 59 para 2 also requires the (implicit) consent of all the parties.

4 The scope of the VCLT does not encompass suspensions of the operation of treaties required by Security Council resolutions, which are adopted under Chapter VII of the UN Charter and prevail over the UN Member States' obligations under any other international agreement (Arts 25 and 103 UN Charter).[5] Moreover, suspending the operation of a treaty, which would ordinarily not be permitted according to the law of treaties, may be an instance of legitimate countermeasures pursuant to the **law of State responsibility**[6] or the consequence of an outbreak of hostilities between the parties, both not covered by the VCLT (Art 73). Apart from these instances, where a party suspends the operation of a treaty although the suspension is not permitted by the law of treaties, the party will usually commit an internationally wrongful act according to the law on State responsibility.[7]

B. Historical Background and Negotiating History

5 In his second report, SR *Waldock* had already proposed to apply the provision on termination of treaties by subsequent agreement of the parties *mutatis mutandis* to their suspension (Draft Art 18 para 5).[8] This proposal was adopted by the ILC and appeared in Draft Art 40 para 3 of the Commission's Draft of 1963.[9] In his fifth report, *Waldock* suggested that in the article on termination of a treaty under its own provisions the suspension of its operation should also be mentioned and revised his Draft Art 38 accordingly.[10] In the ILC's Final Draft, both alternatives were

[2] *G Dahm/J Delbrück/R Wolfrum* Völkerrecht Vol I/3 (2nd edn 2002) 761.

[3] *I Cameron* Treaties, Suspension in MPEPIL (2008) MN 13.

[4] See (*mutatis mutandis*) → Art 54 MN 5 as to whether Art 57 lit a covers implied treaty provisions permitting suspension.

[5] *Cameron* (n 3) MN 11. On the inclusion of obligations from Security Council resolutions in the supremacy clause of Art 103, see *R Bernhardt* in *Simma* Art 103 MN 9.

[6] Arts 49–54 of the 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts. See *Cameron* (n 3) MN 12.

[7] *Cf* ICJ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, para 47.

[8] UN Doc A/CN.4/156, Add.1, Add.2 and Add.3, [1963-II] YbILC 36 *et seq*.

[9] [1963-II] YbILC 189, 202.

[10] *Waldock* V 25.

regrouped in one article (Draft Art 54).[11] Apart from a slight linguistic change, the Vienna Conference added the procedural requirement at the end of lit b, to the effect that the suspension of the operation of a treaty may take place only after consultation with the other contracting States in the sense of Art 2 para 1 lit f.[12] This was intended to mirror the analogous revision of Art 54 VCLT.[13] The provision was also renumbered to become Art 57 VCLT.

The concept of suspension of the operation of a treaty has been considered as **one of the innovations introduced by the VCLT**.[14] When the Convention was drafted, there was no appropriate practice regarding the suspension of a treaty in its entirety.[15] It therefore seems that Art 57 lit a VCLT was adopted not so much for codifying an existing custom but to encourage States to include such a suspension clause in their future treaties.[16] Nevertheless, the entire Art 57 VCLT is an expression of the rule of a customary international law, which makes the States Parties the masters of their treaties so that they can include whatever suspension clause they please and if there is none, agree at any time to suspend the operation of their treaties. 6

C. Elements of Article 57

I. Suspension: Meaning, Duration and Reactivation 7

Art 57, in contrast to Art 58, regulates the suspension of the operation of bilateral as well as multilateral treaties. **Its elements are identical to those of Art 54** (→ Art 54 MN 18 *et seq*). Here, it is therefore only necessary to deal with differences which are mostly related to the different legal consequences of the two provisions, suspension of the operation versus termination of a treaty.

Suspension of the operation of a treaty means the temporary cessation of its operation,[17] *ie* the **temporary release of the parties from the obligation to perform the treaty in their mutual relations** while the treaty remains in effect (Art 72 para 1).[18] The period of suspension may be defined from the start or it may be indeterminate, depending on the term during which the grounds for suspension persist. Ultimately, it is the consent of the parties, either manifested in the treaty (lit a) or formed later (lit b), which determines the duration of the suspension and the conditions for the reactivation of a treaty.[19] Where a party is granted a unilateral 8

[11] Final Draft 251.
[12] *Elias* 108.
[13] *R Huesa Vinaixa* in *Corten/Klein* Art 57 MN 46.
[14] Remarks by *Rosenne* [1966-I/2] YbILC 130 para 14.
[15] *R Huesa Vinaixa* in *Corten/Klein* Art 57 MN 7.
[16] *P Daillier/A Pellet* Droit international public (2002) 305.
[17] *Cf Cameron* (n 3) MN 1.
[18] *F Capotorti* L'extinction et la suspension des traités (1971) 134 RdC 417, 468.
[19] *R Huesa Vinaixa* in *Corten/Klein* Art 57 MN 49 *et seq*.

right of suspension by the treaty, the party will usually also be able to reactivate the treaty at will, unless otherwise provided for by the treaty.[20]

9 As Art 72 para 1 lit a speaks of "the period of the suspension", the Convention obviously assumes that this period, however long and indeterminate it may be, is **finite and not eternal**. Otherwise suspension would for all practical purposes amount to a termination of the treaty which is regulated in other provisions.

II. Partial Suspension *ratione personae* and *ratione materiae*

10 As stated by the introductory clause of Art 57, the suspension may be effected in regard to all the parties or only one or more particular parties, provided that either the treaty provides for such a partial suspension *ratione personae* (lit a) or that all the parties agree to this limited effect (lit b). Although the initial clause of the provision mentions only "a particular party", there is no reason why the parties, acting unanimously as the **masters of their treaty**, should be prevented from suspending the operation of the treaty in regard to more than one party but not to all the parties.

11 Art 57 does not mention the partial suspension *ratione materiae*, *ie* the suspension of the operation of only some of the treaty provisions, whereas Art 60 para 1 and para 2 expressly provide for suspending the operation of a treaty "in part", in reaction to a material breach by one of the parties. Here Art 44 paras 1–3 on **separability of treaty provisions** come in, excluding a partial suspension unless the treaty otherwise provides or the parties otherwise agree on the ground for suspending the operation of a treaty relating solely to particular clauses. Most relevant with regard to a partial suspension under Art 57 are of course the two separability grounds listed in Art 44 para 1, which coincide with the suspension grounds of Art 57. In its commentary, the ILC therefore assumed as a matter of course that Art 57 also covered the suspension of the operation of only some treaty provisions.[21] On the other hand, the unilateral suspension of the operation of a treaty does not "*per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested".[22] Otherwise, such clauses would become potentially a dead letter.

III. Implied Right of Unilateral Suspension?

12 There is no provision supplementing Art 57 in the same sense in which Art 56 supplements Art 54, clarifying what happens if the treaty is silent on suspension.

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[20] *R Huesa Vinaixa* in *Corten/Klein* Art 57 MN 2.

[21] Final Draft, Commentary to Art 54, 251 *et seq*. See also *R Huesa Vinaixa* in *Corten/Klein* Art 57 MN 4.

[22] ICJ *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* [1972] ICJ Rep 46, 53 *et seq*, 64 *et seq*. Also → Art 65 para 4 VCLT.

Should there then be a rebuttable presumption against a right of suspension, in analogy to Art 56? Art 44 para 1 seems to assume that a right of a party to unilaterally suspend the operation of a treaty, if not provided for in that treaty, can arise (only) under Art 56. As the latter provision deals solely with denunciation and withdrawal, it would have to be applied analogously, which seems reasonable. Accordingly, an **implied right of unilateral suspension** can be assumed no more easily than a right of unilateral withdrawal, but it is not impossible. *Waldock* had indeed proposed to add "suspension of [a treaty's] operation" to the Draft Art 39 that later became Art 56 VCLT.[23] This addition was inadvertently dropped in the course of discussions in the ILC when a general reformulation of SR *Waldock*'s proposal was agreed for quite different reasons.[24] Thus, the negotiating history of Art 56 raises no obstacle to the analogy suggested here.[25]

IV. Conditions of Permissible Suspension

The conditions under which Art 57 permits the suspension of the operation of a treaty **mirror the conditions of termination of and withdrawal from treaties pursuant to Art 54**. As a general rule, their interpretation in the context of Art 54 will parallel *mutatis mutandis* their interpretation in the context of Art 54.[26] **13**

1. Conformity with Treaty Provisions (lit a)

Treaty clauses regulating the suspension of those treaties' operation in the sense of Art 57 lit a occur in various contexts. One is **human rights treaties**, which usually include clauses permitting parties to derogate from certain treaty obligations in times of **public emergency** to the extent strictly required by the exigencies of the situation.[27] **14**

Another context is commercial and related treaties.[28] The **waiver provision of the WTO Agreement** represents one important example.[29] A further example is Art XIX GATT 1947/1994, which permits a contracting party to suspend an **15**

[23] *Waldock* V 28.

[24] [1966-I/1] YbILC 43 *et seq*, 122 *et seq*.

[25] See also *R Huesa Vinaixa* in *Corten/Klein* Art 57 MN 13.

[26] *Villiger* Art 57 MN 4.

[27] See *eg* Art 15 ECHR, as amended by Protocol No 11 ETS 155; Art 30 of the 1961 European Social Charter 529 UNTS 89; Art 4 ICCPR; Art 27 of the 1969 American Convention on Human Rights 1144 UNTS 143.

[28] See *eg* Art 96 para 2 lit c of the 2000 Cotonou Partnership Agreement between the members of the ACP Group of States and the EC and its Member States [2000] OJ L 317, 3.

[29] Art IX para 3, 4 of the 1993 WTO Agreement 1867 UNTS 154 according to which in exceptional circumstances the Ministerial Conference is empowered to temporarily waive an obligation imposed on a member by the WTO Agreement or any of the Multilateral Trade Agreements.

obligation with regard to the import of a particular product as an emergency action[30] and must now be read together with the detailed provisions in the 1994 Agreement on Safeguards. This shows that the "provisions of the treaty" mentioned in lit a has to be interpreted broadly so as to cover also provisions in separate but closely related treaties.[31]

16 A third context is international organizations whose constituent instruments (→ Art 5) often include provisions on the **suspension of membership rights** as a sanction for the non-fulfilment of membership obligations by individual members.[32]

17 All the aforementioned provisions represent examples of the suspension of the operation of a treaty in regard to a particular party. One case of a treaty authorizing the suspension of the operation of one of its provisions in regards to all the parties is Art XXIII para 1 Articles of Agreement of the International Monetary Fund concerning suspension of operations and transactions in special drawing rights.[33] Another example is Art 25 para 3 UNCLOS, which permits a coastal State to suspend temporarily and without discrimination the innocent passage of all foreign ships in specified areas of its territorial sea if such suspension is essential for the protection of its security.[34]

18 As was already explained above, the power to suspend the operation of a treaty cannot as a matter of course be rated as the lesser power, which is always included in the power to terminate that treaty (→ MN 1). On the other hand, suspension affects the stability of a treaty much less than termination so that a **termination clause may after all be interpreted as including the power to suspend**, taking into consideration the object and purpose of the relevant treaty (Art 31 para 1).

> When the Russian President announced on 14 July 2007 that the participation of Russia in the Treaty on Conventional Armed Forces in Europe[35] would be suspended after the lapse of a 150-day notice period, that move was deplored politically, but no other party questioned its legality, although Art XIX para 2 CFE Treaty expressly only provides for a right to withdraw.[36] The other parties apparently felt that unilateral suspension was less damaging to the object and purpose of the treaty than outright termination.

2. Consent After Consultation (lit b)

19 Art 57 lit b regulates the suspension of the operation of a bilateral or multilateral treaty by subsequent consent of all the parties, whereas Art 58 defines the

[30] *S Bastid* Les traités dans la vie internationale (1985) 199.

[31] *R Huesa Vinaixa* in *Corten/Klein* Art 57 MN 11.

[32] See *eg* Arts 5, 19 UN Charter; Arts 8, 9 of the 1949 Statute of the Council of Europe ETS 1. See also Art 7 TEU and Art 354 TFEU. Of all these, only Art 19 UN Charter leads to an automatic suspension, whereas all the others leave the competent organs with discretion.

[33] *R Huesa Vinaixa* in *Corten/Klein* Art 57 MN 18.

[34] 1994 Agreement of the International Monetary Fund 1833 UNTS 3.

[35] 1990 Treaty on Conventional Armed Forces in Europe 30 ILM 6.

[36] *DB Hollis* Russia Suspends CFE Treaty Participation (2007) 11 ASIL Insight No 19.

conditions under which certain of the parties of a multilateral treaty may agree to suspend its operation *inter se* only (→ Art 58). The consent of all the parties required by Art 57 lit b need not be established explicitly.[37] One possible instance of an **implicit suspension** is regulated separately by Art 59 para 2 (→ Art 59 MN 34).[38] The consent of all the parties required by lit b amounts to the conclusion of a new treaty in whatever form.[39]

> One of the few examples of a suspension of the operation of treaties by agreement of all the parties is the declaration by the governments of France, the United Kingdom, the United States and the USSR on the suspension of the operation of their rights and responsibilities relating to Berlin and to Germany as a whole and of the related quadripartite agreements, decisions and practices and all related Four Power institutions upon the unification of Germany and pending the entry into force of the Treaty on the Final Settlement with Respect to Germany.[40]

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G Dahm/J Delbrück/R Wolfrum Völkerrecht Vol I/3 (2nd edn 2002) 760–763.

[37] See the comments on the parallel problem regarding Art 54 (→ Art 54 MN 42 *et seq*).

[38] *R Huesa Vinaixa* in *Corten/Klein* Art 57 MN 37–38.

[39] *Ibid* MN 42–44.

[40] Declaration of Oct. 1, 1990, (1991) 85 AJIL 175. 1990 Treaty on the Final Settlement with Respect to Germany 29 ILM 1186. The (re)unification of Germany took place on 3 October 1990, and the Treaty on the Final Settlement with Respect to Germany which brought to an end the Four Power rights and responsibilities entered into force on 15 March 1991.

Article 58

Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(a) the possibility of such a suspension is provided for by the treaty; or
(b) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Contents

A. Purpose and Function

Like Art 41 on modification (→ Art 41 MN 5), Art 58 on suspension tries to strike a balance between granting flexibility to some parties of multilateral treaties and the stability of these treaties.[1] In a quite symmetrical manner, both try to protect all the other parties' rights and obligations as well as the integrity of the treaty as such from **negative consequences of *inter se* agreements**, which is the very concern pursued by the principle of unanimity, as embodied in both Arts 39 and 58. **1**

Art 58 is based on the realization that many multilateral treaties have a bilateral structure in the sense that their regimes, although established multilaterally, **operate bilaterally on the basis of reciprocity**.[2] This holds true, *eg*, for the VCDR and the **2**

[1] *M-P Lanfranchi* in *Corten/Klein* Art 58 MN 1.

[2] See Final Draft, Commentary to Art 55, 252 para 1.

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VCCR, which both regulate bilateral legal relationships between the sending State and the receiving State of diplomatic or consular agents. However, it also applies to the multilateral agreements in Annex 1 to the WTO Agreement.[3] The integrity of treaties of this type may ultimately be better served if some of the parties, when experiencing difficulties in implementing them, are permitted to suspend their operation *inter se*. Otherwise, they might contemplate withdrawal or simply violate their treaty obligations.

3 Multilateral treaties embody a host of compromises between the opposing positions and interests of the negotiating States. Their text accordingly establishes a carefully formulated contractual equilibrium, often in the form of a **package deal**. Preserving the unity and reciprocity of the treaty commitments may therefore be essential for many parties.[4] For this reason Art 44, as general rule, does not permit the splitting-up of the treaty and Arts 19 and 20 restrict the use of reservations, while Arts 41 and 58 try to control the supersession of treaty provisions addressed to all the parties through *inter se* agreements concluded by some of the parties only.

4 While Art 58 is modeled after Art 41, it supplements Art 57, introducing a **carefully circumscribed exception to the principle of unanimity**, which is embodied in the latter mentioned provision. That principle denotes the joint mastership of the contracting parties over 'their' treaties. It is in the context of both these provisions that the meaning of Art 58 must be elicited.

B. Historical Background and Negotiating History

5 The 1963 ILC Draft had not yet included any provision on the suspension of the operation of a multilateral treaty by only some of the parties *inter se*. The issue was first raised by *Ago* in 1966 during the discussion of Draft Art 40, which dealt with "termination or suspension of operation of treaties by agreement".[5] That provision combined the present Art 54 lit b and Art 57 lit b VCLT, requiring the consent of all the parties for both the termination and the suspension of the operation of treaties. *Ago* asked whether termination and suspension should be governed by the same provision. Even assuming that the agreement of all the parties was necessary for the purpose of terminating a treaty, why should some of the parties be prevented from suspending the operation of a multilateral treaty *inter se* without the agreement of all the parties? *Bartoš* cautioned that to allow the parties at any time to suspend a multilateral treaty without consulting all the other parties might upset the balance required in the application of treaties. He therefore suggested that the Drafting Committee should ponder the question.[6] *Waldock* added that it was important to

[3] 1994 WTO Agreement, starting with Annex 1A, 1867 UNTS 187.

[4] *M-P Lanfranchi* in *Corten/Klein* Art 58 MN 13.

[5] [1966-I/1] YbILC 49 para 84.

[6] *Ibid* 50 para 86.

maintain consistency with the provisions on amendment and modification of multilateral treaties (now Arts 40 and 41 VCLT).[7]

6 The Drafting Committee thereupon added a new para 3 to Draft Art 40 that "[t]he operation of a multilateral treaty may not be suspended as between certain parties only except under the same conditions as those laid down in article 67[8] for the modification of a multilateral treaty".[9] As this **proposal drew objections**, further discussion was obviously needed. Accordingly, the ILC decided to defer consideration of Draft Art 40 para 3 until the next session.[10] Reintroduced 4 months later, the paragraph again provoked a controversy.[11]

7 The most elaborate critique was put forward by *Jiménez de Aréchaga* who argued that the paragraph would permit suspension in the absence of consent of all the parties, *ie* in circumstances in which termination would not be possible. It would thus divorce the two institutions of termination and suspension and abandon the legal foundation for the latter, which was the principle *in plus stat minus*, giving the right of suspension *a fortiori* where a right of termination existed. He doubted that a new legal foundation for suspension could be derived from an analogy to Draft Art 67 on the *inter se* modification of a multilateral treaty by some of the parties. In his view, Draft Art 67 was intended to introduce flexibility for the sake of progressive development of multilateral treaties. It could either allow certain parties to conclude an agreement, which went further than the multilateral treaty or help maintain it in operation by eliminating obsolete provisions. For those positive purposes, States practice had opened the way to overcome the power of veto, which a single State had under the unanimity principle. This *ratio legis* could not support *inter se* suspension, which might be a concealed device for undermining the treaty regime. The safeguards laid down in Draft Art 67 were insufficient for *inter se* suspension because, in contrast to the case of modifying a treaty in force, not only the rights of the other parties but also their **interest in the normal continuance of a multilateral treaty binding on all parties** had to be protected. He also emphasized that there was not a single instance in international practice of *inter se* suspension, and the ILC should not introduce a new exception to the principle of unanimity merely on the basis of logical argument or analogy. Otherwise, there would be no reason why *inter se* termination of a multilateral treaty should not also be permitted and that would then ultimately abolish the principle of unanimity.

8 Some ILC members shared these objections while others supported Draft Art 40 para 3 because, in their view, it reflected a certain amount of international practice and would not cause any dangers. Ultimately, it was decided to refer the provision back to the Drafting Committee for reconsideration in the light of the discussion.

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[7] *Ibid* 50 para 92.

[8] For the text of Draft Art 67, see Final Draft 119. It was later revised and became Art 41.

[9] [1966-I/1] YbILC 125 para 57.

[10] *Ibid* 126 para 86.

[11] [1966-I/2] YbILC 129 *et seq*.

9 The Drafting Committee thereupon drafted a new Art 40*bis,* which was already quite close to Art 58 para 1. Draft Art 40*bis* read:

> *"Suspension of the operation of a multilateral treaty between certain of the parties only*
> When a multilateral treaty contains no provision regarding the suspension of its operation, two or more parties may conclude an agreement to suspend the operation of provisions of the treaty temporarily and as between themselves alone if such suspension:
> (a) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; and
> (b) is not incompatible with the effective execution as between the parties as a whole of the objects and purposes of the treaty."[12]

10 This Draft Art 40*bis* immediately followed Draft Art 40, the predecessor of Art 57 VCLT. It dropped the reference to Draft Art 67 on *inter se* modification and instead specified the limitations imposed on *inter se* suspension, albeit in terms closely resembling Draft Art 67. The ILC adopted Art 40*bis* over the dissenting vote of *Jiménez de Aréchaga*.[13]

11 When the ILC discussed the commentary to Art 40*bis*, the question was raised whether the parties intending to agree on *inter se* suspension of provisions of a multilateral treaty should notify the other parties, as Draft Art 67 para 2 required with regard to *inter se* modifications, perhaps because Draft Art 51 (now Art 65) applied.[14] Otherwise, the proviso which now appears in Art 58 para 2 lit b cl i was meaningless. There was a consensus that at this stage, issues of substance, such as an amendment to the text of Draft Art 40*bis*, should not be reopened and that instead a clarification should be incorporated in the commentary. Accordingly, the commentary stated that the ILC did not think that a **notification requirement** should be made a specific condition for a temporary suspension of the operation of a treaty, but "its omission from the present article is not to be understood as implying that the parties in question may not have a certain general obligation to inform the other parties of their *inter se* suspension of the operation of the treaty".[15]

12 In a slightly revised version, the provision was adopted as Draft Art 55.[16] Two amendments worth mentioning were proposed at the first session of the Vienna Conference. Greece submitted an amendment to insert in the introductory paragraph of the article between the words "operation of" and "provisions of the treaty" the words "some or all of the".[17] In the Committee of the Whole, this amendment was rejected by 25 votes to 13, with 49 abstentions.[18] The second amendment, submitted by Austria, Canada, Finland, Poland, Romania and Yugoslavia, primarily concerned the addition of a new para 2 requiring the parties contemplating an *inter*

[12] *Ibid* 224.
[13] *Ibid* 227.
[14] *Ibid* 311 *et seq*.
[15] Final Draft, Commentary to Art 55, 252 para 2.
[16] [1966-I/2] YbILC 332 paras 81–82.
[17] UNCLOT III 179 para 505.
[18] UNCLOT III 179 para 508. See also UNCLOT I 347 para 4.

se suspension to notify the other parties of those provisions of the treaty whose operation they intend to suspend.[19] This amendment was adopted by the Committee of the Whole by 82 votes to none, with 6 abstentions.[20]

However, the final consideration of Draft Art 55 was deferred until the second session of the Conference with regard to two further proposed amendments, according to which restricted multilateral treaties should be excepted from the provision.[21] These amendments were withdrawn at the second session, when the distinction between general and restricted multilateral treaties was abandoned, and the Committee of the Whole adopted Draft Art 55 in the form in which it now appears as Art 58 without formal vote.[22] The Plenary adopted the text with 102:0:0 votes.[23] **13**

C. Elements of Article 58

I. Temporary and Partial Suspension (para 1)

Like many other provisions of the VCLT, Art 58 para 1 starts with setting forth the **legal consequence in a kind of *chapeau*** and then continues with the requirements, which are to be fulfilled so as to trigger this consequence, thereby distinguishing between variants a and b. The legal consequence consists in the licence granted to two or more parties to a multilateral treaty to temporarily suspend the operation of provisions of a multilateral treaty *inter se* by way of an *inter se* agreement. **14**

Art 58 does not allow some of the parties to agree on the definitive termination of provisions of a multilateral treaty as between themselves, nor does any other provision of Part V Section 3 of the Convention. This would be tantamount to a partial withdrawal *ratione personae*, *ie* with effects only in regard to certain other parties. Such a **permanent interference with the operation of a multilateral treaty** remains subject to the principle of unanimity (Art 54), unless one classifies *inter se* terminations as *inter se* modifications in the sense of Art 41. The ILC itself, however, emphasized in its commentary to Draft Art 51 (now Art 54 VCLT) that termination was entirely different from an amendment (modification).[24] **15**

Even if the Commission intended to absolutely exclude the **possibility of *inter se* treaty abrogation**,[25] its reason is entirely unconvincing. The ILC differentiated **16**

[19] UNCLOT III 179 para 505.

[20] *Ibid* para 508.

[21] *Ibid* para 511. The type of treaty meant (which one can call plurilateral or integral treaty) is the one now mentioned only in Art 20 para 2.

[22] UNCLOT III 243 *et seq*, paras 86 *et seq*.

[23] UNCLOT II 111.

[24] Final Draft, Commentary to Art 51, 249 para 3.

[25] See *Sinclair* 185. To me, this is not certain because the passage in its commentary referred to in MN 15 pertains to Art 54 VCLT and not Art 58.

between modification and termination because the latter "necessarily deprives all the parties of all their rights and, in consequence, the consent of all of them is necessary". This is obviously not correct in respect of an *inter se* termination, which would end the rights of only those parties to the multilateral treaty, which are also parties to the *inter se* agreement, and this only in their relations with each other (see Art 30 para 4).[26] Anyhow, the ILC and the Vienna Conference have left a *lacuna* in the VCLT as concerns *inter se* terminating agreements, making them impossible, in view of Art 42 para 2, unless they can be based on Art 41, which I consider possible and reasonable.[27]

1. Temporary Suspension

17 Art 58, in contrast to Art 57, expressly provides that the *inter se* agreement may suspend the operation of treaty provisions "temporarily" only. At first, this seems surprising since the notion of "suspension" is defined as the release of the parties from the obligation to perform the treaty "during the period of suspension" (Art 72 para 1 lit a). This implies that the **duration of the suspension is finite and not eternal** (which would for all practical purposes amount to a termination) (→ Art 57 MN 9). However, as both the suspension and the termination of a treaty are possible at any time by consent of all the parties,[28] the distinction is normally more a matter of legal certainty in the formal sense than anything else.

18 The term "temporarily" was apparently included in Art 58 not only to emphasize an already implicit limitation for the sake of legal certainty, but to provide an **additional safeguard against the destruction of a multilateral treaty by some of the parties** only. Its obvious purpose is to further limit the power of a number of parties to interfere with a multilateral treaty by an *inter se* agreement, cutting it back in comparison with the power which all the parties have under Art 57.[29] Whereas the States Parties can unanimously suspend the operation of a multilateral treaty for a long and indeterminate period of time (→ Art 57 MN 9), the duration of the *inter se* suspension pursuant to Art 58 must be clearly defined and limited from the start. This is not only an expression of the reluctance of the ILC to permit *inter se* suspensions at all (→ MN 5–13), but also a means to safeguard the position of the other parties. It would be very difficult if not impossible for them to determine whether an *inter se* suspension affects the enjoyment of their rights or the performance of their obligations and whether it is compatible with the object and purpose of the treaty (Art 58 para 1 lit b), if its duration were left unclear.

[26] *F Capotorti* L'extinction et la suspension des traités (1971) 134 RdC 417, 511 *et seq*.

[27] See also *Sinclair* 185.

[28] See Art 54 lit b, Art 57 lit b.

[29] However, see *M-P Lanfranchi* in *Corten/Klein* Art 58 MN 27 claiming that the term "temporarily" adds nothing of substance.

2. Partial Suspension

Only the **partial suspension of the operation of multilateral treaties** is regulated by Art 58, and this with regard to both the parties affected (*ratione personae*) and the substance (*ratione materiae*). When the operation of a multilateral treaty is to be suspended either in the relations between all the parties or in regard to all its provisions, Art 58 is inapplicable and the principle of unanimity embodied in Art 57 prevails. **19**

a) *ratione personae:* Suspension *inter se*

Art 58 covers agreements concluded between two or more, but not all, the parties to a multilateral treaty to suspend the operation of provisions of the treaty as between themselves alone. The **personal and substantive scope of these *inter se* agreements** is the same: their parties are those in whose mutual relations the multilateral treaty is no longer to be performed during the period of the suspension (Art 72 para 1 lit a). **20**

Art 57 VCLT also covers the suspension of the operation of a treaty in regard to only one particular party (or a small number of parties) (→ Art 57 MN 10). It goes further than Art 58 in that it also covers bilateral treaties, but it is stricter in regard to multilateral treaties, requiring the consent of all the parties for a suspension benefiting only some of them. **21**

b) *ratione materiae*: Suspension "of Provisions"

It is more difficult to define the substantive scope of suspensions under Art 58 in comparison with Art 57. Whereas according to the latter provision, it is the "operation of a treaty" which may be suspended, meaning either the entire treaty or a part of it (→ Art 57 MN 11), Art 58 speaks of suspending "the operation of provisions of the treaty". The contradistinction in the formulation of both articles indicates that the suspension of the operation of a multilateral treaty in its entirety between some of the parties by virtue of an *inter se* agreement cannot be based on Art 58. This is confirmed by the *travaux préparatoires*: an amendment submitted by Greece to an earlier version of Art 58 VCLT, which would have rephrased it so as to read "to suspend the operation of some or all of the provisions of the treaty", was rejected by the Committee of the Whole of the Vienna Conference.[30] **22**

On the other hand, the title of Art 58 speaks of "suspension of the operation of a multilateral treaty", in parallel to the title of Art 57. This can be understood as indicating that both provisions permit the **suspension of the operation of the entire treaty** – an interpretation which would not be contrary to the wording of Art 58 because the ordinary meaning (Art 31 para 1) of "provisions of the treaty" is indeterminate enough to cover "some or all of the provisions". In this perspective, **23**

[30] UNCLOT III 179 para 508.

the defeated Greek amendment would have produced a clarification only and the Committee might not have adopted it because they considered it superfluous.

24 When the Greek amendment was on the agenda of the Committee of the Whole, the Greek representative stated that its purpose was to make Draft Art 55 (the predecessor of Art 58 VCLT) more precise, in view of the fact that it was the only provision in the relevant part of the draft treaty that used the expression "provisions of the treaty" instead of the expression "of the treaty".[31] One representative said that he had no objection to the Greek amendment.[32] There was no further discussion before it was put to the vote and rejected. The fact that the number of abstentions considerably exceeded the sum of the negative and the positive votes shows that the **prevailing attitude was one of indifference and not opposition**. The conclusion that it seemed superfluous to most members is supported by the explanation that one delegation gave for its abstention. It referred to the principle that the greater contained the less, the suspension of the whole treaty thus included the suspension of a part thereof. Accordingly, no question of substance was involved.[33] Apparently, it was clear to this delegation that Art 58 permitted the *inter se* suspension of the whole treaty.

25 It is true that the ILC and later the Vienna Conference wanted to strictly circumscribe the scope of Art 58. In the light of its object and purpose, it should therefore be interpreted narrowly rather than broadly. However, the main purpose of limiting the scope of Art 58 was to **safeguard the position of the other parties to the multilateral treaty outside the *inter se* agreement**. This was done by restrictively formulating the requirements for permitting an *inter se* suspension. However, if they are fulfilled, so that both the rights and obligations of the other parties and the object and purpose of the multilateral treaty remain unaffected by an *inter se* suspension, there is no reason why it should never be allowed to comprise the entire treaty.[34]

26 The ILC revisited the issue of *inter se* suspension when it drafted the VCLT II. In its commentary on Art 58 VCLT II, the Commission wrote that it had decided to incorporate the unaltered text of Art 58 VCLT in the VCLT II, and "not even to make the title of the article correspond more precisely to the wording of the text, which provides for suspension of the operation of 'provisions of the treaty', not of 'the treaty' as a whole".[35] It did so because it deduced from Art 59 para 2 VCLT that the **Convention did not exclude the case of suspension of all the provisions of a treaty**. In essence, the ILC interpreted Art 58 VCLT in the context of the other provisions of the Convention as including the possibility of suspending the operation of an entire multilateral treaty as between the parties of the *inter se* agreement.

[31] UNCLOT I 347 para 4.

[32] UNCLOT I 348 para 14.

[33] UNCLOT I 350 para 40.

[34] *M-P Lanfranchi* in *Corten/Klein* Art 58 MN 8.

[35] [1982-II/2] YbILC 58.

The Commission's conclusion is not entirely convincing because Art 59, in contrast to Art 58, embodies the principle of unanimity.

However, another argument can be made to support the ILC's conclusion: Art 41 VCLT enables some of the parties of a multilateral treaty to modify it *inter se*. As the **term 'modification' is defined nowhere**, it can be interpreted as including the non-application of a treaty, which amounts to a suspension.[36] Interpreting Art 58 restrictively so as to exclude the *inter se* suspension of a multilateral treaty in its entirety would thus ultimately be of no avail. One should therefore leave that possibility to a group of willing parties. **27**

3. *inter se* Agreement

The means to accomplish an *inter se* suspension is the conclusion of an agreement between the parties in question. **Art 58 avoids the term 'treaty'**, which would have required the conclusion of the agreement in written form (Art 2 para 1 lit a), thus leaving the form to the parties. On the other hand, the notification requirement in Art 58 para 2 can hardly be fulfilled by a completely informal or tacit agreement. For all practical purposes, the *inter se* agreement will thus have to be put down in writing.[37] It then qualifies as a "treaty" in the sense of Art 2 para 1 lit a. **28**

4. Conditions of Permissible Partial Suspension

a) Possibility Provided for by the Treaty (lit a)

Where a multilateral treaty provides for the possibility of *inter se* suspension, it also determines the conditions under which this possibility may be utilized. The conditions can be stricter than those envisaged by Art 58 para 1 lit b but will hardly ever be more lenient. Where the conditions expressly formulated by the treaty seem insufficient, it will usually be possible to interpret the relevant treaty clause as non-exhaustive, thus opening the way for finding **further implied conditions by analogy** with the sensible conditions formulated in lit b. **29**

There are few examples so far of provisions expressly permitting some of the parties of a multilateral treaty to suspend the operation of provisions among themselves through an *inter se* agreement. Art 311 paras 3, 4 and 6 UNCLOS can be mentioned here. In spite of the **scarce international practice**, which leads some authors to conclude that Art 58 VCLT is an example of progressive development rather than codification of international law,[38] there is no doubt that customary international law permits the parties to include a provision in a multilateral treaty concerning the suspension of provisions of this treaty between some of the parties on the basis of an *inter se* agreement. This is a consequence of the contracting **30**

[36] See the remarks by *Jiménez de Aréchaga* [1966-I/1] YbILC 125 para 64.

[37] *M-P Lanfranchi* in *Corten/Klein* Art 58 MN 6.

[38] *M-P Lanfranchi* in *Corten/Klein* Art 58 MN 4 (but see also MN 11).

parties' status as 'masters of their treaty' and their corresponding freedom of contract, according to customary international law.

It is unclear whether Art 98 para 2 Rome Statute[39] provides another example of Art 58 para 1 lit a. This article prevents the ICC from requesting surrender of a person according to Art 89 Rome Statute if the requested States Parties is required by an international agreement to first obtain the consent of the home State of that person and the ICC has not first secured that consent. It is a matter of dispute whether Art 98 para 2 Rome Statute covers only international agreements concluded before the requested State became a party to the Statute or also permits the conclusion of such agreements after acceding to the Statute.[40] Only in the latter case would Art 98 para 2 Rome Statute qualify as a provision permitting two or more parties to the Rome Statute to suspend the operation of Art 89 Rome Statute as between themselves. Moreover, such a suspension would be permitted for an indefinite period (not only "temporarily"),[41] and it would have legal effects beyond the parties to the *inter se* agreement, limiting the powers of the ICC (an international organization with its own international legal personality[42]). At best, this represents a modified version of Art 58 para 1 lit a VCLT.

b) Suspension Compatible with Treaty (lit b)

31 Where the possibility of *inter se* suspension is not positively provided for by a treaty in the sense of lit a, it will only be allowed under the three conditions listed in lit b: if it is not prohibited by the treaty (introductory clause); if it affects neither the rights nor the obligations of the other parties to the treaty, which do not participate in the *inter se* agreement (cl i); and if it is not incompatible with the object and purpose of the treaty (cl ii). It is no wonder that these three conditions closely follow the conditions for *inter se* agreements to modify multilateral treaties between certain parties only set forth in Art 41 para 1 lit b, for the suspension under Art 58 can be understood as an **instance of a temporary modification** in the sense of Art 41.

32 It is important to note that when the three conditions of lit b are met, the motives of the parties for concluding the *inter se* agreement are irrelevant. It is **entirely left to the parties** to that agreement to determine (a) the personal scope of the suspension (*ie* which of the parties to the multilateral treaty to admit to their *inter se* agreement), (b) the substantive scope of the suspension (*ie* which provisions are to be suspended in their operation *inter se*), (c) the duration of the suspension and (d)

[39] 2001 Rome Statute of the International Criminal Court 2187 UNTS 90.

[40] The United States, which has not ratified the Rome Statute, has concluded dozens of such agreements with States Parties to the ICC, see *Aust* 289; *WA Schabas* An Introduction to the International Criminal Court (2007) 27 *et seq*; *T Steinberger-Fraunhofer* Internationaler Strafgerichtshof und Drittstaaten (2008) 260 *et seq*. For the discussion if the conclusion of these agreements violates Art 18 VCLT, → Art 18 MN 37.

[41] As the Rome Statute has not been ratified by all the parties to the VCLT, the rule of Art 41 comes in.

[42] See Art 4 Rome Statute (n 39).

its reason. The strictness of the three conditions set forth in lit b ensures that the possibility cannot be abused.[43]

Treaty practice does not yet provide examples of an outright prohibition as it is envisaged in the introductory clause of lit b. The function of this condition is to **alert the parties negotiating multilateral treaties** of the possibility that *inter se* suspensions might later be contemplated by a number of them and provide themselves with the means to prevent this from happening if they so wish. **33**

Condition (i) is a consequence of the ***pacta tertiis* (relativity of treaties) rule** laid down in Art 34: as the *inter se* agreement on suspension is concluded between some of the parties only, its legal effects must be restricted to these parties. If that is not done (perhaps because it cannot be done), the *inter se* agreement purports to interfere with third parties' rights or obligations, which is impermissible. Condition (i) ensures that provisions of a multilateral treaty can be suspended between some of the parties only if they operate in a bilateral, reciprocal way so that the *inter se* suspension is of no concern to other parties. Examples are the Vienna Conventions on diplomatic and consular relations and the multilateral trade agreements within the WTO (see already → MN 2). Examples demonstrating the opposite, where the faithful and steady performance by all the parties is in the interest of all of them, are treaties on disarmament and treaties on fisheries regulating the allowable catch.[44] Another example could be a treaty establishing a free trade area. If its operation was suspended by some of the parties, the flow of commerce could be diverted in a way that impaired the benefits the other parties derive from the treaty.[45] **34**

Condition (ii) comes from the concern that the instrument of *inter se* suspension might develop into **concealed and belated reservations** that would evade the provisions on reservations in Art 19.[46] It is hard (but theoretically possible) to imagine an *inter se* suspension that leaves the rights and obligations of the other parties unaffected and yet jeopardizes the object and purpose of the multilateral treaty. One example could be a treaty on the pacific settlement of disputes, such as the 1948 Pact of Bogotá. If its operation was suspended between some American States, the rights and obligations of the others might remain unaffected, but not their general interest in the peaceful settlement of any dispute arising in the hemisphere.[47] The availability of a compulsory dispute settlement procedure which ensures that no inter-State dispute remains unsettled can be considered as the object and purpose of such a treaty. Another example is human rights treaties, which aim at establishing universal minimum standards. At least their core provisions, against which no reservations can be made, are not amenable to *inter se* suspension either.[48] **35**

[43] *M-P Lanfranchi* in *Corten/Klein* Art 58 MN 12.

[44] *Ibid* MN 15.

[45] See the remarks by the representative of Mexico, *Sepúlveda Amor*, UNCLOT I 348 para 12.

[46] See the remarks by the representative of Israel, *Rosenne*, UNCLOT I 349 para 21.

[47] See the remarks by the representative of Uruguay, *Jiménez de Aréchaga*, UNCLOT I 349 para 22.

[48] *M-P Lanfranchi* in *Corten/Klein* Art 58 MN 17. See also Art 60 para 5.

Thirdly, the *inter se* suspension of provisions of a multilateral treaty that is intended to codify a certain area of international law may be incompatible with the object and purpose, depending on which provisions and how many parties are affected, as well as the duration of the suspension.[49]

36 The *inter se* agreement functions along the lines of Art 30 para 4, read together with Art 72. It releases the parties to it from the obligation to implement in their mutual relations and for the period specified, those provisions of the multilateral treaty to which the suspension relates. It leaves intact the treaty relations between the other parties, between the parties to the *inter se* agreement and those other parties and also between the parties to the *inter se* agreement themselves with regard to the remaining provisions of the multilateral treaty.[50] While this **split treaty regime is *a priori* temporary**, Art 58 says nothing on how the return to the full application of the treaty is to be brought about. This is left either to the *inter se* agreement or to *ad hoc* arrangements of the parties.[51]

37 When the *inter se* agreement is concluded in violation of the rules set out in Art 58 para 1, it will be **valid but illegal** from the perspective of international law and give rise to the international legal responsibility of the parties.[52]

38 In view of the scarce State practice concerning *inter se* suspension, customary international law has not been able to develop detailed rules on this possibility.[53] However, two quite general customary law rules are involved here: the rule of *pacta sunt servanda* and the *pacta tertiis* (relativity of treaties) rule. Taken together, they prohibit some of the parties to a multilateral treaty from suspending its operation *inter se* where such is prohibited by the treaty, would affect the rights or obligations of the other parties or jeopardize its object and purpose. In other words, the conditions spelt out in detail in Art 58 para 1 lit b can easily be **derived from the more general rules of customary international law**. Even in cases in which Art 58 cannot be applied in view of Art 4, the conditions of permissible *inter se* suspension are more or less the same by virtue of customary international law.[54]

II. Prior Notification of Other Parties (para 2)

39 The obligation to notify under Art 58 para 2 parallels the one under Art 41 para 2 and also brings the consultation requirement of Art 57 lit b to mind. It was added because the Conference thought that the "certain general obligation to inform the

[49] *Cf M-P Lanfranchi* in *Corten/Klein* Art 58 MN 16.

[50] *Cf ibid* MN 26.

[51] *Ibid* MN 28.

[52] *Ibid* MN 22 *et seq* (also → Art 30 para 5).

[53] This is why *M-P Lanfranchi* in *Corten/Klein* Art 58 MN 4 considers Art 58 as an instance of progressive development and not a codification of international law.

[54] See also *Villiger* Art 41 MN 10.

other parties" alluded to in the ILC commentary[55] was insufficient to maintain the **security of treaties** and that therefore a specific obligation should be clearly stipulated.[56]

The notification requirement in Art 41 para 2 makes good sense, warning the parties in good time and protecting them against illegitimate modifications of the treaty by a small number of them.[57] It is also true that *inter se* modifications in the sense of Art 41 and *inter se* suspensions in the sense of Art 58 are closely related, and yet, the necessity of adding para 2 to the latter provision remains questionable because suspension, in contrast to modification, falls under Art 65. In any event, the procedural rules laid down in this provision oblige parties invoking a ground for suspending the operation of a treaty to notify the other parties of their claim at least 3 months beforehand. In this respect, Art 58 para 2 is merely reformulating this already existing obligation and adjusting it to the specific circumstances of Art 58 para 1. **40**

However, in one respect, the obligations under Art 58 para 2 go beyond those under Art 65: whereas the general rule of Art 65 para 4 permits a party, subject to Art 45, to postpone its notification until another party claims performance of the treaty or alleges its violation, Art 58 para 2 obliges the prospective parties of the intended *inter se* agreement to notify in every case their intention to conclude such an agreement beforehand.[58] If this has not been done, the conclusion of the *inter se* agreement violates the rights of the other parties to the multilateral treaty and gives rise to international legal responsibility (→ MN 38). **41**

The purpose of the notification requirement, which protects the **general interest of the community of States Parties in the undisturbed operation of the multilateral treaty**, is to permit other parties to object to the envisaged *inter se* suspension, claiming that the conditions set forth by Art 58 para 1 are not met. However, the legal consequences of such an objection are not spelt out in Art 58 para 2. One must therefore turn to the general procedural rules in Art 65 paras 2 and 3,[59] according to which an objection raised by any other party within 3 months after the receipt of the notification obliges the parties to seek a peaceful settlement of their dispute through the means indicated in Art 33 UN Charter. While the settlement procedure is pending, the *inter se* agreement must not be concluded. If the parties should reach a deadlock, the ILC would leave it to each government "to appreciate the situation and to act as good faith demands"[60] (→ Art 65 MN 41 *et seq*). **42**

[55]Final Draft, Commentary to Art 55, 252 para 2.

[56]See the remarks by the representatives of Austria, *Zemanek*, and Mexico, *Sepúlveda Amor*, UNCLOT I 347, 348 *et seq* paras 5 and 12.

[57]Final Draft, Commentary to Art 37, 235–236 para 3.

[58]By analogy to Art 67 para 1, the notification must be made in writing.

[59]See the remarks by the representative of Mexico, *Sepúlveda Amor*, UNCLOT I 348 para 12.

[60]Final Draft, Commentary to Art 62, 263 para 6.

43 The notification requirement being a consequence of the **principle of good faith** in the implementation of treaties, it can also be considered a part of customary international law.

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F Capotorti L'extinction et la suspension des traités (1971) 134 RdC 417–587.

Article 59

Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Contents

A. Purpose and Function

Art 59 regulates the substitution of one treaty by another. The provision by its para 1 supplements Art 54 lit b and Art 57 lit b by its para 2. Art 59 lays down "**rules which derive from a straightforward consensuality approach**".[1] These rules are declaratory rather than constitutive because they could already be derived from a reasonable interpretation of Art 54 lit b and Art 57 lit b, which also cover treaty terminations and suspensions by way of implicit subsequent consent of all the parties (→ Art 54 MN 40, Art 57 MN 19). The conclusion of a later treaty by all the parties is but one instance of the termination or suspension of their earlier incompatible treaty by implicit consent. **1**

This seems to have also been the impression of a number of governments, which considered the provision as laying down no more than a helpful rule of construction **2**

[1]The quote is from Final Draft 1982, Commentary to Art 59, 58. It was used there as an argument for simply copying Art 59 VCLT into the VCLT II.

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or a self-evident concept or even suggested that the article might be redundant.[2] In any event, the rules formulated in Art 59, which were unanimously adopted at the Vienna Conference, are **plainly part of customary international law**.[3] Yet, there has been almost no subsequent practice based on the rules codified in Art 59 either. The ECJ was called upon by a national court in a reference procedure under Art 234 EC (now Art 267 TFEU) to apply them to an EC-Hungary Agreement, which was allegedly incompatible with the later TRIPS Agreement; the Court held that there was no incompatibility and thus said nothing on Art 59.[4]

3 Devoting a separate article to treaty termination or suspension by implicit consent embodied in a later treaty can be justified because this particular case requires **more detailed guidance** than is provided by Art 54 lit b and Art 57 lit b.[5] However, the latter mentioned provisions remain in the background as general clauses, coming into play as residuary rules in cases which do not meet the specific requirements of Art 59.

4 Art 59 is closely related to Art 30 para 3 – both provisions deal with two sides of the same problem,[6] namely the relationship of two successive treaties concluded by the same parties and relating to the same subject-matter. **Art 59 takes logical priority**. Where its conditions are met, the later treaty will wholly supersede the earlier one, definitely terminating it (para 1) or temporarily suspending its entire operation (para 2). Art 30 para 3 formulates a residuary rule applying only in cases not covered by Art 59, where in other words the two successive treaties remain both in force and operational because it cannot be determined that the parties intended to abrogate or wholly suspend the operation of the earlier treaty.[7] Art 30 para 3 then provides that the provisions of the later treaty shall take priority over the incompatible provisions of the earlier one, suspending the operation of these provisions (→ Art 30 MN 35). Art 30 para 3 codifies the *lex posterior* rule. If the later treaty is terminated or its operation suspended, the earlier treaty will become operational again in its entirety in the cases of both Art 30 para 3 and Art 59 para 2, but not if it was definitely terminated pursuant to Art 59 para 1.[8]

B. Historical Background and Negotiating History

5 In his second report, **SR *Waldock*** included a Draft Art 19 on "implied termination by entering into a subsequent agreement" immediately following his Art 18 on

[2]See *Waldock* V 31. See also [1966-I/1] YbILC 55 *et seq*.

[3]*F Dubuisson* in *Corten/Klein* Art 59 MN 6, 13 *et seq; Villiger* Art 59 MN 15.

[4]ECJ (CJ) *Regione autonoma Friuli-Venezia Giulia and ERSA* C-347/03 [2005] ECR I-3785, paras 6, 116.

[5]*R Plender* The Role of Consent in the Termination of Treaties (1986) 57 BYIL 133.

[6]See *Waldock* VI 54 para 41.

[7]Final Draft, Commentary to Art 56, 253 para 4.

[8]See the explanations given in *Waldock* V 32–33.

explicit termination (which was to become Art 54 lit b VCLT).[9] *Waldock*'s Draft Art 19 para 1 essentially anticipated the present Art 59 in both its termination and suspension variant. His Draft Art 19 para 2 covered from the termination standpoint the *inter se* issue that is now only dealt with by the *lex posterior* rule of Art 30 para 4, a rule which *Waldock* included in a separate provision (Draft Art 14 para 2). In view of the *lex posterior* provision, *Waldock*'s Draft Art 19 para 2 was considered redundant and deleted.

Waldock's Draft Art 19 para 1 read as follows: **6**

> "Where all the parties to a treaty, either with or without third States, enter into a new treaty relating to the same subject-matter, without expressly abrogating the earlier treaty, the earlier treaty shall nevertheless be considered to be impliedly terminated –
>
> (a) when the parties to the later treaty have manifested an intention that the whole matter should thereafter be governed by the later treaty; or
>
> (b) when the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time [. . .]."

Waldock based this proposal not on examples of State practice but on a separate opinion of **Judge *Anzilotti* in the *Electricity Company of Sofia* case of the PCIJ** who formulated the requirements for assuming a tacit abrogation of a treaty by new provisions.[10] The Special Rapporteur believed that "[a]lthough there had not been many instances of such cases, they could arise in the future and Judge Anzilotti had drawn attention to the importance of having a rule concerning implied termination".[11] Draft Art 19 para 1, in a slightly different formulation, became Art 41 of the 1963 ILC Draft, which regulated the termination and suspension variants in two separate paragraphs. With a further clarification in the sense that the terminative or suspensive intention of the parties can either be derived from the later treaty or otherwise established, the provision became Art 56 Final Draft and, in a slightly changed wording, Art 59 VCLT. At the Vienna Conference, the provision was adopted unanimously. **7**

C. Elements of Article 59

I. Termination by Tacit Consent Implied from Conclusion of Later Treaty (para 1)

Art 59 para 1 requires a later treaty in the formal sense of Art 2 para 1 lit a. An unwritten agreement from which the intention of the parties to terminate the earlier treaty could be implied would fall under Art 54 lit b. **8**

[9] *Waldock* II 71.

[10] PCIJ *Electricity Company of Sofia and Bulgaria* (Preliminary Objections) PCIJ Ser A/B No 77, 92 (1939).

[11] [1963-I] YbILC 119. See also the court cases cited by *F Dubuisson* in *Corten/Klein* Art 59 MN 10–12.

9 Art 59 para 1 provides that the conclusion of a "later" treaty shall be the grounds for considering another – earlier – treaty as terminated. It must therefore be established which treaty is earlier and which later. The VCLT does not exactly define the term "conclusion of treaties". Rather, pursuant to Arts 9 *et seq*, "conclusion" extends from the adoption of the treaty text via signature and ratification to accession, a process that can take years. At the Vienna Conference, the question as to which of the instants in the course of that period should be determinative was intensively discussed with regard to the parallel provision of Art 30. Ultimately, a consensus was reached in that the **adoption of the text of the second treaty** should be the relevant date because with it a new legislative intention of the parties became manifest.[12] The treaty having thus been found to be the later one will of course terminate the earlier treaty only from the moment in which it enters into force and only *pro futuro*.[13]

10 The terminative effect of the later treaty is made contingent on the fulfilment of several conditions, two of which are set forth in the introductory clause (*chapeau*) of Art 59 para 1 and must be cumulatively established in all the cases: the subject-matter (substantive) identity (→ MN 11–13) and personal congruence (→ MN 14–18) of both treaties. After these **two objective conditions** have been established, a further inquiry into the presence *vel non* of a **third subjective element** – the terminative intention of the parties – has to be conducted. Each of the two alternatives in lit a and b specifies an apparently distinct litmus test for finding that intention.

1. Later Treaty Relating to Same Subject-Matter (Substantive Identity)

11 Whether a treaty relates to the same subject-matter as an earlier one is to be determined by **interpretation pursuant to the rules laid down in Arts 31–33**. This sameness condition is also met where the earlier treaty deals with a certain subject-matter (such as fisheries) and a later treaty concluded by the same parties takes up that same subject-matter together with one or more further matters (such as agriculture and forestry). In the reverse case – treaty one on fisheries, agriculture and forestry, treaty two only on fisheries – the two treaties would not relate to the same subject-matter. There would only be a partial overlap and if an incompatibility occurred within this area of overlap, the provisions of the later treaty would prevail, pursuant to Art 30 para 3.

12 While the general subject-matter of a treaty is to be distinguished from its specific substantive content, the latter also influences the determination of that treaty's subject-matter. If, *eg*, a treaty on fisheries in the exclusive economic zone with 100 articles is followed by a somewhat shorter treaty on fisheries in the

[12] See the statement by Expert Consultant *Waldock* UNCLOT II 253 para 39. See the detailed account provided by *F Dubuisson* in *Corten/Klein* Art 59 MN 19 *et seq*.

[13] *F Dubuisson* in *Corten/Klein* Art 59 MN 23. See also *EW Vierdag* The Time of the 'Conclusion' of a Multilateral Treaty (1988) 59 BYIL 75, 90 *et seq*; *SA Sadat-Akhavi* Methods of Resolving Conflicts between Treaties (2003) 75 *et seq*.

exclusive economic zone with only 90 articles, the subject-matter of both treaties will most likely be the same. Where a fisheries treaty, however, covers fisheries in the internal waters, the territorial sea and the exclusive economic zone, and the same parties later conclude another treaty on fisheries only in the exclusive economic zone, the subject-matter of the two treaties is certainly different.[14]

13 Distinguishing between **subject-matter and substantive content** may sometimes be more difficult. The most appropriate criterion, taking into consideration the object and purpose of Art 59, seems to be whether the area of regulatory overlap of the successive treaties is large enough to form a reasonable basis for presuming, subject to further inquiry, that the parties intended to terminate the earlier treaty by concluding the later one.[15] This will usually not be the case where a general treaty impinges indirectly on the content of a particular provision of an earlier special treaty.[16] However, a special treaty may well be tacitly abrogated by a later more general treaty, if the parties clearly intended to exhaustively regulate the matter by that later treaty.[17] Where the intention of the parties to either (partially) terminate or supersede their earlier treaty cannot be realized through Art 59 para 1, either Art 54 lit b or Art 30 para 3 will usually help put that intention into effect.

2. Conclusion by All Parties (Personal Congruence)

14 Art 59 para 1 representing a specific instance of the subsequent terminative consent of all the parties regulated in a general way by Art 54 lit b, the implied termination by way of concluding a later treaty also requires the **consent of all the parties** as defined in Art 2 para 1 lit g. It goes without saying that the condition of personal congruence is fulfilled only when the later treaty enters into force for all the parties to the earlier treaty.

15 The participation of all the parties to the earlier treaty in the conclusion of the later one obviously forms a necessary requirement, but it is not absolute in the sense that the parties to both treaties must be identical and that the inclusion of further States in the later treaty would exclude its terminative effect on the earlier treaty. Rather, no more than **personal congruence** is required in the sense that the later treaty may include more (but not less) parties than the earlier one. This was expressly stated in *Waldock*'s Art 19 para 1 (→ MN 6) and Art 41 of the 1963 ILC Draft but ultimately deleted as superfluous.[18] In the commentary to its final Draft Art 56[19] (which no longer contained any reference to third States being parties

[14]On the question whether under Art 59 para 1 an earlier treaty might be partially terminated in case of partial substantive overlap with the later one → MN 26 *et seq*.

[15]On the problem of partial substantive overlap of successive treaties → MN 28.

[16]Statement by Expert Consultant *Waldock* UNCLOT II 253 para 41, invoking the principle *generalia specialibus non derogant*.

[17]*F Dubuisson* in *Corten*/*Klein* Art 59 MN 25.

[18]See *Waldock* V 32–33 para 6.

[19]Later renumbered to become Art 59.

to the later treaty), the ILC convincingly stated that "what the parties to the earlier treaty are competent to do together, they are competent to do in conjunction with other States".[20]

16 If one party to the earlier treaty has been succeeded in that capacity by one or more other States (such as the German Democratic Republic by the Federal Republic of Germany or the Czechoslovak Socialist Republic by the Czech Republic and Slovakia), it is of course (all of) the latter which must be included in the later treaty to give it terminating force. The same applies *mutatis mutandis* in cases of functional succession where one of the States Parties to the earlier treaty has transferred the competence to conclude treaties on that subject-matter to an international or supranational organization such as the EU. Then, this organization must be among the parties of the later treaty, while its Member State need not be.[21] It is true that pursuant to Art 73, the VCLT shall not prejudge any question that may arise in regard to a treaty from a **succession of States**. Accordingly, the question which entity becomes a party to a treaty by way of succession must be answered according to the applicable rules of international law outside the Convention. However, when this question has been definitely answered, Art 59 becomes applicable.

17 Art 59 does not apply if not all the parties to the earlier treaty are also parties to the later treaty. However, when the **consent of the remaining parties to terminate the former treaty** can be ascertained from other sources, the former treaty will be brought to an end by virtue of the general clause of Art 54 lit b.[22]

18 Where some of the parties of a treaty conclude a later treaty for the purpose of terminating the earlier one *inter se,* the ILC wanted Art 30 paras 4 and 5 and Art 41 to apply exclusively.[23] However, as these provisions will practically only suspend the operation of the earlier treaty, the intention of the parties would be partly thwarted. Therefore, an ***inter se* termination** should be enabled pursuant to the residuary rule of Art 54 lit b (→ Art 54 MN 37).

3. Alternative Litmus Tests for Finding Implicit Consent to Terminate Treaty

19 When the two conditions of the *chapeau* of Art 59 para 1 have been established, the survival of the earlier treaty is made uncertain. In view of Art 30 para 3, pursuant to which the later treaty supersedes the earlier one, the parties presumably wanted to abrogate it altogether. However, where the parties have not expressly said so, some uncertainty remains and the stage is set for further inquiry into, and final determination of, their exact intention in this respect. Here the **litmus tests of lit a and b**

[20] Final Draft, Commentary to Art 56, 253 para 1.

[21] *F Dubuisson* in *Corten/Klein* Art 59 MN 3 *et seq,* referring to Art 59 para 1 VCLT II.

[22] *Plender* (n 5) 156 *et seq*.

[23] *F Dubuisson* in *Corten/Klein* Art 59 MN 28 *et seq* who believes that the ILC's regulatory intent does not correspond with States practice.

come in. As the ILC stated in its commentary, the question of what implications the conclusion of the later treaty has for the fate of the earlier one "is essentially one of the construction of the two treaties".[24]

The formulation of the latter part of the provision in two apparently equal alternatives has been criticized as misleading because, properly understood, the instances of lit b are no more than a subgroup of those covered by lit a, both specifying criteria by which the **implicit terminative intention** of the parties to the later treaty can be established.[25] The litmus test part of Art 59 para 1 could be therefore rephrased as follows: 'it appears from the later treaty (*eg* because its provisions are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time) or is otherwise established that the parties intended that the matter should be governed by that treaty'. Although it is heuristically correct to distinguish between the 'subjective test' of lit a and the 'objective test' of lit b,[26] one should always keep in mind that both alternatives of para 1 are subject to the intentions of the parties (→ MN 33). **20**

a) Alternative 1: Establishment of Terminative Intention of Parties (lit a)

Art 59 para 1 lit a distinguishes **two potential bases** from which to deduce the terminative intention of the parties, using the ordinary means of interpretation: the later treaty (referring to para 1 and the *chapeau* of para 2 of Art 31) or other unspecified sources (referring to Art 31 para 2 lit a and b, Art 32). **21**

The case of a later treaty expressly providing that an earlier treaty shall terminate is not covered by Art 59 para 1 lit a.[27] As the title of this provision makes clear, it is meant to regulate only instances of **termination to be *implied* by the conclusion of a later treaty**. The discussion within the ILC and the Conference was limited to that issue. Accordingly, the ILC's commentary begins in the following way: "The present article deals with cases where the parties, without expressly terminating or modifying the first treaty, enter into another treaty [. . .]".[28] Cases where the parties make their terminative intention explicit therefore fall under Art 54 lit b. **22**

The **other sources outside the later treaty** from which the terminative intention can be deduced comprise all those that can be used as a means of interpretation in accordance with Arts 31 and 32, including (but not limited to) the preparatory work and the circumstances of the conclusion of the later treaty.[29] **23**

[24] Final Draft, Commentary to Art 56, 252–253 para 1.

[25] *Plender* (n 5) 154.

[26] See *Villiger* Art 59 MN 9, 11.

[27] See *eg* Art 44 of the 1961 Single Convention on Narcotic Drugs 520 UNTS 204; Art 311 para 1 of the 1982 UNCLOS 1833 UNTS 3.

[28] Final Draft, Commentary to Art 56, 252–253 para 1.

[29] *Waldock* V 33 proposed the following more specific formulation of lit a: "It appears from the later treaty, from its preparatory work or from the circumstances of its conclusion [. . .]". However, that was considered as too narrow, in view of the more comprehensive rules on treaty interpretation (see the remarks by *Verdross* [1966-I/1] YbILC 55–56).

24 When the earlier treaty is of unlimited duration while the **later treaty has been concluded for a fixed term**, special care must be taken to determine whether the parties really acted with terminative intention because then the lapse of the later treaty would leave them with no treaty rules at all.[30] However, the ILC was certainly correct to point out that "it could not be said to be a general principle that a later treaty for a fixed term does not abrogate an earlier treaty expressed to have a longer or indefinite duration. It would depend entirely upon the intention of the States in concluding the second treaty".[31]

25 If terminative intention of parties cannot be clearly **established beyond reasonable doubt**, the requirements of Art 59 para 1 are not fulfilled.[32] This will leave the older treaty in force and bring in Art 30 para 3 (→ MN 4).

26 At first sight, Art 59 appears only to contemplate an all or nothing result: either the later treaty terminates the earlier one in its entirety, or not at all. In contrast to this, Art 30 para 3 also envisages a partial supersession ("to the extent") of the earlier treaty by the later one, if it is not terminated. This raises the **question whether a partial termination is conceivable under Art 59**. Its formulation does not exclude such a possibility from the outset, provided that partial termination corresponds with the intention of the parties to the later treaty, *eg* in cases where the subject-matter of the two treaties overlaps in part only.[33]

27 Art 41 para 1 of the 1963 ILC Draft expressly provided that "[a] treaty shall be considered as having been impliedly terminated in whole or in part if all the parties to it [. . .] enter into a further treaty relating to the same subject-matter and either: (a) [. . .]; or (b) [. . .]."[34] For reason of clarity, *Waldock* in his fifth report proposed to regulate cases of partial termination (and suspension) in a separate third paragraph of Art 41.[35] However, the Drafting Committee deleted that paragraph because "it seemed an unnecessary complication to cover in article 41 the question of partial suspension", which constituted a partial conflict in the sense of Art 30 para 3 ("to the extent").[36] No explanation was given concerning the **deletion of the partial termination variant**, but Art 30 para 3 ensures that in cases of partial overlap, the later treaty will prevail in any event.

28 *Waldock* had previously stated that while a **theoretical difference** remained between the definite intention to terminate a treaty in part by a later one and the intention to give priority to the provisions of the later treaty, the practical results

[30] However, see *Aust* 292 who even in that case considers it likely that the parties intend to terminate the earlier treaty.

[31] Final Draft, Commentary to Art 56, 253 para 3.

[32] For an example, see *F Dubuisson* in *Corten/Klein* Art 59 MN 37.

[33] See *Aust* 293.

[34] [1963-II] YbILC 203.

[35] *Waldock* V 33: "Under the conditions set out in paragraphs 1 and 2, if the provisions of the later treaty relate only to a part of the earlier treaty and the two treaties are otherwise capable of being applied at the same time, that part alone shall be considered as terminated or suspended in operation."

[36] Answer given by *Waldock* to *Castrén* [1966-I/1] YbILC 127 paras 96–97.

would be the same in both cases and that it might be ill-advised to increase the overlap between Art 59 and Art 30 para 3.[37] Nevertheless, at the Vienna Conference Canada unsuccessfully proposed to return to Art 41 para 1 of the 1963 ILC Draft by re-inserting "in whole or in part" in the opening phrase of what now is Art 59 para 1 VCLT.[38]

However, one **difference in practical results** between the legal effects of Art 30 para 3 and Art 59 para 1 would make itself felt should the later treaty be terminated. Pursuant to Art 30 para 3, the inapplicable part of the earlier treaty would then become operational again, whereas having been terminated pursuant to Art 59 para 1, it would not (→ MN 26). If this particular situation arises and it is established that the parties intended to terminate the earlier treaty in part by concluding the later one, either Art 59 para 1 or Art 54 read together with Art 44 para 1 (→ Art 54 MN 22) would have to be applied to realize the intention of the parties.[39] **29**

b) Alternative 2: Absolute Incompatibility of Both Treaties (lit b)

The absolute incompatibility of the two successive treaties clearly indicates the terminative intention of the parties so that the situation will practically always be covered by lit a already. However, if in an exceptional case it could be convincingly demonstrated that the parties indeed wanted to retain the earlier treaty (perhaps because the later treaty was concluded for a certain period only), the earlier treaty would remain in force. Although the letter of lit b would then suggest that the earlier treaty was terminated, the **object and purpose of Art 59 para 1 – realizing the common intention of the parties** – would not. Therefore, the earlier treaty would remain in force, but become inoperational by virtue of Art 30 para 3. **30**

Absolute incompatibility of two successive treaties in the sense of lit b will not come about already when individual provisions of the two are incompatible, so that not all of the provisions of both treaties can be applied at the same time. Rather, an **overall incompatibility** is required: the earlier treaty must be superseded in its entirety because the later treaty leaves no room for the application of its regulatory concept.[40] **31**

4. Consultation with Other Contracting States?

In contrast to Art 54 lit b, Art 59 para 1 does not require the parties to enter into any consultation with the other contracting States of the earlier treaty (Art 2 para 1 lit f) before they terminate it by concluding the later treaty. This is not due to a conscious decision but a **mere oversight**. The consultation requirement, which had been rejected by the ILC, was introduced in Art 54 lit b only at the Conference stage **32**

[37] *Waldock* V 33 para 7.

[38] UNCLOT III 180 para 514.

[39] *F Dubuisson* in *Corten/Klein* Art 59 MN 45 *et seq*.

[40] *Ibid* MN 44.

and Art 59 was simply not coordinated with that revision of Art 54 lit b (→ Art 54 MN 43). Neither the discussion of Art 59 in the ILC nor at the Vienna Conference touches the issue at all[41] so that the provision cannot be interpreted as exhaustively stating the procedural requirements of that specific variant of treaty termination.

33 It seems therefore reasonable to **apply the consultation requirement also in the context of Art 59 para 1**. That specific provision could either be interpreted in the light of the general provision Art 54 lit b or supplemented in this respect by Art 54 lit b. The interests of the contracting States deserve the same attention in the case of Art 59 para 1 as they do in the case of Art 54 lit b. Extending the rather lenient consultation requirement to Art 59 para 1 would not impose any excessive burden on the parties when they contemplate the conclusion of the later treaty. They would indeed be compelled not only to become conscious of the terminative character of their prospective second treaty but also to make their terminative intention known to all the other contracting States. However, this would not be unreasonable.

II. Suspension by Tacit Consent Implied from Conclusion of Later Treaty (para 2)

34 Art 59 para 2 requires the establishment of the parties' intention to suspend the operation of the earlier treaty in its entirety. If the parties intended no more than a **partial suspension**, Art 30 para 3 applies (→ MN 26).

35 If the later treaty only suspends the operation of the earlier treaty without terminating it, any subsequent termination or suspension of operation of the later treaty will make the earlier treaty operational again.[42]

36 In contrast to para 1, para 2 of Art 59 is not expressly divided up in two alternatives. It has therefore been suggested that Art 59 para 2 covers only the situation of Art 59 para 1 lit a (terminative intention), but not the situation of Art 59 para 1 lit b (absolute incompatibility).[43] This is problematic in view of the fact that lit b is but one example of lit a (→ MN 30). Especially where the **later incompatible treaty is concluded for a limited duration** only, the intention of the parties may clearly be to revive the earlier treaty after the later runs out, and that would only be possible in case of suspension, but not termination of the earlier treaty.[44] There is no reason why it should be made impossible for the parties to realize that intention.

Selected Bibliography

R Plender The Role of Consent in the Termination of Treaties (1986) 57 BYIL 133–167.

[41] UNCLOT III 180–181.

[42] Waldock V 32 para 5.

[43] *R Jennings/A Watts* Oppenheim's International Law Vol I Parts 2–4 (9th edn 1992) 1300 footnote 4.

[44] *F Capotorti* L'extinction et la suspension des traités (1971) 134 RdC 417, 501 *et seq*.

Article 60

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State; or
(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or
(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Contents

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A. Purpose and Function

1 Justice requires that a contracting party cannot continue to demand contractual fidelity from the other parties when it defaults on its own obligations and thus upsets the ***synallagma* (reciprocity) of performance and return (*do ut des*)**. That simple truth, which one might call negative reciprocity,[1] is well-known from the national contract law principle *inadimplenti non est adimplendum*, and "is so just, so equitable, so universally recognized, that it must be applied in international relations also".[2] Accordingly, the ICJ has spoken of "the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties" except for those of a humanitarian character.[3] This principle can, however, not easily be translated into manageable provisions of the international law of treaties, although treaties are undoubtedly subject to the principle of reciprocity, which itself follows from the principle of sovereign equality of States.[4] This is because the **function of treaties in the international legal order differs widely from the function of contracts in national law**. Treaties are usually more than exchanges of *quid pro quo* – they are often instruments of international legislation whose termination or suspension requires the balancing of various divergent individual and collective interests.[5]

[1] *B Simma/C Tams* in *Corten/Klein* Art 60 MN 3.

[2] PCIJ *Diversion of Water from the Meuse* (dissenting opinion *Anzilotti*) PCIJ Ser A/B No 70, 50 (1937).

[3] ICJ *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 Rep 16, paras 96, 98.

[4] Statement by *de Luna* [1966-I/1] YbILC 62.

[5] *Cf Rosenne* 117 *et seq*.

On this background, Art 60, which has been called **one of the most complex provisions of the Convention**,[6] carefully circumscribes permissible reactions to treaty breaches pursuant to the law of treaties. It aims at restoring the balance to the contractual relationships, which was disrupted by the defaulting State, providing for either the temporary suspension or the ultimate termination of those relationships. Art 60 accords rights to ***reactive* (or *responsive*) termination or suspension of treaties**. Art 60 supplements, but does not supersede, the rules of customary international law pertaining to State responsibility, which are beyond the scope of the Convention (→ Art 73). Those rules also cover cases of breach of treaty obligations and authorize States aggrieved thereby to take countermeasures against the defaulting State.[7] The exact relationship between these 'contract' and 'tort' law reactions to breaches of treaty needs to be specified further (→ MN 74–80). 2

The contemporary international legal order still lacks compulsory third-party dispute settlement procedures, let alone universal international adjudication of conflicting claims. Therefore, the protection and enforcement of rights is to a large degree left to **self-help mechanisms** to be employed by the individual international actors. The termination or suspension of a treaty by a State to protect its interests in reaction to a breach of that treaty by another State is one of those mechanisms. While self-help mechanisms put at a State's disposal can easily be abused, they are also indispensable for the enforcement of international legal obligations, which is in the general interest. 3

A provision like Art 60, which codifies an instance of self-help, must therefore try to prevent abuse without unduly weakening the mechanism, the **fundamental principle of *pacta sunt servanda* (Art 26)** finding itself on both sides of the equation. Whereas a State in breach of a treaty should have to pay a price for its default, it should not be too easy for States to turn a perhaps fictitious treaty violation into a pretext for terminating treaties that they no longer approve for quite different reasons.[8] 4

Bilateral treaties usually establish **simple reciprocal relationships** between the two contracting parties and can therefore rather easily be dissolved where one of the parties fails to fulfil its obligations and the other feels aggrieved thereby and loses confidence in its counterpart. Neither individual third-party States nor the international community as a whole have any specific interest in the further execution of a bilateral treaty, except for their general interest in maintaining the principle of *pacta sunt servanda,* which is indeed the cornerstone of the international legal order.[9] 5

[6] *F Capotorti* L'extinction et la suspension des traités (1971) 134 RdC 417, 550.

[7] See Arts 49–54 ILC Articles on Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83, 12 December 2001, Annex, UN Doc A/RES/56/83.

[8] *Cf JN Moore* Enhancing Compliance With International Law: A Neglected Remedy (1999) 39 VaJIL 881, 887 *et seq*.

[9] See Preamble 3rd recital UN Charter.

6 **Multilateral treaties** require more caution in balancing the general interest of the many parties in the stability of the treaty and the interest of individual parties in being adequately protected from the negative consequences of breaches of treaty by others.[10] In case of **general normative treaties**, which increasingly form the backbone of the international legal order, the interest of the international community as a whole in legal certainty is also involved.

7 Art 60 attempts to strike a fair **balance between these opposing interests** by: (1) providing that a breach of a treaty does not *ipso facto* put an end to that treaty[11]; (2) limiting the reactive rights of non-defaulting parties to cases of material breach, which amount to only a small subset of conceivable treaty violations (→ MN 19–34); (3) establishing procedural safeguards (→ MN 35–39); (4) distinguishing between bilateral and multilateral treaties (→ MN 40–67) and further between the reactive rights of various categories of parties to multilateral treaties (→ MN 52–63); (5) reserving special provisions in the relevant treaty, which are better adapted to balance interests in the specific constellation of that treaty in the event of a breach (→ MN 68–70); and (6) excluding from its scope provisions of human rights treaties, which lay down the core values of the United Nations, "the foundation of freedom, justice and peace in the world",[12] thereby going far beyond the establishment of mere inter-State contractual relationships (→ MN 81–86).

B. Historical Background and Negotiating History

8 Whereas the ***exceptio non adimpleti contractus*** has been recognized in the international legal literature since *Grotius*,[13] the ILC complained that "States practice does not give great assistance in determining the true extent of this right or the proper conditions for its exercise".[14] In the international jurisprudence available to the Commission, the principle was invoked in the PCIJ case of the *Diversion of Water from the Meuse*, but not applied because the Court denied the existence of a breach of treaty.[15] The only instance where the *exceptio* served as *ratio decidendi* was the *Tacna-Arica* arbitration case. The arbitrator, US President *Coolidge*, there stated that only "wrongs as would operate to frustrate the purpose of the agreement" by one party of a bilateral treaty would suffice to release the other party from its

[10] *Waldock* V 36 para 5.

[11] Final Draft, Commentary to Art 57, 254 para 5.

[12] See Preamble 1st recital of the Universal Declaration of Human Rights, UNGA Res 217A (III), 10 December 1948, UN Doc A/810, 71.

[13] See the references in *G Dahm/J Delbrück/R Wolfrum* Völkerrecht Vol I/3 (2nd edn 2002) 733. See also the very detailed description of the antecedents and negotiating history of Art 60 by *Rosenne* 8 *et seq*.

[14] Final Draft, Commentary to Art 57, 254 para 2.

[15] PCIJ *Diversion of Water from the Meuse* (Judgment) PCIJ Ser A/B No 70 (1937).

obligations.[16] As he could not find a breach of such a serious kind by Chile, he refused to grant Peru release from its own treaty obligations.

The **Harvard Draft Convention on the Law of Treaties of 1935**[17] followed a different path towards limiting the threat to the security of treaties, which can arise from an over extensive use of the *exceptio*. Instead of expressly limiting it substantively to serious breaches, it opted for a procedural solution: a State should not be able to terminate a treaty relationship simply by its own unilateral act on account of an alleged breach of the treaty by another State. The contrary view was **9**

> "largely the product of an earlier day when the community of nations was unorganized and without machinery for the settlement of disputes by judicial processes. It is believed that such a view should no longer prevail in an age which has at its disposal the elaborate and efficient machinery for the orderly and just settlement of international differences such as has come into existence in recent years."[18]

Rather, the State feeling injured by what it considers a breach of a treaty by another State should seek the prior authorization of a competent international tribunal or authority for terminating the treaty relationship.

Accordingly, Art 27 Harvard Draft, entitled "violation of treaty obligations", read as follows: **10**

> "(a) If a State fails to carry out in good faith its obligations under a treaty, any other party to the treaty, acting within a reasonable time after the failure, may seek from a competent international tribunal or authority a declaration to the effect that the treaty has ceased to be binding upon it in the sense of calling for further performance with respect to such State.
> (b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty *vis-à-vis* the State charged with failure.
> (c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority."

The commentary on this article supposed that the declaration envisaged in lit a would only be made in cases of serious violation in the sense of the *Tacna-Arica* arbitral award.[19]

Based on the work of his predecessor, **SR *Fitzmaurice***, **SR *Waldock***, in his second report, introduced a rather lengthy Draft Art 20, which already contained the main elements of the first four paragraphs of present Art 60: (1) the decision that a breach of a treaty by one party does not of itself terminate or suspend the operation of the treaty but can on certain conditions entitle the other party or parties to withdraw from the treaty or suspend its operation in whole or in part; (2) the restriction of any such right to cases of a "material breach"; (3) the provision of **11**

[16] *Tacna-Arica Question (Chile v Peru)* 2 RIAA 921, 943–944 (1922).

[17] Harvard Draft 662.

[18] Harvard Draft 1077. The quote obviously referred to the PCIJ which had been established in 1922, although its jurisdiction was not compulsory.

[19] *Ibid* 1092–1093.

different rules for bilateral and multilateral treaties; (4) a proviso clause respecting constituent instruments of international organizations and treaties closely related to such organizations.[20] He criticized his predecessor as Special Rapporteur for having been **unacceptably restrictive in formulating the right to terminate or suspend treaty relations with a covenant-breaking State**. He also remarked that the role of such a provision was narrowed by the growing practice of concluding treaties for relatively short periods or including denunciation clauses.[21] In a separate provision, *Waldock* proposed to make any use of the right to terminate or suspend the operation of a treaty under his Draft Art 20 contingent on a serious attempt by the injured State either to come to an agreement with the covenant-breaking State or obtain a third-party dispute settlement.[22]

12 On the basis of further discussions within the Commission, the ILC Draft of 1963 included an Art 42[23] whose paras 1–3 and 5 already closely mirrored the present Art 60 paras 1–4. Draft Art 42 para 4 was later moved to another position and integrated into the present Art 44 para 2. The comments of governments on Draft Art 42 that the ILC received mostly concerned the treatment of breaches of multilateral treaties, such as the question whether a distinction should be made between contractual and law-making treaties (→ MN 46–51).

13 Some governments criticized that Draft Art 42 para 2 went too far in giving any other party the unconditional right to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State. They suggested that such right should be limited to those parties actually injured by the breach to prevent abuse. The ILC took up this proposal and reformulated its draft in the sense of the present Art 60 para 2 lit b, limiting the right to suspend to parties specially affected by the breach.

14 Comments by other governments induced the Special Rapporteur to reconsider **special types of multilateral treaties**, such as disarmament treaties, where a breach by one party undermines the whole treaty regime. With regard to these cases, Draft Art 42 para 2 might not adequately protect the interests of an individual party. Although it provided for the suspension of the operation of the treaty in the relation between any party and the defaulting State (lit a), the former remained bound *vis-à-vis* the other parties to disarm and could therefore not react to the breach by rearming. This reaction would only be open to it with the agreement of all the other parties except the defaulting State (lit b). *Waldock* therefore proposed to reformulate and reinstate as para 2 *bis* a provision, which he had originally included in his Draft Art 20:

> "Notwithstanding paragraph 2, if the provision to which the breach relates is of such a character that its violation by one party frustrates the object and purpose of the treaty

[20] *Waldock* II 72 *et seq*.

[21] *Waldock* II 75.

[22] Art 25 (Waldock II 86 *et seq*.).

[23] [1963-II] YbILC 204.

> generally as between all the parties, any party may suspend the operation of the treaty with respect to itself or withdraw from the treaty."[24]

15 This provision became Art 60 para 2 lit c VCLT, but was limited to suspension and without the right to withdraw from the treaty. In the ILC, it had been argued that a right to withdraw was unnecessary because the vital interests of each of the other parties individually could be sufficiently protected by suspension. For a termination, the consent of all the parties other than the defaulting State should be required, as provided in Art 60 para 2 lit a VCLT.[25]

16 The resulting Draft Art 57 of the ILC's Final Draft, which had been adopted by 14 votes to none, was practically identical to the present Art 60 paras 1–4 VCLT.[26] At the first session of the Vienna Conference, various amendments were proposed but either withdrawn or rejected, except for one, which the Swiss representative *Bindschedler* submitted orally. It concerned the addition of the following new para 5 to Draft Art 57:

> "The foregoing rules do not apply to humanitarian conventions concluded with or between States not bound by multilateral conventions for the protection of the human person which prohibit reprisals against individuals. Agreements of this kind must be observed in all circumstances."[27]

This amendment was not pressed to a vote, because Switzerland had been unable to submit it in writing in good time.

17 At the second session of the Conference, the Swiss proposal was resubmitted in writing in a slightly different version:

> "The foregoing paragraphs do not apply to provisions relating to the protection of the human person contained in conventions and agreements of a humanitarian character, in particular, to rules prohibiting any form of reprisals against protected persons."[28]

The plenary of the Conference adopted the **principle embodied in the Swiss amendment** by 87 votes to none with 9 abstentions and referred it to the Drafting Committee.[29] The Drafting Committee having brought the Swiss proposal in the form of present Art 60 para 5, the Conference adopted the whole article without a formal vote.[30]

18 Also at the second session, the United Kingdom proposed amendments to Draft Art 57 para 2 lit a and c.[31] In substantive terms, the United Kingdom wanted to state expressly in both variants that the operation of the treaty could be suspended not

[24] *Waldock* II 36–37.

[25] [1966-I/1] YbILC 127 *et seq:* an amendment proposed by *Yasseen* to delete the right to withdraw was adopted by 12 votes to 1.

[26] Final Draft 184.

[27] UNCLOT I 354–355.

[28] UNCLOT III 269.

[29] UNCLOT II 115.

[30] UNCLOT II 167–168.

[31] UNCLOT III 269.

only in whole but also in part. This was accepted by the majority of the Conference.[32] However, the United Kingdom proposed a further change with regard only to lit a, which was intended to bring its formulation in line with lit b and c, namely to replace "to suspend" by "to invoke the breach as a ground for suspending". The UK representative (*Vallat*) criticized the discrepancies in the various parts of the article, referring to the ILC's deliberate use of "invoke as a ground" in order to "underline that the right arising under the article is not a right arbitrarily to pronounce the treaty terminated". There was no reason why the community of States Parties should, in contrast to individual parties, be given the power to act "arbitrarily" under lit a.[33] In the ensuing discussion, a dispute arose as to whether the requirement of "unanimous agreement" of the other parties provided **adequate guarantees against arbitrary action**.[34] When ultimately put to a separate vote, there were 42 votes in favour of and 24 against this part of the UK amendment, with 32 abstentions. It was therefore not adopted, having failed to obtain the required two-thirds majority.[35]

C. Elements of Article 60

I. The Notion of "Material Breach" (para 3)

1. The ILC's Restrictive Approach to Self-Help Reaction Against Treaty Violations

19 The central element of Art 60 is the notion of "material breach" of a treaty by one party, being the single and indispensable condition for any terminative or suspensive reaction regarding that same treaty by the other party or parties. There had for a long time been a dispute among jurists whether every breach of a treaty or only a serious breach should give rise to a right to withdraw.[36] Those who advocated an unqualified right to abrogate a treaty in reaction to its breach by another party referred to the absence of international mechanisms for securing the enforcement of treaty obligations, necessitating **effective means of self-help**. Others instead insisted on restricting that right to instances of material or fundamental breaches, emphasizing the **threat to the principle *pacta sunt servanda***, which would be posed if the conditions for unilateral withdrawal were defined too broadly and its abuse thus made too easy.

[32]UNCLOT II 115 paras 61, 63.

[33]UNCLOT II 111–112 paras 14–16.

[34]See in particular the intervention by the Israeli delegate (*Rosenne*) and the reaction by the UK delegate UNCLOT II 113 paras 34, 40.

[35]UNCLOT II 115 para 62. See Rule 36 para 1 of the Conference's Rules of Procedure UNCLOT I xxviii.

[36]Final Draft, Commentary to Art 57, 253–254 para 1. See also *Dahm*/*Delbrück*/*Wolfrum* (n 13) 733.

Following a proposal by SR *Waldock*, the ILC unanimously sided with the latter position, explaining "that the right to terminate or suspend must be limited to cases where the breach is of a serious character".[37] They decided to call such a breach "material" instead of "fundamental", because the latter term might be understood too narrowly, as covering "only the violation of a provision directly touching the *central* purposes of the treaty". However, the ILC wanted to go further and include the violation of other – ancillary – provisions, which might still have been very material for a State's decision to become a party because it considered them as essential to the effective execution of the treaty.[38] This passage of the ILC commentary can obviously not be understood as focussing on the subjective appraisal of the importance of treaty provisions by the States Parties, leaving the scope of Art 60 to the determination of each individual State. Rather, the **materiality of the treaty provisions has to be determined objectively**, *ie* from the viewpoint of a reasonable States Parties. This is indeed what the text of lit b makes clear. **20**

In an effort to remove the immanent uncertainties of the notion of "material breach", Art 60 para 3 further narrows it down to only two alternatives: the repudiation alternative (lit a) and the violation of essential provision alternative (lit b). **For the purposes of Art 60, there is no "material breach" beyond these two alternatives**. Art 60 para 3 lit b sets out the main case, with lit a defining a particularly grave instance of a breach, not limited to the violation of one or more specific provisions, but a refusal to observe the treaty in its entirety.[39] **21**

As the ICJ expressly stated in the *Gabčíkovo-Nagymaros Project* case with regard to a bilateral treaty, **22**

> "only a material breach of the treaty itself, by a States Parties to that treaty, [. . .] entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of customary international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties."[40]

Where a treaty violation by one party does not amount to a material breach in the sense of Art 60, the remedies provided therein do not apply. Accordingly, the law of treaties does not provide for any **reaction to non-material breaches of treaties**. Here, however, the law of State responsibility comes in (→ MN 74 *et seq*). **23**

2. Repudiation Alternative (lit a)

By adopting the term "repudiation" and not "denunciation" or "termination", the ILC wanted to emphasize that it refers to "a material rather than a formal act so as to cover all the means available to a State attempting to free itself of obligations under **24**

[37] Final Draft, Commentary to Art 57, 255 para 9.

[38] *Ibid* (emphasis original).

[39] Statement by *Waldock* [1963-I] YbILC 245.

[40] ICJ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 3, para 106.

a treaty".[41] That would include all instances of invoking the invalidity, termination or suspension of a treaty. As the suspension of the operation of a treaty amounts to the temporary release of a party from the obligation to perform the treaty (Art 72 para 1), it also qualifies as an instance of repudiation, all the more when the duration is uncertain.

25 Whereas Art 42 para 3 of the ILC Draft of 1963 had still spoken of "unfounded repudiation", Art 57 para 3 lit a of the ILC's Final Draft further specified that qualification in the sense of the present provision, as meaning a **repudiation of the treaty not sanctioned by the provisions of the Convention**. Quite in line with Art 42 VCLT, only those reasons for repudiating a treaty which are exhaustively listed in the Convention can be considered as legitimate and will therefore not trigger the application of lit a.[42] No more than two cases of legitimate repudiation were expressly mentioned during the discussions in the ILC: a repudiation based on the provisions of the treaty itself and a repudiation based on a peremptory rule of international law.[43] The application of lit a seems to have been considered as a matter of course, which it is not.

26 Art 60 para 3 lit a certainly covers cases where a States Parties refuses to fulfil its treaty obligations on a **ground not recognized at all by the Convention**, *eg* where the State asserts the invalidity of a treaty because it is 'unequal'. However, the question is whether lit a also applies where the **repudiation is explicitly based on one of the provisions in Part V of the Convention**, but that provision's conditions are not met because the State has either misinterpreted it or the facts do not meet that provision's standards. One example would be a State's claiming a treaty to be void pursuant to Art 52 because its conclusion was procured by 'economic coercion', which in that State's opinion amounts to 'force'. Another example would be a State's denunciation of a treaty on the basis of Art 56 para 1 lit a or b where it cannot be established that the parties to that treaty intended to admit the possibility of denunciation or where a right of denunciation may not be implied by the nature of that treaty.

27 If one remembers the object and purpose of Art 60 – namely to ensure that the reactive termination and suspension of a treaty remain limited to instances of a serious breach – it becomes evident that **lit a must be interpreted narrowly**. Thus, the repudiation of a treaty by a State, which is based on the misinterpretation of a provision of Part V of the VCLT or its erroneous application to unfitting factual circumstances, does not meet the standards of lit a, unless bad faith can be proven.

28 However, contrary to what the wording of Art 60 para 3 lit a indicates, there are further legitimate, even compelling, reasons for refusing to perform a treaty outside the VCLT, which, if applicable, will justify the repudiation so that it cannot be

[41] Statement by the President (*Ago*) UNCLOT II 115.

[42] The present formulation goes back to a proposal by *Verdross* [1966-I/1] YbILC 63 paras 38, 76: "The repudiation of the treaty if not authorized by another provision of this convention". See also [1966-I/1] YbILC 127 *et seq* paras 14, 16, 23–28.

[43] [1966-I/1] YbILC 127–128 paras 24, 26.

considered as a material breach of the treaty. Thus, if one of the **circumstances precluding wrongfulness according to the law on State responsibility** exists,[44] the repudiation will not qualify as a material breach (→ Art 73). Another instance is a binding decision of the UN Security Council under Chapter VII of the UN Charter prohibiting the performance, which will override any treaty obligation pursuant to Art 103 UN Charter.[45]

3. Violation of Essential Provision Alternative (lit b)

29 The object and purpose standard laid down in lit b is adapted from the central criterion for appraising the admissibility of reservations (Art 19 lit c). Here and there, it is not easy to apply because of its indeterminacy.[46] The ILC was unanimous in the opinion that **not only "central" provisions but also "ancillary" provisions could be "essential"** (→ MN 20). Thus, a States Parties to the Chemical Weapons Convention (CWC)[47] will commit a material breach in the sense of lit b not only when it stockpiles or uses chemical weapons in violation of the central Art I CWC, but also when it obstructs inspections pursuant to the ancillary Art IX CWC, which are an important element of the treaty's compliance regime that in itself is central to the accomplishment of the CWC's object and purpose.[48]

30 Typical treaty provisions having an 'ancillary' character are those concerning compulsory dispute settlement. As a matter of fact, the Special Rapporteur had in his Draft Art 20 para 2 lit c expressly mentioned a third instance of a material breach:

> "a refusal to implement a provision of the treaty binding upon all the parties and requiring the submission of any dispute arising out of the interpretation or application of the treaty to arbitration or judicial settlement, or a refusal to accept an award or judgement rendered under such a provision."[49]

This lit c was eliminated by the Drafting Committee, together with the reformulation of lit b, which was now capable of including the variant formerly dealt with by lit c. Thus, the violation by a States Parties of a treaty provision relating to compulsory dispute settlement does not automatically constitute a material breach, but only if it can be proven that the provision is essential to the accomplishment of the object or purpose of the treaty.

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[44] *Cf* Arts 20 *et seq* ILC Articles on Responsibility of States (n 7).

[45] *B Simma/C Tams* in *Corten/Klein* Art 60 MN 16.

[46] *M Fitzmaurice/O Elias* Aspects of the Law Relating to Material Breach of Treaty in *M Fitzmaurice/O Elias (eds)* Contemporary Issues in the Law of Treaties (2005) 125 *et seq*. See also *T Giegerich* Multilateral Treaties, Reservations to in MPEPIL (2008) MN 10.

[47] 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction 1974 UNTS 45.

[48] Example taken from *Aust* 295.

[49] *Waldock* II 73.

31 Art 60 para 3 lit b makes any right to reactive termination or suspension contingent on the *violation* of an essential treaty provision by one States Parties. The non-observance of the treaty provision must in other words be incompatible with that State's international legal obligations. Thus, if the **non-observance is justified** either under a specific treaty clause or pursuant to Art 60, being a reaction to a prior material breach of the treaty by another party, or under any of the accepted circumstances precluding wrongfulness of State conduct, or under the UN Charter,[50] it does not qualify as a material breach.[51] On the other hand, where a treaty violation can be objectively established, it need not be based on any subjective fault.[52]

32 Art 60 para 3 lit b does not qualify the violation of an essential treaty provision any further. It thus seems to permit reactive termination or suspension of a treaty already in the event of what amounts to no more than **a minor or trivial violation of an essential provision**. On the other hand, lit b was obviously meant to cover only cases in which the violation seriously jeopardizes the accomplishment of the treaty's object or purpose. A minor violation of an essential provision will not often pose such a serious threat.[53] In this context, it should also be remembered that both lit a and lit b were intended to define treaty violations of equivalent gravity. However, a trivial violation of an essential treaty provision will hardly ever be commensurate with an outright repudiation of the treaty as a whole.

33 The UN Security Council has adopted the concept of "material breach" and applied it to cases of serious violations by States of cease-fire obligations imposed on them by a decision in the sense of Art 25 UN Charter, taken under Chapter VII.[54] The legal consequences of that practice, including possible analogies to Art 60, remain unclear. Some States have taken the view, disputed by other States, that the **determination by the Security Council that a material breach of a cease-fire** has occurred entitles them to disregard that cease-fire and again make use of an earlier Security Council authorization to use armed force against the defaulting State.[55]

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[50] *Cf* Art 20 *et seq* ILC Articles on Responsibility of States (n 7).

[51] *MM Gomaa* Suspension or Termination of Treaties on Grounds of Breach (1996) 36, 44.

[52] *C Feist* Kündigung, Rücktritt und Suspendierung von multilateralen Verträgen (2001) 135.

[53] *Cf E Schwelb* Termination or Suspension of the Operation of a Treaty as a Consequence of Its Breach (1967) 7 IJIL 309, 314 *et seq*. However, see also *Moore* (n 8) 923 *et seq*. According to the Restatement of the Law Third: The Foreign Relations Law of the United States Vol 1 (1987) 217 para 335 comment b, only a "significant" violation of an essential provision amounts to a material breach. *FL Kirgis Jr* Some Lingering Questions about Article 60 of the Vienna Convention on the Law of Treaties (1989) 22 Cornell ILJ 549, 550 *et seq*. But see *Gomaa* (n 51) 121; *B Simma*/*C Tams* in *Corten*/*Klein* Art 60 MN 18 *et seq*.

[54] UNSC Res 707 (1991), 15 August 1991, UN Doc SC/RES/707, para 1; UNSC Res 1441 (2002), 8 November 2002, UN Doc SC/RES/1441, para 1 – both concerning Iraq. See *Aust* 295.

[55] *SD Murphy* Contemporary Practice of the United States Relating to International Law, (2002) 96 AJIL 956 *et seq*.

4. Special Rules for Fundamental Breach?

Although the ILC deliberately used the term "material" breach instead of 'fundamental' breach because it considered the latter term as being too narrow, one can of course still use that term for a particularly serious breach, which goes to the root of a treaty.[56] However, the question is whether the **narrower concept of a fundamental breach** will give rise to legal consequences going beyond those of Art 60 in conjunction with Arts 65–68. It has been suggested that a fundamental breach by one State entitles the other parties to suspend the operation of the treaty with immediate effect, relieving them from observing the procedural requirements of Arts 65 *et seq*.[57] As the VCLT does not provide for such a legal consequence, it could only be justified as a countermeasure pursuant to the international legal rules on State responsibility (→ Art 73).[58] **34**

II. Procedural Safeguards

In its comments on Art 42 of the 1963 ILC Draft, the UK government underlined the **necessity of preventing abuse of the right to terminate a treaty on account of material breach** and therefore demanded that it should be established by independent adjudication whether a breach had in fact occurred.[59] The procedural safeguards of Draft Art 51 (now Art 65) were considered too weak. The Swedish government, on the other hand, considered even those procedural safeguards as too cumbersome to offer "an adequate and sufficiently rapid response to the urgent problem of breach of a treaty". In some cases, the unilateral suspension or termination of treaties should be permitted.[60] **35**

The ILC deliberately used the formula "invoke as a ground" in Art 60 para 1, para 2 lit b and c (but not in lit a)[61] in order to emphasize that the provision did not give any States Parties "a right arbitrarily to pronounce the treaty terminated".[62] Rather, **Art 60 must be read together with Art 65** pursuant to which a States Parties claiming that a material breach has occurred can proceed to suspension or termination only if no other party has raised objection within a reasonable period of time after the claim was made. Otherwise, a dispute arises, which has to be settled according to the ordinary means indicated in Art 33 of the UN Charter. **36**

The ILC did not touch upon the question of what should happen if no settlement could be reached. The Vienna Conference then added Art 66 lit b and the Annex, **37**

[56] *Aust* 296.

[57] *Ibid*.

[58] See Arts 49–54 ILC Articles on Responsibility of States (n 7).

[59] *Waldock* V 34.

[60] *Ibid*.

[61] See → MN 54 *et seq* as to whether lit a is subject to procedural requirements.

[62] Final Draft, Commentary to Art 57, 254 para 6.

establishing a **compulsory conciliation procedure** where no settlement has been reached within 12 months. Although para 6 of the Annex expressly states that the report of the conciliation commission shall not be binding upon the parties but merely have the character of recommendations, a number of States have made reservations to Art 66 and the Annex. This is another instance demonstrating the limits of international law in the contemporary international community.

38 In any event, the defaulting party can, by simply raising an objection, considerably **delay any legitimate reaction by the other parties to the material breach** it committed. Art 27 Harvard Draft[63] tried to protect the innocent parties by giving each of them the right to suspend provisionally performance of its treaty obligations *vis-à-vis* the State charged with breach of treaty. It also provided that each party would bear the risk that such a provisional suspension pending settlement of the dispute on appropriate reactions to an alleged breach of treaty would later prove to have been unjustified.

39 Neither Art 60 nor Arts 65–68 contain any basis for the assumption that the VCLT permits such **provisional suspension**. However, it can be justified as a countermeasure taken pursuant to the law of State responsibility, which the VCLT does not intend to prejudge (Art 73).[64] Art 52 para 2 Articles on Responsibility of States[65] expressly provides that the procedural conditions relating to resort to countermeasures do not prevent an injured State from taking such urgent countermeasures as are necessary to preserve its rights. As an alternative, one can resort to the maxim *inadimplenti non est adimplendum* to permit a non-breaching party to suspend provisionally its own performance in reaction to a material breach.[66] In any event, a party opting for provisional non-performance does so at its own risk and will be liable to make reparation if it later turns out that there was no material breach.[67]

III. Material Breach of Bilateral Treaties (para 1)

40 The regulation of reactions to the **breach of bilateral treaties** was considered as unproblematic by both the ILC and the Vienna Conference, because their termination or suspension will affect only the defaulting party. However, there too, only the material breach by one party will trigger the other party's right of reaction, because

[63] Harvard Draft 662.

[64] *Gomaa* (n 51) 121 *et seq; Dahm/Delbrück/Wolfrum* (n 13) 736; *Kirgis* (n 53) 558 *et seq* (relying alternatively on reciprocity or reprisal). See also *Aust* 293.

[65] ILC Articles on Responsibility of States (n 7).

[66] *E Jiménez de Aréchaga* International Law in the Past Third of a Century (1978) 159 RdC 1, 81, 83 (for a material breach of a bilateral treaty and the relationship between the defaulting State and the party specially affected by the material breach of a multilateral treaty), quoted approvingly by *Sinclair* 188 *et seq*.

[67] For the question whether Art 60 permits resort to either the *exceptio* or countermeasures → MN 72–80.

the **stability of treaties** would be called in question if termination or suspension were made too easy.

The notification under Art 65 para 1 in which a States Parties invokes a material breach by the other party of a bilateral treaty (and correspondingly by another party of a multilateral treaty) must not be made before that breach has actually taken place.[68] Such a **premature notification is invalid** and has to be made once more after the breach has occurred. **41**

In accordance with a general principle of law, a States Parties cannot invoke a material breach by another party, if that breach resulted from the former party's own illegal act, which prevented the other party from fulfilling the treaty obligation.[69] Relying on Art 60 would in such a case amount to an **abuse of rights**. What was expressly laid down in Art 61 para 2 and Art 62 para 2 lit b thus also applies in the case of Art 60.[70] **42**

Art 60 para 1 gives the injured party discretion as to whether it opts for termination, for complete or for only partial suspension of the operation of the treaty. A bilateral treaty relationship is so seriously damaged by a material breach of one party that it cannot but be left to the aggrieved party to decide if and to what extent that damage is reparable. It is almost inconceivable that a State might abuse its discretion or violate any notion of proportionality. When the injured party has opted for complete or partial suspension and the defaulting party later terminates the material breach and resumes full compliance, the suspension must also be brought to an end.[71] **43**

The reactive rights of the injured party are **limited to the same bilateral treaty** that was broken by the defaulting State. The former cannot rely on Art 60 para 1 to terminate or suspend the operation of another treaty, not even if that treaty is closely related to the one that was broken.[72] An injured party wishing to extend its response beyond the specific treaty relationship must resort to countermeasures in accordance with the law on State responsibility. **44**

Art 60 para 1 formulates a right of the innocent party faced with a material breach by the other party. The non-breaching party remains free not to pursue either the termination or the suspension option and **instead demand that the defaulting party terminate the breach and resume performance of the treaty** and perhaps also provide compensation for any damage caused. In other words, a party cannot by material breach bring about the terminative or suspensive consequences of Arts 70 and 72 against the will of the innocent party.[73] **45**

[68] *Gabčíkovo-Nagymaros Project* (n 40) para 108.

[69] *Ibid* para 110.

[70] *B Simma/C Tams* in *Corten/Klein* Art 60 MN 60.

[71] *Moore* (n 8) 957 *et seq*.

[72] *B Simma/C Tams* in *Corten/Klein* Art 60 MN 54.

[73] *Villiger* Art 60 MN 6.

IV. Material Breach of Multilateral Treaties (para 2)

1. Preserving the Stability of Multilateral Treaties as a Goal

46 The long and intricate rules on permissible reactions to the material breach of a multilateral treaty in Art 60 para 2 form the core of the provision. They were intensively discussed in the ILC and at the Vienna Conference. One of the controversial issues was whether a distinction had to be made between **contractual treaties (*traités-contrats*)** on the reciprocal exchange of contractual performances, which were essentially bilateral in their application, and **law-making (normative) treaties (*traités-lois*)**, which established normative obligations in the interest of the international community as a whole (*eg* the VCLT or UNCLOS). While permitting other parties unilaterally to terminate or suspend the operation of contractual treaties in reaction to their material breach by one party was unproblematic, normative treaties were different, their stability and effectiveness being a matter of general interest.[74]

47 The ILC refused to take up that distinction, which had been proposed by the former Special Rapporteur *Fitzmaurice*,[75] not only because it was difficult to draw in practice. As SR *Waldock* also pointed out, normative treaties rather often contain denunciation clauses, giving each party the right to withdraw at will. It was thus difficult to argue that withdrawal in reaction to a material breach should be made more difficult.[76]

48 However, the argument that a material breach of a multilateral treaty by one party should not necessarily permit any other party to suspend or terminate its own membership in that treaty induced the ILC to change its Draft Art 42 para 2 into what is now Art 60 para 2 VCLT. Whereas Art 60 para 2 lit a VCLT by and large mirrors Draft Art 42 para 2 lit b, Draft Art 42 para 2 lit a, which would have entitled any party to invoke the breach as a ground for suspending the operation of the multilateral treaty in the relation between itself and the defaulting State, was split up in two alternatives: Art 60 para 2 lit b and c VCLT. Under lit b, only a party specially affected by the material breach can invoke it as a ground for suspending the operation of the treaty in the relations between itself and the defaulting State. All the other parties not so affected have no such right, except within the strict limits of lit c, which refers to a narrow category of treaties only.

49 Thus, pursuant to the law of treaties, the majority of the parties to the majority of the multilateral treaties are left with **no individual reactive rights at all to a material breach**. As the ILC and the Vienna Conference considered this result to be a necessary tribute to be paid to the stability of multilateral treaties, it cannot simply be overturned by resorting to countermeasures under the law of State responsibility. Thus, a States Parties not specially affected by the material breach of a treaty not

[74] See the comments by Portugal and the United States on Art 42 of the 1963 ILC Draft, *Waldock* V 34 *et seq*.

[75] Draft Art 19 as included in *Fitzmaurice* II 31 *et seq,* 54 *et seq*.

[76] *Waldock* V 35 para 1.

falling under Art 60 para 2 lit c does not qualify as an "injured State" in the sense of Art 42 lit b ILC Articles on Responsibility of States.[77] The ILC closely modelled this particular provision on Art 60 VCLT.[78]

50 Art 60 para 2 tries to preserve the stability of multilateral treaties to the extent compatible with the protection of the legitimate interests of the parties affected by the material breach. This suggests that the rights of the other parties to react pursuant to the law of treaties are subject to the **principle of proportionality** in the same way as their rights to react under the law of State responsibility.[79] This means that only the suspension of the operation of a treaty is permitted where termination would be an overreaction.[80] Where the suspension of the operation of part of the treaty sufficiently protects the interests of the other parties, taking into consideration the seriousness of the breach, suspending the operation of the treaty in whole would be disproportionate. It has also been suggested that a party specially affected by the breach may suspend the operation of only those treaty provisions that are on a reciprocal (*do ut des*) footing with the obligations breached by the defaulting State.[81] In any event, the principle of proportionality leaves the other parties a certain margin of discretion, taking into consideration that their reaction also contributes to upholding the inviolability of treaties (*pacta sunt servanda*). Where the other parties react jointly (lit a), that margin will be somewhat greater than where one party reacts individually (lit b and c).

51 Where the multilateral treaty provides rights or obligations for third States in conformity with Arts 34 *et seq*, the position of these States may not be affected by the reaction of parties to the material breach but in conformity with Art 37. Where the multilateral treaty is the **constituent instrument of an international organization** (→ Art 5), the organization's position must not be affected either, especially if it has an international legal personality of its own. This will usually result either from express provisions in the constituent instrument applicable in the event of a breach, or from implicit rules reasonably to be derived from that instrument, taking into account its object and purpose (Art 60 para 4, → MN 68 *et seq*).

2. Rights of Other Parties Reacting Collectively (lit a)

52 When one States Parties commits a material breach of a multilateral treaty, the other States Parties are free to agree on whatever collective reaction they consider as

[77] ILC Articles on State Responsibility (n 7).

[78] See the ILC's commentary to Art 42 [2001-II/2] YbILC 117 para 4.

[79] Art 51 ILC Articles on Responsibility of States (n 7). It has been argued that the principle of proportionality is a general principle of international law (*J Delbrück* Proportionality (1997) 3 EPIL 1140 *et seq*; *B Simma/C Tams* in *Corten/Klein* Art 60 MN 63 *et seq*); *Villiger* Art 60 MN 6. But see *Gomaa* (n 51) 120 *et seq*: proportionality need not be observed in the context of Art 60 beyond what is already pre-built into the mechanisms of that provision. See also *Capotorti* (n 6) 551; *C Laly-Chevalier* La violation du traité (2005) 476 *et seq*.

[80] *Villiger* Art 60 MN 9.

[81] *Dahm/Delbrück/Wolfrum* (n 13) 736.

appropriate – either suspension in whole or in part or termination of the treaty (*chapeau*) and each of the two either only in the relations between themselves and the defaulting State (cl i) or as between all the parties (cl ii). The fate of the treaty as a whole as well as the defaulting State's position as a party are left to the **discretion of the other members of the treaty community**: they are free even to abandon the treaty (termination alternative, cl ii) or to expel the defaulting State (termination alternative, cl i), the defaulting State being given no influence on their decision.

53 As lit a speaks of "agreement" and not "treaty" (Art 2 para 1 lit a), it covers informal agreements not reduced to writing. On the other hand, the unanimity requirement should be interpreted strictly in the sense of positive unanimity and not only of absence of objections, given the far-reaching character of the reactive rights of the collective non-breaching parties.[82] There is practically **no international practice along the lines of lit a**, either antedating or following the entry into force of the VCLT. It could be used to expel Member States from international organizations for having committed a material breach of the constituent instrument, where that instrument contains neither express nor implied rules regulating that matter.[83]

54 In contrast to lit b and c, the unanimous reaction of the other States Parties to a material breach by one party in lit a is not formulated as a right "to invoke the breach as a ground", referring to the procedural safeguards of Arts 65–68, but as a right to effect the suspension or termination agreed to immediately. When the **phraseological differences within Art 60 para 2** were debated at the Vienna Conference, a relative majority voted for an amendment reformulating lit a along the lines of lit b and c, and only a bare quarter rejected it, yet the present formulation was maintained because the amendment failed to obtain the two-thirds majority required by the Conference's Rules of Procedure (→ MN 18). On this background, the different wording of lit a is not accidental, nor is it cogent enough to cut off further arguments.

55 Anyhow, a relatively large number of States would have preferred to clarify through a reformulation of lit a that the usual procedural safeguards do apply. It is indeed questionable whether in the case of an alleged material breach of a treaty by one party, the other parties should, if they all agree, have the right to **bring about a *fait accompli* and leave the defaulting party without any protection**. The mastership over a treaty, including the accompanying procedural safeguards, is vested in all the parties acting jointly, and not in all the parties minus one.[84] This is why there are several "most highly qualified publicists" in the sense of Art 38 para 1 lit d of the ICJ Statute who see good reason why Arts 65 *et seq* should apply in the case of Art 60 para 2 lit a.[85]

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[82] *B Simma*/*C Tams* in *Corten*/*Klein* Art 60 MN 28.

[83] *Ibid* MN 29 *et seq*.

[84] But see *Dahm*/*Delbrück*/*Wolfrum* (n 13) 738.

[85] *Aust* 294; *R Jennings*/*A Watts* Oppenheim's International Law Vol I Parts 2–4 (9th edn 1992) 1302 footnote 5 ("there is a question whether the procedural provisions in Art 65 apply"). See also *Sinclair* 189 who questions whether the requirement of unanimous agreement provides adequate guarantees against arbitrary action.

The initial clause used in Art 65 ("a party which") can be understood as *pars pro toto,* covering more than one party and potentially also all the other parties to the treaty except the defaulting State. Although it may be less likely that all the parties to a treaty but one band together for the purpose of arbitrarily depriving that one remaining party of its rights, the **object and purpose of the procedural safeguards in Arts 65 *et seq* speak for applying them in the case of lit a**. However, when ratifying the VCLT, the parties can be deemed to have knowingly accepted the different wording of lit a and the inference which can be drawn therefrom. Moreover, that difference was maintained in Art 60 para 2 VCLT II without hesitation. Thus, *de lege lata* there is ultimately no other way but denying the (allegedly) defaulting State any procedural safeguards in the case of lit a.[86] **56**

3. Rights of an Individual Party Specially Affected by Breach (lit b)

The ILC deliberately limited an individual party, when reacting alone to a material breach of a multilateral treaty, to suspending the operation of that treaty in whole or in part only in the relations between itself and the defaulting State and denied it the right to withdraw. The ILC believed that such **relative suspension was sufficient to provide adequate protection** even to a State specially affected by the breach, while at the same time safeguarding the interests of the other parties. This was of particular importance with regard to general multilateral treaties of a law-making character.[87] The Special Rapporteur further explained that every party to a multilateral treaty had a right to the observance of the treaty by every other party. The breach of the treaty by one party should therefore not jeopardize the security of the rights and obligations of the other parties as between themselves, unless they all agree (lit a).[88] **57**

The provision **does not define when a party is specially affected** by a material breach, leaving that to intuition. One instance mentioned in passing in the discussions was in relation to the VCCR: when State A denies a consular agent of State B immunity or fails to protect that State's consular premises in violation of the Convention, only State B is specially affected by that material breach.[89] **58**

The ILC re-used the formulation of lit b in Art 42 lit b cl i ILC Articles on Responsibility of States, where it defined the notion of "injured State". In the relevant commentary, the ILC spoke of the possibility that a wrongful act (for which in our context read "material breach") may have **particularly adverse effects on one State or on a small group of States** for which it gave the following example: a case of pollution of the high seas in breach of Art 194 UNCLOS may have a **59**

[86] *B Simma/C Tams* in *Corten/Klein* Art 60 MN 68.

[87] Final Draft, Commentary to Art 57, 255 para 7.

[88] *Waldock* V 36.

[89] *Ibid* 35.

particularly negative impact on the beaches or coastal fisheries of those States Parties closest to the locality where the pollution occurred.[90]

60 In that context, the ILC also explained that neither Art 42 lit b cl i of the Draft Articles nor Art 60 para 2 lit b

> "define the nature or extent of the special impact that a State must have sustained in order to be considered 'injured'. This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed."[91]

4. Rights of Any Other Individual Party (lit c)

61 Art 60 para 2 lit c was added in reaction to comments by governments, which referred to **special types of treaty**, in particular disarmament treaties and nuclear-free zone treaties,[92] where the material breach by one party undermines the whole treaty regime as between all the parties and destroys the basis for the further performance of the treaty by each of them.[93] With these types of treaty, the performance of the treaty obligation by the defaulting State is a necessary condition of its performance by all the other States, so that one can speak of **integral or interdependent obligation**.[94]

62 In the technical sense of the term, no party is "specially affected" by the breach of such a treaty because they are all equally affected. Apart from that, the suspension of the performance of disarmament obligations by an individual non-breaching party *vis-à-vis* the defaulting State only, as foreseen in lit b, would not help to safeguard the interests of that party. For by starting rearmament, it would necessarily violate its treaty obligations *vis-à-vis* all the other innocent parties.

63 The ILC thought that in such a situation it would not be appropriate to require the individual party first to obtain the agreement of all the other innocent parties under lit a. Rather, each party should individually be entitled to suspend the operation of the "integral" treaty in its relations with all the other parties.[95] On the other hand, the ILC decided that even in the situation of lit c, **individual reaction should be limited to suspension and not include withdrawal**, *ie* the definite termination of the treaty relationship (→ MN 15). It has been correctly observed that it may be difficult to distinguish in practice between the effects of suspension and withdrawal,

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[90] [2001-II/2] YbILC 119 para 12.

[91] *Ibid.*

[92] The first example is mentioned in Final Draft, Commentary to Art 57, 255 para 8, the second in the commentary to Art 42 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts [2001-II/2] YbILC 119 para 13.

[93] Final Draft, Commentary to Art 57, 255 para 8.

[94] See ILC commentary to Art 42 of the Draft Articles on Responsibility of States for Internationally Wrongful [2001-II/2] YbILC 117–118 paras 4–5.

[95] Final Draft, Commentary to Art 57, 255 para 8.

"except that future full participation is facilitated by mere suspension, and that suspension may be merely partial".[96]

5. Relation Between Collective Responses (lit a) and Individual Responses (lit b and c) to Material Breaches

The sequence of the three variants of possible reactions of the other States Parties to a material breach as listed in Art 60 seems to indicate that their concerted reaction (lit a) is preferable. This is because their **unanimous agreement** provides a better **safeguard against arbitrary encroachments upon the security of treaties** than that of individual reactions. **64**

This raises the question whether individual reactions pursuant to lit b or c should be made conditional on **prior good faith efforts to reach a unanimous agreement** among all the non-breaching parties under lit a. However, as Art 60 para 2 is formulated in the sense of entitlements and does not include any such procedural requirement, from the standpoint of positive law (*lex lata*), the question can only be denied. **65**

However, as individual reactions pursuant to lit b and c are subject to the procedural safeguards of Arts 65 *et seq,* any other party can raise an **objection** on the grounds that it considers the **individual reaction premature** and would prefer a collective reaction pursuant to lit a, although the latter option does not have priority on purely legal terms. Such an objection will then initiate a period of contemplation, negotiations and ultimately conciliation, which may ultimately lead to a unanimous agreement in the sense of lit a. **66**

6. Additional Constraints on Reactive Rights Paralleling Those with Regard to Bilateral Treaties

Apart from the special constraints that Art 60 para 2 imposes on reactive termination and suspension of multilateral treaties, the constraints already explained with regard to bilateral treaties also apply (→ MN 40 *et seq*). **67**

V. Residuary Character (para 4) and Relationship with Other Rules of International Law

1. Overriding Provisions in the Specific Treaty Broken

Art 60 para 4 is an instance of the ***lex specialis* maxim**.[97] Its origin was Draft Art 20 para 5 proposed by SR *Waldock,* which specifically dealt with "a material breach of a treaty which is the constituent instrument of an international organization, or **68**

[96] *Jennings/Watts* (n 85) 1302 footnote 6.

[97] *B Simma/C Tams* in *Corten/Klein* Art 60 MN 12.

which has been concluded within an international organization". In these cases, the question of termination or suspension was to be determined by decision of the competent organ of the organization concerned.[98] That proposal was then generalized so as in particular also to include special treaty provisions on dispute settlement. Examples which come to mind are Art 19 UN Charter, Art 8 Statute of the Council of Europe,[99] Art 23 Dispute Settlement Understanding (Annex 2 of the WTO Agreement) and Art 96 Cotonou Partnership Agreement.[100]

69 In more general terms, Art 60 para 4 covers both substantive *leges speciales* in the relevant treaty that either limit, modify or extend the rights of the parties faced with a material breach and procedural *leges speciales* on how to exercise those rights and settle disputes.[101] Art 60 para 4 also applies where the treaty broken establishes a **self-contained regime**, exhaustively regulating the permissible responses to a material breach and thereby prohibiting others, including those envisaged in Art 60 paras 1–3. The ICJ has considered the VCDR a self-contained regime and ruled that a breach of this Convention by one party (*eg* espionage by diplomats) does not permit another party injured thereby to react in forms other than those provided therein (*eg,* Art 9 VCDR).[102] I would be reluctant to interpret this judgement which dealt with hostage taking as also prohibiting a State specially affected by a material breach of the VCDR from resorting to the regular responses of Art 60 para 2 lit b. In any event, the inviolability of the diplomatic premises and of the diplomatic agents and their family must be respected at all times.[103]

70 The **European integration treaties (TEU and TFEU)** establish another self-contained regime in two respects. First, according to the constant jurisprudence of the ECJ, an EU Member State cannot invoke a breach of the TEU or the TFEU by another Member State nor by an EU organ to withhold its own performance. This is because those treaties exhaustively regulate such conflicts in Art 258 and Art 259 TFEU.[104] From the perspective of the VCLT, that jurisprudence can either be based on an unwritten *lex specialis* in the treaties in the sense of Art 60 para 4 or on the special nature of those Treaties which are not governed by international law in the sense of Art 2 para 1 lit a. Secondly, the Treaties do not permit the expulsion of an EU Member states which has committed a material breach nor the suspension of the operation of the TEU and TFEU beyond what is permitted under Art 7 TEU.

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[98] *Waldock* II 73.

[99] ETS 1.

[100] 2000 Cotonou Partnership Agreement between the members of the ACP Group of States and the EC and its Member States [2000] OJ L 317, 3.

[101] *B Simma* Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law (1970) 20 ZÖR 5, 82.

[102] ICJ *United States Diplomatic and Consular Staff in Tehran (United States v Iran)* [1980] ICJ Rep 3, paras 80 *et seq*.

[103] *B Simma/C Tams* in *Corten/Klein* Art 60 MN 50 *et seq*.

[104] ECJ (CJ) *Commission v Italy* Case 52/75 [1976] 277, paras 11–13; *Commission v France* 232/78 [1979] ECR 2729, para 9; *Commission v Germany* 325/82 [1984] ECR 777, para 11.

2. Relationship with Other Provisions of the Convention

Within the VCLT, Art 60 constitutes *lex specialis* with regard to the rules on separability of treaty provisions to the effect that the party or parties reacting to a material breach are free to decide to what extent they suspend the operation of or terminate the treaty (Art 44 para 2). However, in making their choice, they are bound to observe the **principle of proportionality** (→ MN 50).[105] Conversely, the rights under Art 60 are subject to forfeiture in accordance with Art 45. Finally, Art 30 para 5 indicates that the conclusion or application of a later incompatible treaty in a case where not all the parties to the earlier treaty are also parties to that later treaty potentially constitutes a material breach of the earlier treaty *vis-à-vis* those States that are parties only to the earlier treaty. **71**

3. Relationship with Similar Rules of International Law

a) *Exceptio Inadimpleti Contractus*

Art 60 codifies and carefully circumscribes the *exceptio inadimpleti contractus,* which is both a general principle of law and part of customary international law. Invoking that ***exceptio* is not equivalent to the suspension** of the operation of the relevant treaty. Pursuant to Art 72 para 1 lit a, suspension releases both parties from the obligation to perform the treaty in their mutual relations. In difference thereto, the *exceptio* will only benefit the innocent party, entitling it to suspend the performance of its obligations, while the other State whose non-performance has given rise to the *exceptio* remains obliged to perform. **72**

The carefully drafted Art 60 is apparently intended to codify exhaustively the permissible responses to treaty violations for the purposes of the law of treaties. Yet, one should not completely exclude **resort to the *exceptio* to fill in gaps** where this can be done without upsetting the balance of interests embodied in Art 60.[106] If interpreted too strictly, Art 60 would fail to attain its ultimate purpose, *ie* to promote the international rule of law: the *exceptio* not only derives from the principle of reciprocity, it is also among the dictates of justice and States Parties might be inclined to circumvent a provision they consider unjust. **73**

Within its remaining scope of application, the *exceptio* can be used only to suspend performance of treaty obligations that are reciprocal to those that the defaulting State failed to perform.[107]

[105] *Kirgis* (n 53) 569 *et seq*.

[106] For an example see → MN 8.

[107] *J Crawford/S Olleson* The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility (2001) 21 AustrYIL 55, 62 *et seq*.

b) Countermeasures

74 Art 60 partly overlaps with the customary international law rules on countermeasures that the ILC has in the meantime attempted to codify in Arts 49–54 of the 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts. The material breach of a treaty always amounts to an internationally wrongful act giving rise to State responsibility in accordance with the relevant rules of customary international law, including those on countermeasures. While Art 60 primarily aims at **restoring the balance of performances within the treaty** at a lower level, having a corrective aim, countermeasures are taken to compel the defaulting party to resume performance at its original level, thus having a **coercive character**. The purposes of both regimes are therefore different.[108] On the other hand, States withholding their own performance under the broken treaty will in many cases pursue both purposes simultaneously.

75 This leaves open the possibility of supplementing Art 60 by resorting to the law on State responsibility,[109] potentially giving another party injured by what is merely a minor breach of a treaty the right to take countermeasures in the form of unilaterally suspending its own performance. However, the question is if, and to what extent, Art 60 exhaustively regulates the permissible reactions to treaty violations. The **careful balancing of interests in Art 60** would be worthless if it could simply be brushed aside by resorting to the regime of State responsibility. A good argument can thus be made for that provision's functioning as *lex specialis*. As such, it would prevent the other parties from resorting to countermeasures for the purpose of justifying their responsive non-performance of the treaty beyond what is permitted under Art 60.

76 On the other hand, Art 73 provides that Art 60 does not prejudge any question arising from State responsibility for treaty violations, and Art 55 ILC Articles on Responsibility of States[110] correspondingly makes clear that Art 60 VCLT is *lex specialis* as to the content of international responsibility only with regard to the law of treaties ("to the extent"). In its commentary on Art 42 ILC Articles on Responsibility of States, the ILC accordingly wrote, "in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity",[111] but without explaining the content of that responsibility any further. It could well be limited to claims of cessation and non-repetition and not include termination or suspension. However, this would significantly reduce the innocent parties' defences with regard to non-material breaches of a treaty, in effect diminishing deterrence for

[108] *L-A Sicilianos* The Relationship Between Reprisals and Denunciation or Suspension of a Treaty (1993) 4 EJIL 341, 345; *Dahm/Delbrück/Wolfrum* (n 13) 732–733.

[109] As the ICJ indicated, a treaty violation not amounting to a material breach may justify the taking of countermeasures (which the Court did not specify any further): ICJ *Gabčíkovo-Nagymaros Project* (n 40) para 106.

[110] ILC Articles on State Responsibility (n 7).

[111] [2001-II/2] YbILC 117 para 4.

a large number of treaty violations.[112] Such a result hardly corresponds with the **general interest of the international community as a whole in the effective implementation of the fundamental principle *pacta sunt servanda***.

Properly interpreted, Art 60 therefore excludes only the termination or suspension of the operation of a treaty in whole in reaction to something other than a material breach. It leaves intact the parties' right, pursuant to the law on State responsibility, as countermeasures, to suspend their own performance of a part of the broken treaty *vis-à-vis* the delinquent State, but only to the extent strictly commensurate with the injury caused by the non-material violation (principle of proportionality).[113] **77**

With respect to multilateral treaties, the law of State responsibility does not give individual parties reactive rights beyond what is permitted under Art 60 para 2 lit b and c. This is because their taking of countermeasures must not interfere with the rights of other innocent parties.[114] **78**

Art 60 certainly leaves room for injured States not only to claim reparation from the defaulting State for the injurious consequences of the treaty violation pursuant to the law of State responsibility.[115] They may also take countermeasures other than withholding their own performance of obligations under the same treaty in order to compel the defaulting State to resume performance of its treaty obligations. **79**

Countermeasures are limited to the temporary non-performance of international obligations by an injured State in order to induce the delinquent State to resume fulfilling its international legal obligations.[116] Their **overlap with Art 60 thus extends only to the suspension of operation of the broken treaty** because treaty termination amounts to a *fait accompli,* which itself could not be terminated as soon as the defaulting State resumes the fulfilment of its treaty obligations.[117] **80**

VI. Inapplicability to Treaties of a Humanitarian Character (para 5)

As already explained above, para 5 was added only at the second session of the Vienna Conference (→ MN 17). The purpose of the underlying Swiss initiative was to guarantee that Art 60 "should not disturb a whole series of conventions relating to **81**

[112] *L Fisler Damrosch* Retaliation or Arbitration – or Both? The 1978 United States-France Aviation Dispute (1980) 74 AJIL 785, 790 *et seq*.

[113] *B Simma* Termination and Suspension of Treaties: Two Recent Austrian Cases (1978) 21 GYIL 74, 85 *et seq*; *Jennings/Watts* (n 85) 1302 footnote 4; *Moore* (n 8) 910; *OY Elagab* The Place of Non-Forcible Counter-Measures in Contemporary International Law in *GS Goodwin-Gill/S Talmon* (eds) Festschrift Brownlie (1999) 125, 147 *et seq*; *B Simma/C Tams* in *Corten/Klein* Art 60 MN 69 *et seq*.

[114] Art 49 para 2 Articles on Responsibility of States (n 7).

[115] Final Draft, Commentary to Art 57, 255 para 6.

[116] See Art 49 para 2, Art 53 ILC Articles on Responsibility of States (n 7).

[117] *Simma* (n 101) 14.

protection of the human person".[118] The Swiss delegate expressly mentioned the virtually universal Geneva Conventions for the protection of war victims, which prohibited reprisals against the protected persons.[119] He also referred to "conventions of equal importance concerning the status of refugees, the prevention of slavery, the prohibition of genocide and the protection of human rights in general". Even a material breach of those conventions by a party should **not give licence to other parties to injure innocent people**. However, the problem of finding a satisfactory definition of the type of treaty concerned was immediately pointed out.[120]

82 At the second session of the Vienna Conference, the necessity of the proposed amendment was questioned in light of Art 43, taking into account that many provisions in conventions of a humanitarian character were at the same time part of general international law, some of them even having *ius cogens* character. However, on the one hand, the conventions sometimes went further, and on the other hand, even something self-evident might be better stated. It was also considered whether denying reactive rights to States injured by a material breach of a humanitarian treaty might ultimately encourage such breaches and therefore actually promote the inhumanity it intends to prevent. However, it had been the **deliberate decision of the 1949 Geneva Conference to prohibit reprisals** against war victims absolutely because of the serious risk of escalating brutalities. Thus, the principle embodied in the Swiss proposal was adopted by 87 votes to none, with 9 abstentions.[121]

83 Art 60 para 5 immunizes certain treaty provisions against collective or individual termination and suspension in reaction to a material breach by one party, formulating an important exception to paras 1–3. Its purpose is to protect humans as "innocent third parties" from falling victim to the **entirely inappropriate negative application of the principle of reciprocity** by States, whose interests have been affected by another State's material breach of a treaty. This corresponds with the invocation of the principle of "universal respect for, and observance of, human rights and fundamental freedoms for all" in the 6th preambulary paragraph of the VCLT. Art 60 para 5 does not extend to para 4, which was made clear by the Drafting Committee of the Conference so as to underline the supremacy of the special rules of the relevant treaty over the more general rules of the VCLT.[122]

84 The practical effects of para 5 make themselves felt in two different ways: (1) where the relevant treaty provision arguably codifies a rule of customary international law, para 5 renders unnecessary the definite proof that this is actually the case

[118]Statement by Swiss delegate *Bindschedler* (Switzerland) UNCLOT I 354–355 para 12.

[119]Art 46 of the 1949 Geneva Convention I 75 UNTS 31; Art 47 Geneva Convention II 75 UNTS 85; Art 13 para 3 Geneva Convention III 75 UNTS 135; Art 33 para 3 Geneva Convention IV 75 UNTS 287. See also Art 20 of the 1977 Protocol I Additional to the Geneva Conventions of 1977 1125 UNTS 3.

[120]Statement by British delegate *Vallat* (United Kingdom) UNCLOT I 359 para 83.

[121]UNCLOT II 109, 112 *et seq*.

[122]UNCLOT II 167 para 29.

and Art 43 therefore neutralizes termination or suspension of that treaty provision; (2) where the relevant treaty provision goes beyond the current state of customary international law, para 5 prevents the lowering of human rights standards with constitutive force.[123]

85 Art 60 para 5 defines the provisions to be immunized rather broadly, yet they must meet two cumulative conditions, they must: (1) be relative to the protection of the human person, and (2) be contained in treaties of a humanitarian character. The humanitarian purpose of para 5 suggests that it should not be interpreted narrowly. The second condition is easily met by both the treaties codifying international humanitarian law and by the **international human rights treaties** at the global and regional level.[124] However, as States will be more inclined to subject to reprisals the mostly foreign persons protected by treaties on humanitarian law than the mostly national persons protected by human rights treaties, the practical effects of Art 60 para 5 will primarily be felt with regard to the former.[125]

86 A treaty can be characterized as humanitarian in the sense of para 5 when its primary purpose is the protection of humans.[126] Pursuant to Art 60, such a treaty cannot be terminated at all, for that would render ineffective all its provisions, including those relating to the protection of the human person.[127] Nor can the operation of any of the latter provisions be suspended. Treaties that prohibit the use of certain **weapons for the sake of humanity**, such as the CWC,[128] are covered by para 5.[129] A treaty whose main purpose is to regulate international relations between States, such as the VCDR, does not fall under para 5. Isolated provisions for the protection of the human person which it contains anyway[130] are then subject to Art 60 paras 1–3, irrespective of Art 60 para 5. However, the relevant treaty can expressly or impliedly prohibit suspension of the operation of those humanitarian provisions in reaction to a material breach, superseding Art 60 paras 1–3 by virtue of Art 60 para 4.

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[123] *G Barile* The Protection of Human Rights in Article 60, Paragraph 5 of the Vienna Convention of [sic] the Law of Treaties in Festschrift Ago Vol 2 (1987) 3 *et seq* seems to underestimate the practical relevance of para 1.

[124] *Feist* (n 52) 156 *et seq*; *Dahm/Delbrück/Wolfrum* (n 13) 739 *et seq*. See also Art 50 para 1 lit b and c Articles on Responsibility of States (n 7).

[125] *A Verdross/B Simma* Universelles Völkerrecht (3rd edn 1984) 518 *et seq*. See also *B Simma/C Tams* in *Corten/Klein* Art 60 MN 45.

[126] *Dahm/Delbrück/Wolfrum* (n 13) 739 *et seq*.

[127] As numerous 'humanitarian' treaties contain denunciation clauses, such as the four Geneva Conventions of 1949, which a party could use instead, this aspect of Art 60 para 5 has little practical relevance. According to Art 43, however, the denunciation will not release the State from its obligations under customary international law of which the humanitarian treaties are declaratory.

[128] (n 47).

[129] *Gomaa* (n 51) 110 *et seq; B Simma/C Tams* in *Corten/Klein* Art 60 MN 47.

[130] See *eg* Art 36 para 1 lit b VCCR.

VII. Article 60 as a Codification of Customary International Law

87 The ICJ has held several times that the rules set forth in Art 60, which were adopted without a dissenting vote, may **"in many respects" be considered as a codification of customary international law**.[131] This formulation raises the question of which, if any, of the paragraphs of Art 60 might not be declaratory of an existing customary law rule. The limitation of the provision to material breach, and probably also the definition given in para 3, is in line with customary international law.[132] So is the priority of relevant provisions of the treaty that was breached, para 4 codifying the generally accepted *lex specialis* maxim. The same holds true for the immunity of human rights provisions in treaties of a humanitarian character to termination and suspension on account of breach, as embodied in para 5.[133] The procedural safeguards established by Art 60 in conjunction with Art 65 "at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith".[134]

88 It is much less certain whether the rather intricate regulations in para 2 pertaining to multilateral treaties, which are the result of long discussions within the ILC and at the Vienna Conference, reflect customary international law. There is no significant States practice either before or after Art 60 entered into force.[135] Whereas the customary law character of lit a can easily be accepted because it codifies the unanimity rule, lit b and c significantly limit the rights of individual parties to react to a material breach. A similar **tendency to limit self-help mechanisms for the sake of legal stability** has found expression in Arts 42, 49 and 54 ILC Articles on Responsibility of States,[136] and there it was also intensively debated. It therefore remains to be seen whether the practice of States not party to the VCLT will virtually uniformly adhere to the rules embodied in Art 60 para 2 lit b and c.

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[132] *Jennings/Watts* (n 85) 1300–1301; *Dahm/Delbrück/Wolfrum* (n 13) 732.

[133] ICJ *Construction of a Wall* (n 131) para 96.

[134] ICJ *Gabčíkovo-Nagymaros Project* (n 40) para 109 – quoting PCIJ *The Factory at Chorzów (Claim for Indemnity)* (Jurisdiction) PCIJ Ser A No 9, 31 (1927).

[135] *Villiger* Art 60 MN 27 *et seq*.

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Article 61

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Contents

A. Purpose and Function

Arts 54–60 regulate the termination or the suspension of the operation of a treaty in consequence of either its own terms or the exercise of a right which it expressly or impliedly grants to a party or which arises out of its breach. In contrast to those provisions, Art 61 and Art 62 deal with **unforeseen developments or events affecting the execution of a treaty, which occur outside of it and subsequent to its conclusion**.[1] Art 61 determines the fate of a treaty following a specific **1**

[1] *Waldock* II 36, 78.

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instance of supervening impossibility of performance, whereas Art 62 covers the fundamental change of circumstances in more general terms (→ MN 39).

2 The ILC stated in 1966 that States practice furnished few examples of treaty termination based on impossibility of performance in the sense of Art 61[2] but in 1982 explained that the principle set forth in it was "so general and so well established" that it could be extended without hesitation to treaties involving international organizations.[3] That principle is the **maxim *ad impossibilia nemo tenetur***.[4] The ICJ has indicated that it considers Art 61 to be declaratory of customary international law.[5]

3 The impossibility of performance constitutes the law of treaties' **counterpart of the *force majeure* defence** in the law of State responsibility,[6] an area which the Convention expressly declines to regulate (→ Art 73). Yet, the ILC considered it desirable to determine the legal consequences under the law of treaties of certain instances of *force majeure* (→ MN 36).

4 In the unlikely event that the parties foresaw the possibility of, and made provisions for, the permanent disappearance or destruction of an object indispensable for the execution of a treaty, their agreed solution will prevail over Art 61, although that provision does not include the "which was not foreseen by the parties"-clause appearing in Art 62 para 1. If the parties agreed that such impossibility should terminate the treaty, or if they so agree after the impossibility occurred, Art 54 lit a or lit b respectively applies. In other words, Art 61 sets out a **subsidiary rule** only, subject to the paramount consensus of the parties, as masters of the treaty.

B. Historical Background and Negotiating History

5 **Art 26 Harvard Draft** referred to the impossibility of the execution of a treaty due to territorial changes.[7] This was to be an exception to the general rule that addition or loss of territory does not deprive a State of rights or relieve it of obligations under a treaty. Examples given in the comment are a treaty provision granting the right of

[2]Final Draft, Commentary to Art 58 (which became Art 61 VCLT) 255, 256 para 2. The Commission did not cite a single real case but only several theoretical examples (→ MN 13). Of those, SR *Waldock* had already remarked: "No doubt, any of these things may happen, but none of them has so far given rise to a leading case or diplomatic incident concerning the dissolution of treaties." *Waldock* II 79 para 5.

[3]Final Draft 1982, Commentary to Art 61, 59 para 1.

[4]*Sinclair* 191; *F Capotorti* L'extinction et la suspension des traités (1971) 134 RdC 417, 527 n 39, considers that principle to be a general principle of law.

[5]ICJ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 3, paras 99, 102 *et seq*.

[6]Art 23 ILC Articles on Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83, Annex.

[7]Harvard Draft 1066.

navigation on a river or lake or fishery rights in certain waters or economic concessions when the State granting those rights later loses the pertinent territory or waters.[8]

The present Art 61 goes back to Draft Art 21 in **SR *Waldock's*** second report, which, however, was much more comprehensive, containing three variants: the impossibility of performance brought about by the disappearance of one party (para 1), the impossibility of performance caused by the disappearance of the treaty's subject-matter (factual impossibility – paras 2 and 3) and the illegality of performance (legal impossibility – para 4).[9] **Only the second variant was carried over into Art 61 para 1**, while the first variant was relinquished to the later work of the ILC on succession of States with respect to treaties (→ Art 73),[10] and the third variant was turned into a provision of its own (Art 64). **6**

> "Article 21 – Dissolution of a treaty in consequence of a supervening impossibility or illegality of performance
>
> 1. (a) Subject to the rules governing State succession in the matter of treaties, if the international personality of one of the parties to a treaty is extinguished, any other party may invoke the extinction of such party –
>
> (i) in the case of a bilateral treaty, as having dissolved the treaty;
>
> (ii) in other cases as having rendered the treaty inapplicable with respect to the extinguished State;
>
> provided always that the extinction of such party was not brought about by means contrary to the provisions of the Charter of the United Nations.
>
> (b) In a case falling under sub-paragraph (a) (ii), if the extinction of the party in question materially affects the fulfilment of the object and purpose of the treaty as between the remaining parties, it may be invoked by any such party as a ground for withdrawing from the treaty.
>
> 2. It shall be open to any party to call for the termination of a treaty if after its entry into force its performance shall have become impossible owing to –
>
> (a) the complete and permanent disappearance or destruction of the physical subject-matter of the rights and obligations contained in the treaty; provided always that it was not the purpose of the treaty to ensure the maintenance of the subject-matter;
>
> (b) the complete and permanent disappearance of a legal arrangement or régime to which the rights and obligations established by the treaty directly relate.
>
> 3. If in a case falling under paragraph 2 there is substantial doubt as to whether the cause of the impossibility of performance will be permanent, the treaty may only be suspended, not terminated. In that event, the operation of the treaty shall remain in suspense until the impossibility of performance has ceased or, as the case may be, has to all appearances become permanent.
>
> 4. It shall be open to any party to call for the termination of a treaty, if after its entry into force the establishment of a new rule of international law having the character of *jus cogens* shall have rendered the performance of the treaty illegal under international law."

When introducing his Draft Art 21, *Waldock* stated that the core of the provision was contained in paras 2 and 3, that he was uncertain whether para 1 should be **7**

[8] *Ibid* 1069.

[9] *Waldock* II, 77 *et seq*. *Waldock* based himself on Draft Art 17 set out in *Fitzmaurice* II 16, 29 *et seq*, 49 *et seq*.

[10] See the 1978 Vienna Convention on Succession of States in Respect of Treaties 1946 UNTS 3.

retained because it was so closely connected with the problem of State succession, and that it might be advisable to embody para 4 in a separate article.[11] Based on proposals of the Drafting Committee, the ILC agreed to delete para 1 on the extinction of a party[12] and to turn para 4 into a separate article.[13] It furthermore decided, again upon the proposal of the Drafting Committee, to merge lit a and b of para 2 into one rule and phrase it in terms broad enough to cover "the disappearance both of the physical subject-matter and of such metaphysical elements as a legal régime". It was also agreed to shorten para 3.[14] Both paragraphs formed the new Draft Art 21 *bis*. Later, the Commission added a third paragraph on the impossibility relating only to particular and separable treaty clauses.[15] Thus, Art 43 of the 1963 ILC Draft emerged, its para 1 dealing with permanent impossibility, its para 2 with temporary impossibility and its para 3 with partial impossibility concerning separable treaty provisions.[16]

8 Based on comments by various governments, the Special Rapporteur in his fifth report completely reformulated Draft Art 43:

> "1. If the total disappearance or destruction of the subject-matter of the rights and obligations contained in a treaty renders its performance temporarily impossible, such impossibility of performance may be invoked as a ground for suspending the operation of the treaty.
> 2. If it is clear that such impossibility of performance will be permanent, it may be invoked as a ground for terminating or withdrawing from the treaty.
> 3. Paragraphs 1 and 2 shall not apply when the impossibility of performance is the result of a breach of the treaty by the party invoking such impossibility.
> 4. If part of the treaty has already been executed, a party which has received benefits under the executed provisions may be required to give equitable compensation to the other party or parties in respect of such benefits."[17]

9 After intensive discussion in the ILC focusing on paras 3 and 4,[18] this version was referred to the **Drafting Committee** which produced the abbreviated text that became Art 58 of the Final Draft[19]:

> "A party may invoke an impossibility of performing a treaty as a ground for terminating it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty."

This text, which mostly mirrors the present Art 61 para 1, was adopted with 13 votes to none, with the abstention of the chairman who thought that impossibility

[11] [1963-I] YbILC 132–133 paras 46–50.

[12] *Ibid* 248 para 4.

[13] *Ibid* 256 *et seq*.

[14] *Ibid* 248 (the quotation is taken from the statement by *Waldock*, para 6).

[15] *Ibid* 295. Now Art 44 para 3.

[16] [1963-II] YbILC 206.

[17] Final Draft, Text of Art 43, 39.

[18] [1966 I/1] YbILC 67 *et seq*.

[19] Final Draft, Text of Art 58, 255.

did not result solely from the disappearance or destruction of an indispensable object but that there might be other cases of impossibility that did not involve any fundamental change of circumstances.[20] In other words, he feared **possible gaps between Art 61 and Art 62**.

As an expert consultant in the Committee of the Whole, *Waldock* explained that the ILC had ultimately not included any reference to one of the parties having illegally caused the supervening impossibility. That problem was only dealt with in Art 62 para 2 lit b, because it was more likely that a fundamental change of circumstances brought about by the acts of one of the parties would become practically significant.[21] It remains unclear, however, why the withdrawal alternative which *Waldock* had added in para 2 of his reformulated Draft Art 43 (→ MN 8) was dropped by the ILC's Drafting Committee. **10**

At the Conference, the Netherlands proposed a two-part amendment so as to restore the aforementioned two aspects of the provision that had been deleted by the Drafting Committee of the ILC.[22] The restoration of the withdrawal alternative to the first sentence was considered a drafting matter whereas the addition of a paragraph on the illegal causation of the impossibility was put to the vote and adopted by 30 votes to 10, with 40 abstentions.[23] On this basis, the Drafting Committee of the Conference formulated the present Art 61, which was approved without a vote by the Committee of the Whole[24] and adopted by the Plenary by 99 votes to none.[25] The ILC later stated that Art 61 "was adopted at the Conference [. . .] without having given rise to particular difficulties".[26] **11**

C. Elements of Article 61

I. Narrow Concept of Impossibility

1. Loss of Indispensable Object Leading to Absolute Impossibility of Performance

In the interest of the stability of treaties, Art 61 is couched in narrow terms covering only **one particular instance of impossibility**.[27] As the title of the provision indicates a comprehensive regulation of supervening impossibility of performance, the ILC itself called it "perhaps a little ambiguous" when reconsidering Art 61 in **12**

[20] [1966 I/1]YbILC, 129 *et seq*.

[21] UNCLOT I 365 para 43.

[22] A/CONF.39/C.1/L.331, UNCLOT III 183 para 531 lit c.

[23] UNCLOT I 365 para 45.

[24] UNCLOT I 479 paras 29 *et seq*.

[25] UNCLOT II 116 para 6.

[26] Final Draft 1982, Commentary to Art 61, 59 para 1.

[27] Remarks by *Waldock* [1966-I/1] YbILC 73 para 24. The narrow scope of Art 61 was considered as unjustified by *Capotorti* (n 4) 529 *et seq*.

1982 in preparation of the VCLT II but left it unchanged because the narrow scope of the norm was made evident by its text.[28] In his ninth report on treaties concluded between States and international organizations or between international organizations, SR *Reuter* indicated that he found the narrow scope of Art 61 as compared with the *force majeure* provision of the Articles on State Responsibility (Art 23) unsatisfactory but felt constrained to retain it for the purposes of the VCLT II.[29]

13 Art 61 requires that the impossibility results from the disappearance or destruction of an object indispensable for the execution of the treaty. One has to **distinguish between such an indispensable object and the object of the treaty as such**. Art 61 does not apply whenever it has become impossible to realize the object and purpose of the treaty but only where this is due to the disappearance or destruction of an indispensable object.[30] As States practice is scarce in this regard, the ILC originally gave the following theoretical examples for the type of cases envisaged: "the submergence of an island, the drying up of a river or the destruction of a dam or hydro-electric installation".[31]

14 The Commission later added that not only a physical object (physical impossibility) but also a **"legal situation"** indispensable for the execution of a treaty could disappear resulting in juridical impossibility. Art 61 would thus also arise where a treaty concerned aid to be given to a trust territory and linked to the trusteeship régime and then that régime later ended.[32] Another instance could be the one referred to in Art 63 – the severance of diplomatic or consular relations indispensable for the application of the treaty (→ MN 42). On the other hand, the emergence for a contracting party of a legal obligation, which renders the execution of a treaty illegal (but not materially impossible), is not covered by Art 61.[33] In the *Gabčíkovo-Nagymaros* case, the ICJ found it unnecessary to determine "whether the term 'object' in Article 61 can also be understood to embrace a legal régime".[34]

15 The loss of territory by a State normally leads only to an adaptation of the purview of its treaties according to the **principle of moving treaty boundaries** (→ Art 29). In exceptional cases, however, impossibility under Art 61 will ensue when the control of a certain territory is indispensable for the execution of a treaty.[35]

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[28] Final Draft 1982, Commentary to Art 61, 59 para 1.

[29] A/CN.4/327 [1980-II/1] YbILC 133 *et seq*.

[30] *P Bodeau-Livinec* in *Corten/Klein* Art 61 MN 12.

[31] Final Draft, Commentary to Art 58, 256 para 2. Further examples are the death of a person to be extradited or the destruction of a work of art to be returned, *A Verdross/B Simma* Universelles Völkerrecht (3rd edn 1984) 522.

[32] Final Draft 1982, Commentary to Art 61, 59 para 3.

[33] *P Bodeau-Livinec* in *Corten/Klein* Art 61 MN 17. A special example of this kind is regulated by Art 64, 71 para 2, *cf P Bodeau-Livinec* in *Corten/Klein* Art 61 MN 21.

[34] ICJ *Gabčíkovo-Nagymaros Project* (n 5) para 103.

[35] *Sinclair* 191 mentions the example of a State, which after having concluded an agreement conceding the use of one of its ports by another State becomes landlocked as a result of the loss or cession of its maritime littoral.

Art 61 only covers the **absolute impossibility** of performing a treaty, whereas the **relative impossibility** (*ie* the radical transformation of the extent of the treaty obligations which renders them excessively burdensome) falls at most under Art 62 or Art 25 ILC Articles on State Responsibility.[36] An example would be a treaty on the supply of certain quantities of raw materials by one State to another if the deposits of the former are unexpectedly exhausted and further performance would require it to buy the owed materials on the world market for an excessively high price. As long as the former State can obtain the raw materials owed by it, there will be no permanent and at most temporary impossibility. **16**

Where financial resources are an object indispensable for the performance of a treaty and a State's own resources cease to exist, *eg* due to a natural disaster, absolute impossibility will not result unless that State is unable to realize other resources. Normally, this will be possible, any **hardship only leading to an instance of relative impossibility** (→ MN 16).[37] If, however, in an exceptional case, the fulfilment of a treaty obligation would jeopardize the very existence of the State or render impossible the performance of essential governmental functions, the States Parties cannot invoke impossibility in the sense of Art 61 but *force majeure* to preclude the wrongfulness of its non-performance (→ MN 37 *et seq*).[38] **17**

2. Supervening Impossibility

As the title of Art 61 clarifies, the provision only regulates the supervening impossibility, *ie* the disappearance or destruction of an indispensable object after "the time when the treaty was entered into".[39] The ILC did not further specify that time. One can draw upon the related provision in Art 62 para 1,[40] which refers to "the time of the conclusion of a treaty" as *terminus post quem*. That term is nowhere expressly defined but as the titles of Part II, Section 1 and 3 of the Convention indicate, the "conclusion" of a treaty usually precedes its entry into force. The decisive act by which a State concludes a treaty is the **expression of its consent to be bound by the treaty**, which is irrevocable even if the treaty has not yet entered into force, provided that such entry into force is not unduly delayed (Art 18 lit b). Leaving aside that exception, the *terminus post quem* for the disappearance or destruction of an indispensable object is the expression of **18**

[36]See the remarks by *de Luna* [1966-I-1] YbILC 71 paras 9 *et seq*.

[37]See also the comment on Harvard draft Art 26, pp. 1069 – 70, and Final Draft 1982, Commentary to Art 61, 59 para 4. As the ICJ remarked in the Gabčíkovo-Nagymaros case (n 5), para 102, Art 61 was not intended to cover the impossibility to make payments because of serious financial difficulties, such a situation at most leading to a preclusion of wrongfulness of non-performance by a party of its treaty obligations.

[38]*Verdross/Simma* (n 31) 522.

[39]This quotation is from the Final Draft, Commentary to Art 58, 256 para 1.

[40]On the relationship between Art 61 and Art 62 → MN 39.

the State's consent to be bound by the treaty, even if the treaty has not yet entered into force.

19 Any impossibility arising before the conclusion of the treaty as defined in the preceding margin note qualifies as **initial impossibility** beyond the scope of Art 61. There is no express provision in the Vienna Convention dealing with initial impossibility,[41] but it may fall under Art 48 (error) read together with Arts 65, 69 in the case of good faith, and under Art 49 (fraud) in the case of bad faith by one of the parties.[42] According to certain authors, a treaty having an impossible object is void.[43]

3. Objective and Subjective Impossibility

20 Two kinds of impossibility have to be distinguished: the **objective impossibility** which occurs if an indispensable object is lost by all the parties to the treaty and the **subjective impossibility** where only one of the parties loses such an object. In the latter case, the impossibility may be absolute or relative, with only absolute impossibility falling under Art 61 (→ MN 16–17). If, *eg*, five States, which each have sovereignty over different islands of an archipelago, conclude a treaty regulating reciprocal access to their islands and the whole archipelago disappears in consequence of a natural catastrophe, an objective impossibility squarely within Art 61 para 1 cl 1 occurs. If only some islands belonging to one of the States disappear, the impossibility will be subjective and absolute, entailing legal consequences only in the treaty relationship between the affected party and each of the other parties. If the natural catastrophe destroys the port facilities of the last-mentioned islands which can be rebuilt, the subjective impossibility will be temporary in the sense of Art 61 para 1 cl 2. The affected State cannot evade its obligation to rebuild the port facilities by relying on excessive costs, relative impossibility remaining outside Art 61.

21 One instance of impossibility not covered by Art 61 is "**the total extinction of the international personality of one of the parties**" although it will always exclude any performance in the case of a bilateral treaty and may well have the same consequence with regard to certain multilateral treaties, where their object and purpose require the participation of the extinct party. The ILC nevertheless

[41] A pertinent provision (Art 15) proposed by SR *Fitzmaurice* in *Fitzmaurice* III 26, 39, was not adopted by the ILC.

[42] See the remarks by *de Luna* [1966-I/1] YbILC 71, para 7. The matter was also discussed at the Conference but without result (see an Ecuadoran amendment UNCLOT III 183 para 531 lit c), which was later withdrawn. Several delegates referred to error, UNCLOT I 362 *et seq*, whereas the Ecuadoran delegate explained that initial impossibility of performing the object of a treaty was distinct from error or fraud and that it should perhaps be regulated in a separate provision, UNCLOT I 364 *et seq*; see also UNCLOT II 116.

[43] *Capotorti* (n 4) 527. But → Art 42 para 1.

decided to exclude the issue because of its **overlap with the problem of succession of States** to treaty rights and obligations, which was under separate study in the Commission (Art 73, 1st variant).[44] The same holds true if the supervening impossibility is the consequence of an outbreak of hostilities (Art 73, 3rd variant).[45]

II. Permanent Impossibility (para 1 cl 1)

Art 61 para 1 cl 1, dealing with the permanent disappearance or destruction of an indispensable object, applies only if it is clear that the impossibility will be permanent. In cases of doubt, only the suspension of the operation of the treaty under cl 2 is permitted.[46] In other words, a party who invokes the impossibility as a ground for terminating or withdrawing from a treaty bears the **burden of proof concerning its permanent nature**. The ILC underlined that it regarded the suspension and not the termination as the desirable course of action in cases of supervening impossibility.[47] For the sake of the principle of *pacta sunt servanda* (Art 26), treaty relationships should be maintained as far and as long as possible.[48] **22**

The destruction or disappearance of an indispensable object does not give rise to permanent impossibility of performance if the object can be replaced.[49] In that case, only Art 61 para 1 cl 2 on temporary impossibility applies. The same holds true if the object of the treaty is a legal regime (→ MN 14), which has not definitively ceased to exist due to the fact that the treaty itself makes available to the parties the necessary means to negotiate the required readjustments.[50] **23**

If the permanent impossibility for one of the reasons recognized by Art 61 is clear, the procedure of terminating or withdrawing from the treaty can be initiated (Art 65).[51] If the permanent character of the impossibility is not clear, para 1, cl 2 applies (→ MN 25). Where the impossibility is obvious to all the parties, they can (even tacitly) waive these procedural requirements.[52] **24**

[44]Final Draft, Commentary to Art 58, 256 para 6; Final Draft 1982, Commentary to Art 61, 59 para 2. According to *Capotorti* (n 4) 533 *et seq*, the extinction of a State leads to the extinction of its treaty relationships quite irrespective of the question of succession and should therefore have been covered by Art 61. See also *P Bodeau-Livinec* in *Corten/Klein* Art 61 MN 23.

[45]See *Waldock* II 79 para 7.

[46]Final Draft, Commentary to Art 58, 256 para 4.

[47]*Ibid.*

[48]*P Bodeau-Livinec* in *Corten/Klein* Art 61 MN 44.

[49]UNCLOT I 479 para 32. Already → MN 16.

[50]See the ICJs *Gabčíkovo-Nagymaros Project* (n 5) para 103.

[51]On the legal consequences, further → MN 30 *et seq*.

[52]*Villiger* Art 61 MN 7.

III. Temporary Impossibility (para 1 cl 2)

25 In all other cases in which it cannot be established that the disappearance or destruction of an indispensable object is permanent, **the temporary character of the impossibility** will be presumed and the suspension of the operation of the treaty then becomes the only permissible option.

> One example of temporary impossibility of fulfilling a certain treaty obligation due to the destruction of indispensable objects is given by *Aust:* at the end of the Falklands conflict in 1982, British forces had taken over 10,000 Argentine prisoners of war who had to be protected from the severe weather. When the tents shipped to the islands for that purpose were lost due to enemy action, it became temporarily impossible for Britain to fulfil its obligation under Art 22 of the Third Geneva Convention[53] that prisoners of war may be interned only in premises located on land. After consultations with the International Committee of the Red Cross, Britain kept the prisoners on ships until their repatriation.[54]

IV. Impossibility Illegally Caused by One Party (para 2)

26 Pursuant to Art 61 para 2, a party may not invoke the impossibility of performance to relieve itself permanently or temporarily from its treaty obligations if it has caused the impossibility by a violation of an international legal obligation owed to any other party to the treaty. The provision was formulated along the same lines as the **equivalent exception in the context of the *clausula rebus sic stantibus*** (Art 62 para 2 lit b, → Art 62 MN 81 *et seq.*). The exception had been missing from both Draft Art 43 (now Art 61) and Draft Art 44 (now Art 62) in the ILC Draft of 1963. Its essence was brought up by Israel and also by Pakistan in their reactions to that draft.[55]

27 Although the exception of illegality obviously reflects a general principle of law that a party cannot take advantage of its own wrong,[56] which is itself an offshoot of the **principle of *bona fides***, there was resistance in the ILC to specifically reflect it in the VCLT. Some members considered it unnecessary, whereas others emphasized the principle's close connection with the issue of State responsibility, which was beyond the scope of their project on the law of treaties (→ Art 73, 2nd variant). The ILC eventually decided to include the exception only in its Draft Art 59 (now Art 62) because "the problem of a fundamental change of circumstances brought about by the acts of one of the parties would be more likely to be significant".[57] In view of the uncertainties surrounding the concept of the *clausula,* it was more

[53] 1949 Convention (III) Relative to the Treatment of Prisoners of War 75 UNTS 135.

[54] *Aust* 297 and 250.

[55] *Waldock* V 37 *et seq*.

[56] *Ibid* 38, quoting PCIJ *The Factory at Chorzów (Claim for Indemnity)* (Jurisdiction) PCIJ Ser A No 9, 31 (1927).

[57] Explanation by *Waldock* (Expert Consultant) UNCLOT I 365 para 43.

important to include the exception as a limiting rule in Art 62.[58] The Conference, however, based on an amendment submitted by the Netherlands,[59] overruled the ILC in this respect and included the exception also in Art 61.[60]

Art 61 para 2 does **not codify an exception of general illegality but of special illegality**: a party loses its right of invoking the supervening impossibility of performance only if the impossibility is the result of an act or omission by that party in breach of either an obligation under that very treaty or another international obligation outside the treaty owed to any other party to that treaty. The violation of an international legal right of a third State is not sufficient unless it gives rise also to a violation of an international obligation owed to a member of the closer 'treaty community'. On the other hand, that other States Parties need not qualify as an "injured State" according to Art 42 of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts.[61] Thus, if a States Parties causes the impossibility by violating an international obligation *erga omnes*, this will bring in Art 61 para 2 even if the strict requirements of Art 42 lit b of the aforementioned Articles are not fulfilled. 28

Art 61 para 2 can have peculiar consequences: it 'punishes' a tort committing State by binding it into a treaty which it can no longer execute and will therefore inevitably violate – a result scarcely compatible with the **general principle *ad impossibilia nemo tenetur*** underlying the provision (→ MN 2).[62] It would have been more apt to terminate the inexecutable treaty obligation but hold the tortfeasor responsible *vis-à-vis* all the other States Parties for the internationally wrongful act by which it destroyed the treaty.[63] 29

V. Legal Consequences

1. Procedural Requirements, Substantive Options and Subjective Impossibility with Regard to Multilateral Treaties

The supervening permanent impossibility of performing a treaty due to a ground recognized in Art 61 **does not trigger any legal automatism**. Rather, in line with Arts 60 and 62, it only creates a right to invoke the impossibility as a ground for terminating the treaty, withdrawing from it or suspending its operation, the use of 30

[58] *Waldock* V 38 para 4.

[59] A/CONF.39/C.1/L.331, UNCLOT III 183 para 531.

[60] *Ibid* 183 para 534. The amendment was adopted by 30 votes to 10, with 40 abstentions. *Capotorti* criticized the Conference for adding para 2 and thereby confounding an issue arising under the law of treaties (impossibility) with an element of the law on State responsibility which should have been kept separate, *Capotorti* (n 4) 532. See also *P Bodeau-Livinec* in *Corten/Klein* Art 61 MN 38 *et seq*.

[61] (n 6).

[62] Also → Art 45, which extends the principle of estoppel to Arts 60 and 62, but not Art 61.

[63] *Capotorti* (n 4) 532.

which initiates the procedure of Arts 65 *et seq* (→ Art 60 MN 35 *et seq*). This is because the ILC anticipated disputes as to whether the conditions of Art 61 were actually met and did not want to enable parties arbitrarily to assert a supposed impossibility of performance as a mere pretext for repudiating a treaty.[64]

31 The substantive options provided to the parties – termination, withdrawal and suspension – have the same meaning in Art 61 as in the other provisions in Part V, Section 3 of the Convention.[65] Where the **impossibility relates only to particular clauses of the treaty**, termination, withdrawal or suspension may only be invoked with regard to those clauses, provided that they are separable in the sense of Art 44 para 3.[66] The right to invoke the impossibility can be lost in accordance with Art 45.

32 The performance of a multilateral treaty may become impossible for only one or a few of the parties while the others still have the object indispensable for the execution of the treaty at their disposal **(subjective impossibility)** (→ MN 20). Normally, this will make **adjustments of the treaty obligations** necessary only in the relation between the 'unable' party or parties and the 'able' parties but not in the *inter se* relations of the latter. But when the subjective impossibility seriously affects the overall balance of the treaty obligations, it possibly amounts to a fundamental change of circumstances in the sense of Art 62 which the 'able' parties can invoke as a ground for withdrawing from the treaty.[67]

2. Which Party Can Invoke the Impossibility?

33 The wording of Art 61 para 1[68] does not make absolutely clear **to which party the right to invoke the impossibility accrues**: is it only the 'incapable' party or parties or is it all the parties?[69] Whereas the provision seems to indicate the former, its correct interpretation depends on how one defines the article's object and purpose (→ Art 31 para 1). If the purpose of the provision is to give an 'incapable' party the opportunity to rid itself of treaty obligations it can no longer fulfill, lest it be compelled first to break the treaty and then invoke *force majeure* as a defence against international responsibility (→ MN 40 *et seq*), the first clause of Art 61

[64] Final Draft, Commentary to Art 58, 256 para 5. *Capotorti* criticized that approach as "illogical" because the objective impossibility of performance could not but automatically put an end to the treaty relationship, *Capotorti* (n 4) 531 *et seq*. See also *P Bodeau-Livinec* in *Corten/Klein* Art 61 MN 32 *et seq*.

[65] → Art 54 MN 18 *et seq* on termination and withdrawal; → Art 57 MN 7 *et seq*.

[66] *Capotorti* (n 4) 528; *Sinclair* 192. However see *P Bodeau-Livinec* in *Corten/Klein* Art 61 MN 18 who believes that the indispensable object will in most cases either relate to the execution of all the treaty clauses or form an essential basis of the consent of the other party or parties.

[67] This is essentially the solution provided by Art 60 para 2 in the case of a material breach of a multilateral treaty by one of the parties.

[68] "A party may invoke *the* impossibility of performing a treaty [. . .]" (emphasis added).

[69] At least the French and the Spanish versions of Art 61 para 1 do not remove this uncertainty: "Une partie peut invoquer l'impossibilité d'exécuter un traité [. . .]"/"Una parte podra alegar la imposibilidad de cumplir un tratado [. . .]."

para 1 should be read in the sense of '[a] party may invoke *its own* impossibility of performing a treaty [. . .]'.[70]

However, Art 61 para 1 could also be read as stating '[a] party may invoke *its own or another party's* impossibility of performing a treaty [. . .]' This reading would be preferable if the purpose of the provision was to enable parties **to bring to an end a treaty relationship which no longer makes sense**. With regard to a bilateral treaty between State A and State B, if only State A becomes permanently incapable of performance for a reason recognized by Art 61, State B should also be able to terminate the treaty. The same holds true with regard to the treaty relationships between an 'incapable' State and each of the 'capable' States Parties to a multilateral treaty. This would also offer a solution for a case in which the 'incapable' State is prevented by Art 61 para 2 from invoking the impossibility.[71] If one chooses the narrow reading of Art 61, restricting the termination power to an 'incapable' and thus necessarily defaulting State, the others would have to rely on Art 60 if the former was unwilling to withdraw or prevented under para 2 from withdrawing. **34**

If one opts for the broader reading, which this author prefers because it is more in line with the **principle of reciprocity**, an analogy to Art 60 para 2 suggests itself: this provision restricts the reaction of individual parties to the non-fulfilment of treaty obligations by one party of a multilateral treaty, giving them only the right to demand the suspension of the treaty's operation while reserving the right to terminate the treaty to the unanimous agreement of the other parties (→ Art 60 MN 52 *et seq*, 57 *et seq*). **35**

3. Equitable Adjustment of Partial Performance Accomplished Before Impossibility Supervenes?

In their written comments on Art 43 of the ILC Draft of 1963, the United States and Venezuela suggested that allowance should be made for cases in which, before the impossibility supervened, one party or some parties had already obtained benefits from the performance of a treaty by the other party or parties without having itself accorded reciprocal benefits. By way of an example, the United States referred to a bilateral treaty in which State A cedes territory to State B in consideration of the latter's obligation to maintain, and permit the use of, a navigable channel in a river and then a natural event shortly after the cession renders the river useless for navigation.[72] SR *Waldock* thereupon added a fourth paragraph to draft Art 43, which was intended to **restore balance between the parties in such instances of partial execution of the treaty** (→ MN 8). **36**

[70]That reading would have been made clear by an amendment proposed to the Conference by Mexico, which was later withdrawn: "A party may invoke *force majeure* as a ground for terminating a treaty when the result of the *force majeure* is to render permanently impossible the fulfilment of its obligations under the treaty [. . .]." *Cf* A/CONF/.39/C.1/L.330, UNCLOT III 182–183 para 531 lit a.

[71]See in this sense also *Villiger* Art 61 MN 10 *et seq*.

[72]*Waldock* V 37.

37 After a lengthy discussion, however, in which it was doubted to what extent the **national law concept of unjust enrichment** had actually become part of international law,[73] the ILC decided against including a pertinent paragraph in Art 61. The problem of equitable adjustment could also arise in the context of other provisions leading to the invalidity or termination of a treaty, such as Arts 48, 49 or Art 62, so that it would have to be dealt with in a general provision in Part V Section 5 regulating the consequences of the invalidity or termination of a treaty.

38 In the context of Art 70 concerning the consequences of the termination of a treaty, the ILC reconsidered this **"extremely thorny subject"**.[74] Although it did not disagree with the concept of equitable adjustment, it ultimately felt that each case would have to be dealt with according to its particular circumstances. In view of the complexity of relations between sovereign States, "it would be difficult to formulate in advance a rule which would operate satisfactorily in each case". The Commission therefore left the matter "to the application of the principle of good faith in the application of the treaties demanded of the parties by the rule *pacta sunt servanda*".[75]

VI. Relationship with Other Rules of International Law

39 The ILC realized that any supervening impossibility of performance necessarily amounted to a fundamental change of circumstances, making **Art 61 *lex specialis* in relation to Art 62**. For two reasons, it nevertheless decided to treat both issues in separate articles: juridically, impossibility of performance and fundamental change of circumstances constituted distinct grounds for terminating or suspending the operation of a treaty.[76] Moreover, the former ground could be defined more clearly so that cases falling under Art 61 were less open to subjective appreciations than those falling under Art 62.[77] However, the Commission recognized that there might be borderline cases in which the two articles overlapped,[78] especially where international organizations were parties to a treaty.[79] Thus, if the narrowly circumscribed conditions of Art 61 are not met in a specific case, one should always also consider Art 62.

40 The regulatory principle of **Art 61 is closely related to the *force majeure* defence in the customary law of State responsibility**,[80] both principles *mutatis mutandis* pertaining to the unforeseen and uncontrollable impossibility of

[73]Remarks by *E Castrén* [1966-I-1] YbILC 68 para 42.

[74]Term used by *Waldock* (Expert Consultant) UNCLOT I 365 para 42.

[75]Final Draft, Commentary to Art 58, 256 para 7; Commentary to Art 66 (now Art 70), 266 para 4.

[76]Final Draft, Commentary to Art 58, 255 *et seq*.

[77]*Waldock* V 38 para 1.

[78]Final Draft, Commentary to Art 58, 256 para 1.

[79]Final Draft 1982, Commentary to Art 61, 59 para 4.

[80]Codified in Art 23 ILC Articles on Responsibility of States (n 6). → MN 3.

performing a certain international legal obligation and resulting in the exoneration of a State from further performance. **The two principles are, however, not exchangeable equivalents**. Rather, Art 61 enables a State to terminate or suspend its primary legal obligations deriving from a treaty, thus preventing the occurrence of a breach of any international obligation from the outset. In difference thereto, the *force majeure* defence precludes the wrongfulness of a treaty violation and thus only prevents the arising of secondary obligations such as compensation.

41 Where a State cannot terminate or suspend treaty obligations pursuant to the narrowly phrased Art 61, it might therefore still be able to escape itself from responsibility for their non-performance on the basis of the **wider concept of *force majeure***. In this context, it should be noted, however, that Art 61 para 2 is less strict than Art 23 para 2 of the Articles on State Responsibility to the extent that it only prevents those parties from invoking the impossibility of performance who have illegally brought it about, whereas according to Art 23 para 2 of the aforementioned Articles, the mere innocent causation of a situation of *force majeure* renders that defence inapplicable.[81]

42 One particular instance of the temporary juridical impossibility of performance is regulated in Art 63.[82] According to this provision, the **severance of diplomatic or consular relations** between parties to a treaty does affect their treaty relationship in an exceptional case where the existence of diplomatic or consular relations is indispensable for the application of the treaty.

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A Verdross/B Simma Universelles Völkerrecht (3rd edn 1984) 522.

[81] In the addendum of 30 April 1999 to his second report on State responsibility, SR *J Crawford* vainly proposed to adopt the concept of Art 61 para 2 for the purposes of Art 23 of the Articles on State Responsibility [1999-II/1] YbILC 66 para 262.

[82] *Capotorti* (n 4) 530; *P Bodeau-Livinec* in *Corten/Klein* Art 61 MN 22.

Article 62

Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
(b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) If the treaty establishes a boundary; or
(b) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.[1]

Contents

[1]The provision is quoted in the version which was published in 1155 UNTS 347. However, different from this version, in the text appearing in Document A/CONF.39/27 (UNCLOT III 287, 297), the first word after (a) and (b) in each of the first two paragraphs ("The" and "If") is spelt with a lower-case letter. Such spelling difference obviously does not affect interpretation.

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A. Purpose and Function

1 In contrast to Arts 54–60 and similar to Art 61, Art 62 makes provision for unforeseen developments or events affecting the execution of a treaty which occur outside of it and subsequent to its conclusion. It covers the fundamental change of circumstances in general terms, whereas **Art 61 deals with one specific instance** – the narrowly defined supervening impossibility of performance (→ Art 61 MN 1; also → MN 65).

2 Art 62 has rightly been called one of the **"fundamental articles"** of the Vienna Convention.[2] It was intensively and controversially debated in the ILC and at the UN Conference on the Law of Treaties, both in the Committee of the Whole in 1968[3] and in the Plenary Meetings in 1969.[4] Although there was a basic consensus that the traditional principle *rebus sic stantibus* had its rightful place in the law of treaties, the ILC and the negotiating States found it very difficult to formulate the pertinent provision of the Convention as precisely, narrowly and fairly as possible. Their difficulties were intensified by the **absence of any general international system of compulsory jurisdiction**,[5] which they were unable to set off in Section 4 on procedure. The procedural safeguards which the ILC attached to Art 62, "having regard to the extreme importance of the stability of treaties to the security of international relations",[6] fall far short of providing a safe route towards the settlement of likely disputes.[7]

3 The principal challenge in formulating Art 62 was to maintain the **proper balance** between on the one hand the **stability ("sanctity") of treaties** as the cornerstone of the international legal order and international relations, which is expressed in the fundamental rule of *pacta sunt servanda* (Art 26),[8] and on the other hand the

[2] See Final Draft 1982, Commentary to Art 62, 60 para 1.

[3] UNCLOT I 365 *et seq*.

[4] UNCLOT II 116 *et seq*.

[5] Final Draft, Commentary to Art 59, 257 para 1.

[6] Final Draft, Commentary to Art 59, 260 para 13.

[7] See Art 65 para 3, 66 lit b in conjunction with the Annex on conciliation which result only in non-binding recommendations by the conciliators (para 6 of the Annex). See *A Verdross/B Simma* Universelles Völkerrecht (3rd edn 1984) 533 MN 837.

[8] True believers in the maxim *pacta sunt servanda* are always inclined to "adopt a defensive attitude to the insidious wiles of that serpent of the law, the *rebus sic stantibus* clause." (Remarks by *Amado* [1963-I] YbILC 142 para 65).

principles of equity and justice calling for the adaptation of treaties to a profoundly changing environment.[9] In this tension, Art 62 cautiously attempts to ensure harmony between the dynamism inherent in the life of the international community, necessitating continuous evolution of international law, and the stability essential in every legal order.[10] One important element in that precarious balance is the limited effect of the article which does not automatically terminate the treaty but instead gives the parties no more than an option to initiate a procedure, however imperfect (→ MN 2), toward terminating or suspending their treaty obligations.

Technically, the provision amounts to an **exception to the rule of *pacta sunt servanda,*** the lifeblood of the international legal order. It was therefore of utmost importance to formulate Art 62 in a way which provides the best possible safeguards against the abuses of subjective interpretation.[11] It would be an intolerable offense against the international rule of law if a party could unilaterally relieve itself of treaty commitments which according to its own subjective interpretation had turned out to be overly burdensome.[12] For this reason, the ILC tried as far as possible to abstract the provision from the subjective expectations of the parties. In particular, it rejected any reference to the '*clausula rebus sic stantibus*' in the sense of a purely fictitious tacit condition implied in any long-term treaty, which would dissolve it in the event of a fundamental change of circumstances. Rather, the ILC formulated the principle "as an objective rule of law"[13] outside the treaty itself and accordingly did not place it among the rules of interpretation in Part III, Section 3 of the Convention, but among the substantive grounds for termination and suspension of treaties in Part V, Section 3.[14] **4**

Art 62 functions as a **strictly circumscribed safety valve in the law of treaties** mitigating what would otherwise amount to excessive rigidity in the rule of *pacta sunt servanda,* which is exacerbated by the presumption against unilateral withdrawal codified in Art 56. If a party considered its treaty obligations as having unexpectedly become too burdensome and oppressive, due to a fundamental change of circumstances, and the law of treaties offered no way out, that party might seek relief outside the law by simply disregarding the treaty.[15] This would indeed **5**

[9]See the 3rd recital of the Preamble of the UN Charter according to which the Peoples of the United Nations are determined "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."

[10]See remarks by the Spanish delegate *de Castro* UNCLOT I 371 para 9, and of the Polish delegate *Wyzner* UNCLOT II 117 para 14.

[11]See the comments by the US Government, quoted in *Waldock* V 40.

[12]See *Fitzmaurice* II 56 para 142, warning against "importing into treaty law a juridical doctrine of release that is wholly at variance with its spirit and fundamental purpose."

[13]Final Draft, Commentary to Art 59, 258 para 7. On the various theories trying to explain the operation of the *rebus sic stantibus* doctrine, see *Waldock* II 82–83 paras 7–8.

[14]Restatement (Third) of the Foreign Relations Law of the United States Vol 1 (1987), MN 336 comment a; *MN Shaw*/*C Fournet* in *Corten*/*Klein* Art 62 MN 4.

[15]Final Draft, Commentary to Art 59, 258 para 6.

seriously jeopardize the sanctity of treaties and perhaps even international peace and security.[16] Permitting the controlled withdrawal of such a party certainly constitutes the lesser evil from the perspective of *pacta sunt servanda* and the international rule of law. **It is not in the interest of the international legal and political order to petrify a treaty which has become anachronistic**.[17] In codifying Art 62, the international community has adopted a soundly realistic perspective on the nature of treaty relations between States.[18]

6 **Art 62 is an escape clause**.[19] It codifies an extraordinary right to seek release from or suspension of treaty obligations whose performance has been rendered something essentially different from that originally undertaken by a profoundly transformed environment.[20] Where a fundamental change of circumstances radically upsets the original balance between the costs and the benefits for a party to a treaty – in a reciprocal treaty between the *quid* and the *quo* – the natural remedy (and the one best compatible with the rule of *pacta sunt servanda)* would be a revision of the treaty so as to adapt it to the new circumstances. A **readjustment of overly burdensome treaty obligations** can, however, only be obtained by an amendment pursuant to Art 39 or Art 40, which requires the consent of the other parties. A 'right' to request the review of the treaty given to the overburdened party would be illusory if the other party or parties were unwilling to accept any modification.[21] The ILC therefore decided to open a way for the overburdened party to terminate or suspend the operation of the treaty. This opportunity should serve as "a lever to induce a spirit of compromise in the other party" or parties,[22] leading to the necessary amendments which adapt the treaty to the new circumstances. Art 62 thus provides a **residuary rule** enabling treaty termination or suspension only as an ***ultima ratio***.[23]

7 In spite of its theoretical importance, which to some is so great that they consider the *rebus sic stantibus* rule as a peremptory norm of international law (*ius cogens*),[24] the **practical relevance of Art 62 is minor**. It does not come into play with regard to treaties which were either concluded for a short duration or which are easily terminable by other means in the sense of Art 54 lit a. Even though Art 62 also covers those treaties, they give the dissatisfied party easier means to apply

[16] See the remarks by *S Rosenne* [1966-I-1] YbILC 79 para 11.

[17] Remarks by *Bartoš* [1966-I-1] YbILC 84 *et seq* para 77.

[18] *MN Shaw*/*C Fournet* in *Corten*/*Klein* Art 62 MN 1 *in fine*.

[19] The term "escape clause" is used by the Restatement (n 14) comment b.

[20] See *Waldock* II 84 para 14.

[21] See *Waldock* V 28 para 5.

[22] Final Draft, Commentary to Art 59 (now Art 62), 258 para 6.

[23] See *G Dahm*/*J Delbrück*/*R Wolfrum* Völkerrecht Vol I/3 (2002) 753. See also → MN 98 on treaty revision as a consequence of a fundamental change of circumstances.

[24] *G Haraszti* Treaties and the Fundamental Change of Circumstances (1975) 146 RdC 1, 57 *et seq* But see *Villiger* Art 62 MN 30.

pressure to the other party or parties to revise the treaty provisions which have become outmoded or excessively burdensome or alternatively to relieve itself from unbearable obligations. Only in a residual number of cases, primarily regarding long-term treaties which permit no withdrawal (→ Art 56), is Art 62 needed as a last resort for a party either to obtain a compromise on treaty revision or terminate its commitment.[25] As a matter of fact, although the VCLT entered into force 30 years ago, there is still a **scarcity of affirmative decisions** on or resort to the provision.[26]

B. Historical Background and Negotiating History

Whereas the exact origin of the principle '*rebus sic stantibus*' is disputed,[27] it was apparently introduced into international law by *Gentili*.[28] Usually formulated as '*conventio omnis intellegitur rebus sic stantibus*', its scope and even its very existence as a legal principle remained controversial in the legal literature through the centuries.[29] While both national and international courts have indicated that they accept the principle in theory as a **rule of reason**, they have shown marked reluctance to apply it in practice, usually finding that its strict requirements were not satisfied in the pending case.[30] **8**

Most prominently, the PCIJ stated in 1932: **9**

> "[a]s the French argument fails on the facts, it becomes unnecessary for the Court to consider any of the questions of principle which arise in connection with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law, the occasions on which and the method by which effect can be given to the theory if recognized, and the question whether it would apply to treaties establishing rights such as that which Switzerland derived from the treaties of 1815 and 1816 [*ie* rights relating to customs territory]."[31]

[25] *Waldock* II 82 para 6; Final Draft, Commentary to Art 59, 258 para 6.

[26] *DF Vagts Rebus* Revisited: Changed Circumstances in Treaty Law (2005) 43 Columbia JTL 459, 474 *et seq*. However, see also *O Dörr* Codifying and Developing Meta-Rules (2006) 49 GYIL 129, 153.

[27] It is uncertain whether the doctrine has its origin in canon law or civil law, *Dahm/Delbrück/Wolfrum* (n 23) 744. See the extensive exposition of the doctrine's sources by *A Vamvoukos* Termination of Treaties in International Law. The Doctrines of *Rebus Sic Stantibus* and *Desuetude* (1985) 5 *et seq*.

[28] De Jure Belli Libri Tres (1612), Liber II, 245: "Iusiurandum intelligitur, *Rebus sic stantibus*." (quoted from the facsimile edition of the Carnegie Endowment for International Peace [The Classics of International Law No 16]).

[29] *R Jennings/A Watts* Oppenheim's International Law Vol I Parts 2–4 (9th edn 1992) 1305–1306 MN 3 and 4.

[30] Final Draft, Commentary to Art 59, 257–258 paras 2–4.

[31] PCIJ *Free Zones of Upper Savoy and the District of Gex* PCIJ Ser A/B No 46, 66 (1932).

10 In States practice, reliance on the concept of *rebus sic stantibus* has not been infrequent, although hardly supportive of any right to denounce a treaty unilaterally solely because of a change of circumstances.[32]

> An important counterexample is the **London Declaration of 1871**[33]: it denied Russia the right of unilateral withdrawal from the provisions of the Treaty of Paris of 1856 concerning the neutralization of the Black Sea which the Czarist Government had tried to base on recent changes in the foundations of the European equilibrium. However, the parties to that treaty agreed to negotiate on and ultimately accepted the revisions demanded by Russia.[34]

11 Although it did not codify any *rebus sic stantibus* rule, the **Covenant of the League of Nations** in Art 19 accepted that treaties may become inapplicable in the course of time so that they need to be reconsidered by the parties. The Assembly of the League was charged with giving appropriate advice.[35] However, in paving the way towards consensual modification of outdated treaties, Art 19 of the Covenant implicitly refused to recognize that the parties had a right of unilateral reaction to a change of circumstances.[36]

12 Based on Art 15 of the (Havana) Convention on Treaties of 20 February 1928,[37] the **Harvard Draft Convention on the Law of Treaties** included the following:

> "Article 28. Rebus Sic Stantibus
>
> (a) A treaty entered into with reference to the existence of a state of facts the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or authority to have ceased to be binding, in the sense of calling for further performance, when that state of facts has been essentially changed.
>
> (b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.

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[32] Final Draft, Commentary to Art 59, 257 paras 4 *et seq*: See also *C Feist* Kündigung, Rücktritt und Suspendierung von multilateralen Verträgen (2001) 168 *et seq*; *Dahm/Delbrück/Wolfrum* (n 23) 746 *et seq*.

[33] The Declaration is quoted → Art 54 MN 13.

[34] *H Lauterpacht* Oppenheim's International Law Vol I (8th edn 1955) 943; *Dahm/Delbrück/Wolfrum* (n 23) 746. See the detailed account by *E Kaufmann* Das Wesen des Völkerrechts und die clausula rebus sic stantibus (1911) 12 *et seq*.

[35] Art 19 was specifically intended to cover cases of fundamental change of circumstances, *W Schücking/H Wehberg* Die Satzung des Völkerbundes (2nd ed. 1924) 661 *et seq*.

[36] See the memorial of the Belgian Government filed with the PCIJ in 1927 in a dispute with China which had denounced a Sino-Belgian treaty of 1865 on the basis of a change of circumstances (PCIJ Ser C No 16-I, 22). After the parties had settled their dispute by a new treaty, the case was withdrawn from the PCIJ.

[37] "The caducity of a treaty may also be declared when it is permanent and of non-continuous application, on condition that the causes which originated it have disappeared and when it may logically be deduced that they will not reappear in the future. The contracting party invoking this caducity may, upon not obtaining the consent of the other party or parties, appeal to arbitration, the contracted obligation to remain in force if a favourable award is not obtained and while the decision is being made." (Quoted from Harvard Draft 1205, 1206).

(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority."[38]

13 As is explained in the extensive comment, the foregoing provision was based on the well-established principle that "one party [. . .] does not have the right to terminate its treaty obligations unilaterally merely upon the ground that it believes that the doctrine of *rebus sic stantibus* is applicable to the treaty".[39] The drafters **avoided putting the final decision into the hands of the party claiming a fundamental change of circumstances**, either immediately or after requesting the other party or parties to agree that the doctrine was applicable. On the other hand, they recognized that no party should have a veto on the application of the doctrine. Their compromise solution was to require both sides to submit to a competent international tribunal or authority[40] to decide on the termination of the treaty. As a means of immediate relief, the provisional suspension by one party of its obligations was to be permitted, but subject to the risk that it was later found unjustified by the competent tribunal or authority so that the suspending party could be held responsible by the other parties for failure to perform its obligations. This mechanism should serve to discourage precipitate provisional suspensions.[41]

14 **Art 14 of the UN Charter**, the successor provision to Art 19 of the League Covenant, codifies the notion of peaceful change. Although it makes no express mention of treaties that have become inapplicable, these are covered.[42] If the General Assembly were to recommend the adaptation of a treaty in view of a fundamental change of circumstances, this would certainly constitute a weighty argument in support of the application of Art 62.[43]

15 The immediate source of Art 62 was Draft Art 22 in *Waldock*'s second report on the law of treaties of 1963 with six paragraphs five of which had several subparagraphs.[44] *Waldock* drew on the extensive preparatory work of *Fitzmaurice*, his predecessor as Special Rapporteur.[45] Being aware of the **controversy surrounding the doctrine of *rebus sic stantibus***, he nevertheless believed that, on balance, a carefully delimited and regulated version of it should be included in any convention on the law of treaties.[46]

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[38]Harvard Draft 1096.

[39]*Ibid* 1124.

[40]That formulation would have included the Council of the League of Nations (*ibid* 1096).

[41]*Ibid* 1097.

[42]*O Kimminich/M Zöckler* in *Simma* Art 14 MN 5.

[43]Statement by the Ecuadoran delegate invoking an article by *F Blaine Sloan* The Binding Force of a 'Recommendation' of the General Assembly of the United Nations (1948) 25 BYIL 1, 29, *cf* UNLOT I 376 para 67.

[44]*Waldock* II 79 *et seq*.

[45]See the restatement-like Arts 21–23 in *Fitzmaurice* II 32 *et seq*, 56 *et seq*. See *Feist* (n 32) 172 *et seq*.

[46]*Waldock* II 82 para 6.

16 *Waldock*'s draft provision read as follows:

"Article 22 – The doctrine of rebus sic stantibus

1. (a) A change in the circumstances which existed at the time when a treaty was entered into does not, as such, affect the continued validity of the treaty.
   (b) Under the conditions set out in the following paragraphs of this article, however, the validity of a treaty may be affected by an essential change in the circumstances forming the basis of a treaty.
2. An essential change in the circumstances forming the basis of a treaty occurs when:
   (a) a change has taken place with respect to a fact or state of facts which existed when the treaty was entered into;
   (b) it appears from the object and purpose of the treaty and from the circumstances in which it was entered into, that the parties must both, or all, have assumed the continued existence of that fact or state of facts to be an essential foundation of the obligations accepted by them in the treaty; and
   (c) the effect of the change in that fact or state of facts is such as –
      (i) in substance to frustrate the further realization of the object and purpose of the treaty; or
      (ii) to render the performance of the obligations contained in the treaty something essentially different from what was originally undertaken.
3. A change in the policies of the State claiming to terminate the treaty, or in its motives or attitude with respect to the treaty, does not constitute an essential change in the circumstances forming the basis of the treaty within the meaning of paragraph 2.
4. An essential change in the circumstances forming the basis of a treaty may not be invoked for the purpose of denouncing or withdrawing from a treaty if –
   (a) it was caused, or substantially contributed to, by the acts or omissions of the party invoking it; [. . .]
   (c) such change of circumstances has been expressly or impliedly provided for in the treaty itself or in a subsequent agreement concluded between the parties in question.
5. An essential change in the circumstances forming the basis of a treaty may not be invoked for the purpose of terminating –
   (a) stipulations of a treaty which effect a transfer of territory, the settlement of a boundary, or a grant of territorial rights;
   (b) stipulations which accompany the transfer of territory or a boundary settlement and are expressed to be an essential condition of such transfer or settlement;
   (c) a treaty which is the constituent instrument of an international organization.
6. A party shall only be entitled to terminate or withdraw from a treaty on the ground of an essential change in the circumstances forming the basis of the treaty –
   (a) by agreement under the provisions of articles 18 and 19 [now Art 54 lit b and 59 VCLT]; or
   (b) under the procedure laid down in article 25 [now Art 65 VCLT]."

17 The foregoing proposal already **included all the elements of the later Art 62**, albeit in a partly different and less concise form: the exceptional character of the relief to be obtained through the operation of the *rebus sic stantibus* doctrine (para 1 – now Art 62 para 1 – negative formulation of the initial clause); the narrow definition of the initiatory change of circumstances (paras 2 and 3 – now Art 61 para 1 lit a and b); the *bona fides* exception (para 4 lit a – now Art 62 para 2 lit b); the supervening and unexpected character of the change (paras 2 and 4 lit c – now Art 62 para 1, initial clause); the exception with regard to certain classes of treaty provisions (para 5 – now Art 62 para 2 lit a); the procedural requirements which

show that a change of circumstances does not set any automatism in motion (para 6).

After intensive discussion in the ILC, the thrust of *Waldock*'s proposal became Art 44 of the ILC Draft of 1963[47] – a simplified provision closer to the present Art 62. In its title, Draft Art 44 omitted the term *rebus sic stantibus* and with it any reference to a fictitious implied condition of the treaty, turning the provision into a purely **objective rule of international law**. Moreover, the definition of what was now called "fundamental change of circumstances" became short enough to fit in one paragraph, the exceptions in Draft Art 22 para 4 lit a[48] and para 5 lit b and c were eliminated and the procedural requirements transferred to a separate article. **18**

Draft Art 44 of 1963 read as follows: **19**

"Article 44. Fundamental change of circumstances

1. A change in the circumstances existing at the time when the treaty was entered into may only be invoked as a ground for terminating or withdrawing from a treaty under the conditions set out in the present article.
2. Where a fundamental change has occurred with regard to a fact or situation existing at the time when the treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:
   (a) The existence of that fact or situation constituted an essential basis of the consent of the parties to the treaty; and
   (b) The effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty.
3. Paragraph 2 above does not apply:
   (a) To a treaty fixing a boundary; or
   (b) To changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself. [. . .]."

However, this version was still too cumbersome, requiring paragraphs 1, 2 and 3 lit b to express the rule now contained in Art 62 para 1.

The ILC's Draft Art 44 was subject to critical comments by numerous governments, which the Special Rapporteur paraphrased in his fifth report.[49] He observed that while some governments doubted that the *rebus sic stantibus* principle was part of the *lex lata,* most of them endorsed the narrowly defined version which was included in his draft. However, in order to defuse **potential dangers for the stability of treaties**, a number of governments insisted on some form of obligatory independent adjudication.[50] **20**

Subsequent debates in the ILC resulted in a number of important changes: first, the initial clause of para 1 was reformulated in the negative sense so as to make even clearer that any invocation of a fundamental change of circumstance must remain the **rare exception**. Second, the reference to a fundamental change with regard to facts or situations in para 2 was replaced by the reference to a change of **21**

[47]For the text [1963-II] YbILC 187, 207.

[48]The reason seems to have been that a party should not be deprived of its rights in consequence of perfectly legal behaviour (see the remarks by *Tunkin* [1963-I] YbILC 145 para 3).

[49]*Waldock* V 39 *et seq*.

[50]*Ibid* 42 para 1, 44 para 10.

circumstances, mirroring the title of the provision. Third, reviving *Waldock*'s Draft Art 22 para 4 lit a in a much narrower version, a party was prohibited from invoking any fundamental change which it had illegally brought about.

22 The outcome was Art 59 of the ILC's Final Draft[51]:

> "Article 59. Fundamental change of circumstances
> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
> (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
> (b) The effect of the change is radically to transform the scope of obligations still to be performed under the treaty.
> 2. A fundamental change of circumstances may not be invoked:
> (a) As a ground for terminating or withdrawing from a treaty establishing a boundary;
> (b) If the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty."

23 This text is almost identical with the first two paragraphs of Art 62. It makes no reference to any form of obligatory dispute settlement because the ILC decided to deal with that matter in a general provision covering various grounds of invalidity and termination of treaties.[52] The Commission adopted Draft Art 59 by 13 votes to 1 (*Ruda*), with 1 abstention (*Briggs*).[53] *Ruda* rejected the provision because he feared that it would "tend to give rise to considerable instability and to manifest injustice in international relations", as there was no appropriate safeguard to its application in the sense of a higher jurisdiction.[54] *Briggs* abstained because he considered the provision as dangerously vague and lacking adequate procedural safeguards.[55]

24 The intensive discussions at the UN Conference on the Law of Treaties focussed on two issues: whether the boundary treaty exception in para 2 lit a should be maintained at all or even extended to cover treaties on territorial status and whether it should also be possible for a party to invoke a fundamental change of circumstances as a ground for suspending the operation of the treaty. Whereas the Conference reformulated the **boundary treaty exception** in a way which left its substance untouched (→ MN 74 *et seq*), it decided to add a new para 3 on suspension (→ MN 91 *et seq*). The final Art 62 was adopted by the Conference by 93 votes to 3, with 9 abstentions. Where delegations explained their abstentions or no-votes, they referred either to their rejection of the boundary exception in Art 62 para 2 lit a or the procedural deficits of the provision.[56]

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[51] Reprinted with commentary in Final Draft, 256 *et seq*.

[52] Art 62 Final Draft, 261 *et seq*, which became Art 65 VCLT.

[53] [1966-I/1] YbILC 130 paras 53 *et seq*.

[54] [1966-I/1] YbILC 78, 79 paras 9–10.

[55] [1966-I/1] YbILC 77 paras 81 *et seq*.

[56] UNCLOT II 121 paras 47 *et seq*. For an explanation of the Turkish opposition, see UNCLOT I 376 paras 73 *et seq*.

At the ratification stage it became apparent that the idea underlying Art 62 as such was unacceptable to both Argentina and Chile so that they made a reservation to it.[57] Chile invoked the "general principle of the immutability of treaties, without prejudice to the right of States to stipulate, in particular, rules which modify this principle". No other State reacted to these reservations. **25**

C. Elements of Article 62

I. Coverage and Exceptional Character

Art 62 extends to all treaties which are, pursuant to Arts 1–5 VCLT, covered by the Convention (→ MN 86 *et seq*), with the sole exception of treaties establishing a boundary in the sense of Art 62 para 2 lit a (→ MN 74 *et seq*). It is not through far-reaching exceptions of certain treaty types from its coverage but through the narrow formulation of its elements that the provision safeguards the **stability of international relations, which is based on the security of treaties**. **26**

Art 62 does not presuppose that the treaty is either perpetual or long-term. It is true that a fundamental change of circumstances is less likely to occur shortly after the recent conclusion of a treaty. However, referring to the 'cataclysmic events' of the twentieth century, the ILC explained that even within a period of only 10 years circumstances could change fundamentally. Moreover, some treaties of limited duration contained specific *rebus sic stantibus* provisions.[58] **27**

Although **treaties concluded for only a short period of time or terminable on notice** are thus theoretically covered by it, Art 62 will hardly become practically relevant for them.[59] Where Art 54 lit a provides a party with an easy way out, it will be disinclined to rely on the much more demanding conditions of Art 62.[60] The same applies when the remaining term of a treaty is short. In that case, waiting for the treaty's automatic expiration will usually place no undue burden on the party and it is questionable whether in such a case the fundamental change of circumstances indeed radically transforms the extent of the remaining obligations in the sense of Art 62 para 1 lit b. **28**

[57] 2009 Multilateral Treaties Deposited with the Secretary-General, UN Doc ST/LEG/SER.E/26, Vol III 527 (Argentina), 528 (Chile) (ch XXII.1).

[58] Final Draft, Commentary to Art 59, 258 para 8.

[59] *Ibid* 259 para 8 *in fine*.

[60] One instance was the US withdrawal from the ABM Treaty two months after the terrorist attacks in 2001. This was effected in accordance with Art XV para 2 of that treaty, giving each party a unilateral right of withdrawal, although the US Government invoked a fundamental change of circumstances affecting US national security as a political justification, *cf R Müllerson* The ABM Treaty (2001) 50 ICLQ 509, 530. See also *M Fitzmaurice/O Elias* The Doctrine of Fundamental Change of Circumstances Revisited in *M Fitzmaurice/O Elias* (eds) Contemporary Issues in the Law of Treaties (2005) 173, 185 *et seq*.

29 In his second report, SR *Fitzmaurice* suggested that the principle *rebus sic stantibus* could not be applied to

> "law-making treaties *(traités-lois),* or [. . .] system or régime creating treaties [. . .], or [. . .] treaties involving undertakings to conform to certain standards and conditions, or [. . .] any other treaty where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty [. . .]."[61]

The *a limine* exclusion of these types of treaties – among them human rights treaties and all treaties drafted by the ILC (which are *traités-lois*) – was based on his belief that the principle *rebus sic stantibus* extended only to **reciprocal (synallagmatic) treaties** where the balance of the *quid* and the *quo* in a *quid pro quo* relationship could be upset by a fundamental change of circumstances.[62] However, one could also conceive of a change of circumstances which makes the continuous performance of a non-reciprocal treaty obligation excessively burdensome for one party, such as the accommodation of refugees from third countries when an unforeseeable event carries great numbers of them to the borders of one particular party. A fundamental change of circumstances will not often make the further implementation of a law-making treaty unacceptable to one or more parties, but if that happens, Art 62 applies.[63]

30 By framing the introductory clause in the negative form, the ILC has emphasized the exceptional character of the relief to be derived from Art 62.[64] The formulation makes it clear that even a fundamental change of circumstances will as a rule not affect the obligation of parties continuously to perform their treaty obligations, as required by the principle of *pacta sunt servanda*. This warrants two conclusions: first, **Art 62 must be interpreted restrictively**; second, the **burden of proof** lies with the party invoking a fundamental change of circumstances so that it has to establish the existence of all the conditions listed in para 1 of the provision.[65] In these respects, Art 62 resembles Art 56.

II. Para 1: Five Cumulative Conditions

31 For the sake of the security of treaties, Art 62 para 1 sets out and defines as narrowly as possible five conditions under which a change of circumstances can be invoked.[66] These conditions – three of them appearing in the *chapeau* of para 1, the fourth in lit a and the fifth in lit b – must be fulfilled **cumulatively, not**

[61] Art 22 para 1 cl ii in conjunction with Art 19 para 1 cl iv, *Fitzmaurice* II 31 *et seq*.

[62] The concept of *Fitzmaurice* was revived by *Feist* (n 32) 178 *et seq*.

[63] *Haraszti* (n 24) 72.

[64] Final Draft, Commentary to Art 59, 259 para 9 *in fine*. See also the ICJ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 3, para 104 *in fine*.

[65] See the remarks by the German delegate *C-A Fleischhauer*, UNCLOT II 119 para 30.

[66] See the helpful questionnaire by *Villiger* Art 62 MN 26, which also incorporates the exceptions according to Art 62 para 2.

alternatively.[67] Contrary to what notable Chinese scholars have argued, there is no exception with regard to **'unequal' treaties**. These too will only be subject to termination or suspension on account of a fundamental change of circumstances if all the conditions of Art 62 are met.[68]

The ILC took great pains to formulate the provision in **objective terms**, avoiding as far as possible references to the **subjective expectations** of the parties, let alone any individual party, of how circumstances would develop. Even though the utmost precautions must be taken against arbitrary manoeuvres by individual parties, it is inevitable to consider the original intentions of the parties when entering into the treaty.[69] Otherwise it would be impossible to establish two of the article's five conditions, namely that certain circumstances constituted an essential basis of the consent of the parties to be bound by the treaty (Art 62 para 1 lit a) and that their change was not foreseen by the parties (Art 62 para 1). **32**

In this respect, however, the provision draws upon "an objective interpretation of the treaty and of the circumstances which surrounded its conclusion".[70] Using the means of interpretation set out in Arts 31–33 VCLT, one has to establish whether the existence of certain **circumstances constituted an essential basis of the *consent of the parties*** to be bound by the treaty, and not how important they might have been for one or a few of the parties (→ MN 59 *et seq*). The same applies with regard to the question of whether a fundamental change of those circumstances was foreseen *by the parties* (→ MN 53 *et seq*). **33**

1. Supervening Change of Circumstances (*Chapeau*)

a) Factual Changes

In earlier versions of the provision, the term "circumstances" was explained by "a situation of fact, or state of affairs",[71] "a fact or state of facts"[72] or "a fact or situation".[73] Art 28 of the Harvard Draft had referred to "state of facts" and not used the term "circumstances" at all (→ MN 12). It was *Ago* who suggested that the first two paragraphs of the ILC's Draft Art 44 of 1963 could be merged into one if one replaced "a fact or situation", which was used in para 2, by "circumstances" – the term appearing in para 1.[74] When the Drafting Committee thereupon proposed that **34**

[67] Final Draft, Commentary to Art 59, 259 para 9:"and (5) [. . .]" (the "and" appearing also twice in the text of Art 62 para 1). *Aust* 298. The contrary assertion in *Dahm/Delbrück/Wolfrum* (n 23) 751 fn 82 is clearly erroneous.

[68] *A Peters* Treaties, Unequal in MPEPIL (2008) MN 56 *et seq*.

[69] See also Restatement (n 14) comment a.

[70] *Waldock* II 84 paras 12–13.

[71] Draft Art 22 para 2 cl ii in *Fitzmaurice* II 32 *et seq*.

[72] Draft Art 22 para 2 lit a in *Waldock* II 79 (→ MN 16).

[73] Art 44 para 2 of the 1963 ILC Draft, [1963-II] YbILC 187, 207 (→ MN 19).

[74] [1966-I/1] YbILC 82 para 48.

Art 44 para 1 should read "A fundamental change which has occurred with regard to a circumstance existing at the time of the conclusion of a treaty [...]",[75] *Ago* objected since the phrase "a circumstance" might cover an event of very minor importance whereas the ILC had a real change of *circumstances* in mind. *Ago's* amendment was adopted.[76]

35 At a certain stage of the discussions, it was suggested by a government to bring the text of Art 62 para 1 into line with Art 48 para 1 on error, the latter provision (in its current version) giving a State the right to invoke an error relating to "a fact or situation" as invalidating its consent to be bound by the treaty. Whereas SR *Waldock* initially agreed with the suggestion,[77] it was ultimately not adopted. Consequently, the object of the error in Art 48 can be much narrower than the object of the change in Art 62.

36 In speaking of "circumstances", Art 62 refers to **objective (external) conditions and not subjective (internal) motives, attitudes or expectations of the parties**.[78] On the other hand, shared expectations of the parties, *eg* concerning the profitability of an agreed project, can form an essential basis of their consent. If the profitability diminishes to such an extent that the treaty obligations of the parties are radically transformed as a result, Art 62 is applicable.[79] However, changes leading a State into economic or financial difficulties will only rarely meet the strict conditions of that provision.[80] In any event, the article does not in any respect circumscribe the character of those circumstances, except by requiring in para 2 lit a that their existence must have constituted an essential basis for the consent of the parties to enter into the treaty (→ MN 59 *et seq*). Accordingly, all kinds of circumstances – factual, political, legal, economic, social, *etc* – are within the purview of the provision.[81]

b) Three Exceptions: Factual Changes Outside the Scope of Article 62

37 There are three exceptions to the foregoing: one is the **outbreak of hostilities**, which would otherwise provide an excellent example of a fundamental change of

[75] [1966-I/1] YbILC 130 paras 38–39.

[76] *Ibid* 130 paras 45, 52.

[77] *Waldock* V 43 para 5.

[78] *Fitzmaurice* II 63 para 170; *Dahm/Delbrück/Wolfrum* (n 23) 753 *et seq*.

[79] ICJ *Gabčíkovo-Nagymaros Project* (n 64) para 104.

[80] *MN Shaw/C Fournet* in *Corten/Klein* Art 62 MN 33, referring to the 1929 judgements of the PCIJ in *Serbian Loans* and *Brazilian Loans* PCIJ Ser A Nos 20/21, 39 *et seq*, 120. The Court here denied that the economic dislocations caused by the First World War released the debtor States from their obligations due to *force majeure*. When Argentina suspended foreign debt service in 2002 in reaction to its financial crisis, it did not rely on Art 62 (against which it had entered a reservation – → MN 25) but pleaded a state of necessity to justify its action, *cf A Reinisch* Sachverständigengutachten zur Frage des Bestehens und der Wirkung des völkerrechtlichen Rechtfertigungsgrundes "Staatsnotstand" (2008) 68 ZaöRV 68 3 *et seq*.

[81] *Dahm/Delbrück/Wolfrum* (n 23) 751.

circumstances, and has historically been used as such,[82] but according to Art 73 is not covered by the Convention. Since 2005, the ILC has been considering "Effects of armed conflicts on treaties" as a separate topic. In 2009, it appointed *Caflisch* as Special Rapporteur.[83] For the time being, the effect of hostilities on treaty relations is governed by customary international law.[84] The ECJ confirmed that the rule of customary international law underlying Art 62 embraces the outbreak of hostilities as an instance of a fundamental change of circumstances.[85]

The second exception is **State succession**, which could at least in certain cases amount to a fundamental change. The issue was raised by a comment of the Jamaican Government to the ILC's Draft Art 44 of 1963 when it referred to treaties which were manifestly unjust or inequitable for a newly independent State. In his fifth report, SR *Waldock* replied that as the Commission was treating State succession as a separate topic, it left aside questions of State succession in dealing with 'supervening impossibility of performance' and for that reason applied with equal force to Art 62.[86] Accordingly, Art 73 also excludes any question that may arise from a succession of States from the scope of the Convention.[87] **38**

The third exception concerns the **severance of diplomatic or consular relations**, which is subject to the special provision in Art 63. **39**

c) Political Changes

Significantly, Art 62 as adopted, in difference to certain predecessors, does not speak of "(state of) facts". Thus, it covers not only changes in the factual basis of the parties' consent (*eg* the extent of their territory or the availability of natural resources or the existing fishing techniques and capacities[88]), but also political **40**

[82]In 1941, the *rebus sic stantibus* principle was applied by the United States when it suspended the operation of the International Load Line Convention of 1930 in view of the war, later revoking the suspension as of 1 January 1946, see Restatement (n 14) reporters' note 1; *OJ Lissitzyn* Treaties and Changed Circumstances (Rebus Sic Stantibus) (1967) 61 AJIL 895, 908 *et seq*. For further examples, see *ibid* 905 *et seq*.

[83]Report of the ILC (61st Session 2009), UN Doc A/64/10 (2009), 363 para 229.

[84]See Restatement (n 14) reporter's note 4; *Dahm/Delbrück/Wolfrum* (n 23) 753 *et seq*.

[85]ECJ (CJ) *Racke* C-162/96 [1998] ECR I-3655, paras 53 *et seq* – concerning the suspension of trade concessions under the Cooperation Agreement between the EEC and the Socialist Federal Republic of Yugoslavia by the Council of the EC. See also *K Bannelier* Les effets des conflits armés sur les traités, in Festschrift Salmon (2007) 125, 142 *et seq; W Heintschel von Heinegg* Treaties, Fundamental Change of Circumstances in MPEPIL (2008) MN 33.

[86]*Waldock* V 42 para 3.

[87]Art 16 of the 1978 Vienna Convention on Succession of States in Respect of Treaties 1946 UNTS 3 solves the problem raised by Jamaica in providing that a newly independent State was not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States related.

[88]A change with regard to the latter circumstance was claimed by Iceland in the ICJ's *Fisheries Jurisdiction* (*Germany v Iceland*) [1973] ICJ Rep 3, paras 36 *et seq*.

upheavals (*eg* a revolution which radically changes a State's political alignment) and legal developments (*eg* the new permissibility or prohibition of certain acts or omissions). Admittedly, however, **legal changes** were not discussed in the ILC or at the Conference, which indicates that it was not envisaged that they should fall under Art 62.[89] However, the ordinary meaning of that provision's terms in context and its object and purpose (Art 31 para 1) cover legal changes. In view of Art 27, a State cannot invoke changes in its internal law, even if they were brought about in conformity with that State's international legal obligations and thus do not fall under the exception of Art 62 para 2 lit b.[90]

41 The ILC ultimately agreed that a subjective change in the political attitude of a party towards a treaty could not trigger Art 62, but – in contrast to *Waldock*'s Draft Art 22 para 3 (→ MN 16) – left open the possibility of invoking the provision where a **profound political transformation** radically changed the political alignment of a State. That might make it unacceptable, from the point of view of all the parties, to keep to, for instance, a treaty of alliance.[91] In the ***Gabčíkovo-Nagymaros* case**, the ICJ indicated that the political conditions prevailing at the time of the conclusion of a treaty and the economic system then existent (*ie* before the fall of the Iron Curtain in 1989) could be so closely linked to the object and purpose of the treaty "that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed". In the particular case, however, the Court rejected this argument.[92] In any event, the mere change of government which leaves the juridical personality of the State unaffected does not normally constitute a fundamental change in the sense of Art 62 para 1.[93]

d) Legal Changes

42 Changes in the legal situation outside of the treaty can give rise to the application of Art 62. The ICJ recognized in the ***Fisheries Jurisdiction* case** that "changes in the law may under certain conditions constitute valid grounds for invoking a change of circumstances affecting the duration of a treaty".[94] However, in such a case, one should not prematurely rely on Art 62, not the least because the ILC originally wanted to regulate (automatic) treaty termination or modification on account of

[89] *N Kontou* The Termination and Revision of Treaties in the Light of New Customary International Law (1994) 34, 149.

[90] *Villiger* Art 62 MN 14; *MN Shaw*/*C Fournet* in *Corten*/*Klein* Art 62 MN 31.

[91] Final Draft, Commentary to Art 59, 259 para 10. However, see *Verdross*/*Simma* (n 7) 529 MN 834. In 1966, France invoked a fundamental change of political circumstances to justify its withdrawal from the NATO integrated commands, see *E Stein*/*D Carreau* Law and Peaceful Change in a Subsystem, (1968) 62 AJIL 62 577, 618 *et seq*.

[92] ICJ *Gabčíkovo-Nagymaros Project* (n 64) para 104.

[93] *MN Shaw*/*C Fournet* in *Corten*/*Klein* Art 62 MN 32. See also *C Binder* Die Veränderung innerstaatlicher Verhältnisse als Nichterfüllungsgrund von völkerrechtlichen Vertragspflichten (2009) 47 AVR 187, 197 *et seq*. See already Art 24 Harvard Draft 1044 *et seq*.

[94] ICJ *Fisheries Jurisdiction* (n 88) para 32.

legal changes in a separate provision, which was later dropped in view of opposition by governments.[95]

When a **new rule of customary international law** not qualifying as *ius cogens* (→ Art 64) emerges during the life of a treaty which binds all the parties and has the same degree of specificity as the treaty,[96] it will qualify as *lex posterior* and thus prevail over the earlier treaty. Its emergence can then either be considered as an implicit agreement to terminate the earlier treaty according to Art 54 lit b (→ Art 54 MN 37 *et seq*), or bring in a rule analogous to Art 30 para 3, Art 59. It may also be possible to interpret the older treaty in light of the new rule of customary international law (Art 31 para 3 lit c). These variants, all of which are more in line with the principle of *pacta sunt servanda,* supersede Art 62. That provision will take hold if none of them applies.[97] If Art 62 is applicable, a change in customary international law will rarely meet its strict conditions.[98] In the ***Gabčíkovo-Nagymaros*** **case**, Hungary had argued that new (non-peremptory) requirements of international environmental law precluded performance of its treaty with Slovakia. The ICJ, without mentioning Art 62, rejected the Hungarian argument because said treaty included evolving provisions, which required both parties to incorporate new environmental norms through a process of consultation and negotiation.[99] **43**

e) Personal Scope of Change

The change **need not necessarily affect all or most of the parties**; it suffices if it affects one or a few of them, provided always that in the latter case the other conditions of Art 62 para 1 are met.[100] If the change, however, affects more or less all or most of the parties, they will probably be ready to agree on the necessary revision or termination of the treaty so that there is no need to use Art 62.[101] **44**

f) Supervening Character of Change

The circumstances must have actually existed at the time of the conclusion of the treaty[102] and changed thereafter. Like Art 61, Art 62 regulates a supervening event affecting the execution of a treaty. It does not cover any change of subsequent (post-treaty) circumstances, *ie* those which themselves only emerged after the conclusion **45**

[95] *Kontou* (n 89) 135 *et seq*.

[96] On the question of whether a treaty is *lex specialis* with regard to rules of customary international law, see *Kontou* (n 89) 141 *et seq*.

[97] See *Dahm/Delbrück/Wolfrum* (n 23) 676 *et seq*.

[98] *Kontou* (n 89) 34 *et seq,* 149 *et seq*.

[99] ICJ *Gabčíkovo-Nagymaros Project* (n 64) paras 111 *et seq*.

[100] → MN 61 *et seq* on lit b (speaking of *obligations*).

[101] *Fitzmaurice* II 62 para 167.

[102] If the parties, or some of them, erroneously believed in their existence, Art 48 applies.

of the treaty.[103] The 'conclusion of a treaty' functions as the *terminus ante quem* for the existence of the circumstances and as the *terminus post quem* for their change. The relevant date is the **expression of a State's consent to be bound by the treaty**, even if the treaty enters into force later (→ Art 61 MN 18). This makes any change, which occurs between the adoption of the text of the treaty and the expression of consent by a State irrelevant. If the State was aware of the change when it expressed its consent, it deserves no protection; if the State was not, it may invoke an error pursuant to Art 48.

46 According to the preceding paragraph, the relevant date can (and often will) be different for the parties, especially in the context of multilateral treaties. Thus, a party which later accedes to such a treaty cannot invoke any change having occurred before it deposited its own instrument of accession whereas that change can be invoked by the previous parties. This **differentiation of the legal positions which the various parties have under Art 62** corresponds with this provision's object and purpose. For the sake of equity and justice, the concept of *rebus sic stantibus* codified in Art 62 is intended to offer relief to an innocent party which unexpectedly faces intolerable burdens imposed on it by an unforeseeable fundamental change of circumstances.

2. Fundamental Character of Change (*Chapeau*)

47 A change of circumstances will only be a ground to invoke Art 62 if it qualifies as being fundamental. According to the traditional view, only those changes of circumstances can be regarded as fundamental which imperiled the existence or vital development of one of the parties.[104] This seems to be too narrow a definition, for it would make Art 62 almost inoperative.[105] A modern proposal requires a significant imbalance between the *quid* and the *quo*,[106] but that helps only with reciprocal (synallagmatic) treaties (→ MN 29). Unfortunately, the discussions in the ILC and at the Conference do not shed much light on **how to distinguish the 'fundamental' from the other changes**. It is only clear that the adjective was one element in the obvious trouble taken to narrow down the *rebus sic stantibus* doctrine.

48 Whereas Art 28 of the Harvard Draft of 1935, *Fitzmaurice*'s Draft Art 22 para 2 of 1957 and *Waldock*'s Draft Art 22 para 2 of 1963 had *mutatis mutandis* used the term "essential change", the ILC introduced the term "fundamental change" in its Draft Art 44 of 1963. However, the Commission kept the adjective "essential" to qualify both the importance of the circumstances for the consent of the parties to the treaty (para 2 lit a: "essential basis") and the grave effect which the change must

[103] *Fitzmaurice* II 63 para 171.

[104] ICJ *Fisheries Jurisdiction* (n 88) para 38. The Court could here – but did not – cite *Oppenheim* (n 34), 939–940 who used the term "vital change of circumstances" (*ibid* 941).

[105] See *Villiger* Art 62 MN 10.

[106] *Dahm/Delbrück/Wolfrum* (n 23) 751 (*signifikante Äquivalenzstörung*).

have for the character of the treaty obligations (para 2 lit b: "to transform in an essential respect"). In its final form, Art 62 para 1 preserved only the "essential" in lit a, while replacing it by the adverb "radically" in lit b. This textual development indicates the **close connection between the terms "fundamental", "essential" and "radically"** in Art 62 para 1.

The question is what independent role the condition that the change of circumstances be "fundamental" plays along with the conditions set out in Art 62 para 1 lit a and lit b.[107] One can indeed scarcely conceive of any change which firstly affects circumstances whose existence formed an essential basis of the consent of the parties to be bound by the treaty (→ MN 59 *et seq*) and secondly radically transforms the extent of the remaining treaty obligations (→ MN 61 *et seq*) but is still not fundamental. *Waldock*'s Draft Art 22 para 2 provided that any change was essential (*vice* fundamental) if it affected **circumstances whose invariability was the essential foundation of the treaty** and if it rendered the performance of the treaty obligations something essentially different from what was originally undertaken.[108] Apparently, the close relation of the adjective qualifying the change to the adjectives qualifying the importance of the circumstances and the seriousness of the effects of the change was lost when the first "essential" was replaced by "fundamental" and the third "essential" by "radically". **49**

The foregoing warrants the conclusion that whenever a change of circumstances fulfils the conditions of both Art 62 para 1 lit a and lit b, there will at least be a very strong presumption that it is also fundamental. In other words, the **fundamentality requirement plays little – if any – independent role**. On the other hand, according to the general rules of interpretation, no element of a treaty provision may be deemed as nugatory. Accordingly, one can characterize the fundamentality requirement as an additional safeguard to prevent abuse in a very exceptional constellation where the other safeguards of Art 62 fail. **50**

No matter how fundamental a change of circumstances may be, it cannot be invoked to obtain release from a treaty obligation unless it directly affects that very obligation. This was the reason why the ICJ in the ***Fisheries Jurisdiction* case** did not accept the argument made by Iceland that a fundamental change in fishing techniques enabled it to evade the compromissory clause establishing the jurisdiction of the ICJ.[109] **51**

As Art 62 para 3 makes clear, a **change need not be irreversible** to be qualified as fundamental. If it is reversible, the primary option will be to invoke it as a ground for only suspending the operation of the treaty (→ MN 91 *et seq*). **52**

[107]On the overlap between the cumulative conditions of Art 62, see also *Fitzmaurice*/*Elias* (n 60) 187.

[108]Similarly, *F Capotorti* L'extinction et la suspension des traités (1971) 134 RdC 417, 543 states that a change is fundamental when its effect is to radically transform the extent of the remaining obligations.

[109]ICJ *Fisheries Jurisdiction* (n 88) paras 38 *et seq*. See also *E Jiménez de Aréchaga* International Law in the Past Third of a Century (1978) 159 RdC 1, 73 *et seq*.

3. Change Not Foreseen by Parties (*Chapeau*)

53 A supervening fundamental change of circumstances may be invoked only if it was not foreseen by the parties. The double negative followed by exceptions in the introductory clause of Art 62 para 1 ("not foreseen [. . .] may not be invoked [. . .] unless") must of course not be understood as permitting the unconditional invocation of changes which were foreseen because that result would be manifestly unreasonable (Art 32 lit b).[110]

54 To exclude the invocation, the change must have been **foreseen by *the parties* altogether**. According to earlier versions of the provision, in particular the ILC's Draft Art 44 para 3 lit b (→ MN 19), "changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself" should not serve as a ground for terminating or withdrawing from the treaty. The shortening of that proviso and its transfer to the introductory part of Art 62 para 1 did not modify its character as an instance of the *lex specialis* maxim.[111] However, it permits the application of the proviso to cases where all the parties foresaw the change without considering it necessary to include a precautionary provision in the treaty. That can be taken as an implied agreement that the occurrence of the change should not be used as a pretext to seek termination or withdrawal.[112] Alternatively, one can argue that in such a case the parties either did not consider the anticipated change to be fundamental or the continuation of the pertinent circumstance was not an essential basis of their consent. A common device to provide for future changes of circumstances in treaties is the use of revision clauses (→ MN 109). Where the treaty includes provisions designed to accommodate change of the kind which actually occurred, there is no room for resorting to Art 62,[113] except where *bona fide* negotiations fail to produce an agreement within a reasonable period of time (→ MN 98).

55 The proviso will only exclude the invocation of the change if its anticipation by all the parties can be proven.[114] The **burden of proof** here is exceptionally not on the party invoking the change (for which non-anticipation amounts to a negative fact) but on any party raising the objection that the change was indeed foreseen when the treaty was concluded (Art 65 paras 2 and 3). The latter party can resort to *prima facie* evidence where appropriate.

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[110]Concerns in this regard which were indeed voiced at the Conference (see the remarks by the German delegate *C-A Fleischhauer*, UNCLOT II 119 para 33 with references) are therefore unfounded. See also *MN Shaw*/*C Fournet* in *Corten*/*Klein* Art 62 MN 29.

[111]See the observation by *Waldock* V 43 para 6: "If a treaty makes provision for the consequences of a change of circumstances, the will of the parties must prevail; and this would appear to form part of the general conditions for the operation of the article rather than to be an 'exception'."

[112]See *Waldock*'s Draft Art 22 para 4 lit c (→ MN 16) which also refers to implied provisions in the treaty to provide for the change.

[113]ICJ *Gabčíkovo-Nagymaros Project* (n 64) para 104.

[114]*Dahm*/*Delbrück*/*Wolfrum* (n 23) 751 (sub d).

Sometimes, the very nature of the transformed treaty obligation shows that the parties foresaw a certain kind of change. One example is a treaty commitment to grant **most-favoured-nation treatment** to the other parties (*eg* Art I of the GATT 1947/1994). When a party, after having assumed such a commitment, grants advantages to non-parties, it cannot avoid its obligation to accord those advantages immediately and unconditionally also to the other parties by invoking a change of circumstances. It was for the purpose of regulating that particular change that the parties agreed on the most-favoured-nation clause in the first place.[115] **56**

Anticipation of the change of circumstances by some or even the majority of the parties is in any event not sufficient to forestall the legal consequences of Art 62 para 1. In such a case, the **innocent parties** may find additional support in either Art 48 or Art 49. For a party which can be proven to have foreseen the change but did not try to include a precautionary provision in the treaty or was unsuccessful in such an attempt and still became a party without reservation, later reliance on Art 62 will amount to an abuse of rights. **57**

The **foreseeability of the change** does not fulfil the condition. The Jamaican government unsuccessfully suggested to the ILC that the exception should be extended to include "a fundamental change of circumstances, which the parties could reasonably have foreseen and the occurrence of which they impliedly undertook not to regard as affecting the validity of the treaty".[116] A similar suggestion by the Spanish delegate in the Committee of the Whole was not taken up by the Committee.[117] **58**

4. Existence of Circumstances Constituting an Essential Basis of the Consent of the Parties (lit a)

Art 62 para 1 lit a further qualifies the circumstances whose change can be invoked as a ground for terminating or withdrawing from a treaty: their existence must have constituted an essential basis of the consent of the parties to be bound by the treaty. **The adjective "essential" is a fundamental element** in the effort to keep the provision narrow in the interest of the security of treaties.[118] **59**

"Basis of the consent of the parties" means that the existence of the circumstances must have been the **determining factor for all the parties to enter the treaty**, not just the motive or inducement of one or a few of them. Art 62 is thereby placed on a firm objective foundation and removed from the realm of the arbitrary and the unilateral.[119] What circumstances formed the essential basis of the parties' consent has to be ascertained by using the ordinary means of interpretation (Arts 31–33). The decisive factor is how closely linked those circumstances were to the object and **60**

[115] See the statement by the Italian delegate, UNCLOT I, 380 para 22.

[116] *Waldock* V 39.

[117] UNCLOT I 371 para 12.

[118] Remarks by *Waldock* [1966-I-1] YbILC 86 para 12.

[119] *Fitzmaurice* II 63 para 172.

purpose of the treaty.[120] With regard to what is necessary to show for the purposes of Art 62 para 1 lit a, SR *Fitzmaurice* formulated the following litmus test: "that in the absence of those circumstances they [the parties] would not (that is, neither of them would) have entered into the treaty at all, or that they would have drafted it differently".[121]

5. Radical Transformation of Extent of Remaining Obligations (lit b)

61 According to the ICJ, "[t]he change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken".[122] The adverb "radically" is another device to closely circumscribe the scope of the provision, defusing any threat it might otherwise pose to the security of treaties. While it does not require that the further performance of the treaty has become impossible,[123] **impossibility** – unless falling under the special provision of Art 61 – may be an instance of radical transformation (→ Art 61 MN 39).

62 Where no obligations remain unfulfilled because the treaty has been carried out completely, Art 62 does not apply: **it does not cover executed treaties but only executory treaties**.[124] Draft Art 44 para 2 lit b of 1963 (→ MN 19) drew a critical comment from the Australian Government for not being clear enough in this respect. The latter argued that it would be contrary to common sense and to the need for stability and certainty to admit the possibility of an executed treaty's being brought within the provision. The Special Rapporteur clarified the text accordingly.[125] That leaves the problem of when exactly a treaty is fully executed so that no obligations remain – an issue which was intensely debated in the ILC with regard to boundary treaties (→ MN 68).

63 The use of the plural "obligations" raises the question whether the change of circumstances must radically transform all the remaining obligations under the treaty and not only the obligation of one party. An interpretation in the latter sense is more in line with the object and purpose of the provision. Art 62 is intended as a **safety valve for parties** who, because of a change of circumstances, are unexpectedly overburdened by their treaty obligations. They shall be provided with a legal way out.[126] The condition of Art 62 para 1 lit b is therefore met

[120] ICJ *Gabčíkovo-Nagymaros Project* (n 64) para 104.

[121] *Fitzmaurice* II 63 para 171 *in fine*. See also *Dahm/Delbrück/Wolfrum* (n 23) 751 (sub b).

[122] ICJ *Fisheries Jurisdiction* case (n 88) para 43. The passage is based on *Waldock*'s Draft Art 22 para 2 lit c cl ii (→ MN 16).

[123] *Heintschel von Heinegg* (n 85) MN 40.

[124] *Jennings/Watts* (n 29) 1309 MN 651 footnote 14.

[125] *Waldock* V 43 para 5, 44 para 11.

[126] Final Draft, Commentary to Art 59, 257 para 6.

when the extent of any remaining obligation is so radically transformed that the affected party can no longer be reasonably expected to fulfil it.[127]

The extent of obligations still to be performed can be **radically transformed either directly or indirectly**. Direct transformation means that the onerousness of the obligation is increased, whereas indirect transformation means that the value to be gained by further performance is diminished.[128] The text as well as the object and purpose of Art 62 cover both alternatives: the further performance by a party of its own unaltered obligations also becomes excessively burdensome and unreasonable if, due to a fundamental change of circumstances, it receives nothing in return. A party can of course not invoke any transformation of the extent of its obligations if in the treaty it has expressly or impliedly assumed the risk of such a transformation occurring.[129] In that case, the change will have been foreseen by the parties in the sense of the *chapeau* of Art 62 para 1 (→ MN 53 *et seq*). **64**

As explained elsewhere, the **supervening impossibility of performance**, one aspect of which is regulated in Art 61, constitutes a specific instance of fundamental change of circumstances (→ Art 61 MN 39). Cases of impossibility outside the scope of Art 61 can therefore fall under Art 62. As a matter of fact, in the drafting process of Art 62, **frustration, *ie* the impossibility of the (further) realization of the object and purpose of the treaty**, was specifically mentioned as a problem to be regulated by that provision.[130] Where a fundamental change of circumstances results in frustration, the further performance of the parties' treaty obligations becomes fruitless and thus excessively burdensome and unreasonable. **65**

In accordance with the precept that Art 62 should be interpreted strictly for the sake of *pacta sunt servanda*, the condition of 'radical transformation' is subject to a ***de minimis* rule**. This is to say that the fundamental change of circumstances must radically transform the extent of remaining obligations both in the formal (relative) sense and in the substantive (absolute) sense. The tenfold increase of such an obligation is certainly radical in the relative sense, but will not be radical in absolute sense if the remaining amount of that obligation is small. **66**

III. Para 2: Two Exceptions

1. Boundary Treaties (lit a)

According to Art 62 para 2 lit a, a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty establishing a **67**

[127] See *Dahm/Delbrück/Wolfrum* (n 23) 746.

[128] *Fitzmaurice* II 60 para 151.

[129] Compare Art 23 para 2 lit b ILC Articles on Responsibility of States for Internationally Wrongful Acts which mostly codify customary international law, UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83, Annex.

[130] *Fitzmaurice* II 60 *et seq* paras 153–154. See also *Waldock's* Draft Art 22 para 2 lit c cl i (→ MN 16).

boundary. As the provision functions as a safety valve which is ultimately to serve the maintenance of peaceful international relations (→ MN 5), it is not surprising that it excepts boundary treaties. The sanctity of those treaties is certainly the **cornerstone of international peace and security**.[131] Abrogating a boundary treaty on the basis of *rebus sic stantibus* may even be considered a *casus belli* by the other party.[132] Along the same lines, Art 11 of the Vienna Convention on Succession of States in Respect of Treaties of 1978 provides that a succession of States does not as such affect boundary régimes.[133]

a) Discussions in the ILC and at the Conference: The Principle of Self-Determination

68 The boundary treaty exception was nevertheless the most intensely debated portion of Art 62. Some considered it as unnecessary because a treaty ceding territory was fully executed when the cession had taken place, rendering the article inapplicable for lack of obligations still to be performed.[134] However, this argument was ultimately not adopted because a treaty establishing a boundary remained in force and continued to have obligatory effects in the sense that it had to be accepted and continuously respected as the definitive settlement of the respective territorial issues.[135] The **object and purpose of a boundary treaty is to create a stable legal position** which should not be subject to any challenge based on a change of circumstances.

69 In what amounted to a much more serious objection to para 2 lit a, a number of former colonies and other developing countries found its absolute character to be **incompatible with the principle of self-determination**. Yet, the ILC included it in its Draft Art 59 para 2 lit a "because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions". The Commission also stated in its commentary that non-inclusion in Art 62 para 2 lit a of a counter-exception in favour of the principle of self-determination would not exclude that principle's operation where a boundary treaty conflicted with it.[136] This impliedly refers to Arts 53 and 64, which render any treaty void that is incompatible with a people's right to self-determination.

70 At the Conference, several delegations assumed that Art 62 did not at all apply to **boundary treaties imposed by an aggressor State or in violation of the principle**

[131] See ICJ *Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Rep 6, 34 where the Court emphasized that stability and finality were the primary objects of boundary treaties.

[132] *Haraszti* (n 24) 65.

[133] 1946 UNTS 3.

[134] See [1966-I/1] YbILC 76 paras 61–62, 84 para 76 – *Verdross*; *ibid* 78 para 8 – *Ruda*; *ibid* 83 paras 66 *et seq* – *Jiménez de Aréchaga*; *ibid* 85 para 78 – *Bartoš*. See also *Haraszti* (n 24) 66 *et seq*.

[135] [1966-I/1] YbILC 82 para 53 – *Ago*; *ibid* 86 para 14 – *Waldock*. *E Klein* Statusverträge im Völkerrecht (1980) 292 *et seq* See also ICJ *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, para 73. *Heintschel von Heinegg* (n 85) MN 31.

[136] Final Draft, Commentary to Art 59, 259 para 11.

of self-determination because these were void by virtue of Art 52 or Art 53.[137] Similarly, SR *Waldock*, who attended the Conference as an expert consultant, explained to the Committee of the Whole that the ILC had not intended in para 2 lit a to give the impression that boundaries were immutable, but only that Art 62 was not a basis for seeking the termination of a boundary treaty.[138] On the insistence of the Afghan delegation, *Waldock*'s explanation was read out in the 22nd Plenary Meeting after the vote on Art 62 had already been taken, so as to make it part of the record also of that meeting.[139] The Syrian delegation still objected to para 2 lit a, which in its view contravened *ius cogens*.[140]

b) Declarations by States Parties and Objections Thereto in the Ratification Phase

Opposition to the boundary treaty exception did not end with the adoption of Art 62 at the Conference.[141] Rather, Morocco, Oman and Syria each appended a declaration to their ratification or accession.[142] Morocco interpreted Art 62 para 2 lit a as not applying to unlawful or inequitable treaties, or to any treaty contrary to the principle of self-determination, specifically invoking the explanation given by the expert consultant to the Committee of the Whole (→ MN 70).[143] Oman declared its understanding that the implementation of Art 62 para 2 did not include those treaties which were contrary to the right to self-determination. Syria more radically stated that it did not in any case accept the non-applicability of the principle of a fundamental change of circumstances with regard to treaties establishing boundaries, referred to in Art 62 para 2 lit a, inasmuch as it regarded this as a flagrant violation of an obligatory norm which formed part of general international law and which recognized the right of peoples to self-determination.[144] **71**

Both the Moroccan and the Omani statement are **interpretative declarations rather than reservations**. The legal opinion expressed by Syria, strictly speaking, makes any interpretative declaration or reservation on its part superfluous. However, as it so fervently underlines how unacceptable Art 62 para 2 lit a is, its declaration seems to imply as a *minus* that, should its legal opinion be wrong (which it is), it would not in any event want to be bound by that exception. Syria thereby purported to exclude the application of para 2 lit a to it, thus making a reservation in the sense of Art 2 para 1 lit d. **72**

[137]United Arab Republic (UNCLOT I 382 para 41); Afghanistan (*ibid* 382 para 42); Syria (*ibid* 480 para 46); Philippines (*ibid* 480 para 49); Poland (UNCLOT II 118 para 16, 17); USSR (*ibid* 120 paras 37–39].

[138]UNCLOT I 381 para 31.

[139]UNCLOT II 121 paras 50–52.

[140]UNCLOT II 117 para 12 – Syria.

[141]→ MN 24. One no-vote (Afghanistan) and one abstention (Syria) were expressly based on para 2 lit a.

[142]Afghanistan made a similar declaration upon signature but never ratified the VCLT.

[143]http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en#EndDec. See MN 70.

[144]*Ibid*.

73 These declarations provoked reactions by several other States. Algeria, being dedicated to the principle of the inviolability of the frontiers inherited on accession to independence, objected to what it called the Moroccan reservation. Both Argentina and Chile, which had themselves each entered a reservation against the rule underlying Art 62 (→ MN 25) formulated an objection to all current and future reservations to Art 62 para 2 lit a. This is quite consistent because the boundary treaty exception restores for a certain treaty type the immutability of treaties, which both States wanted to uphold by their own reservation and are thus interested in defending against further encroachments through reservations. The US Government also voiced concern over the Syrian reservation but refrained from formally objecting because it had another reason to reject treaty relations with Syria under all provisions in Part V of the Convention.[145]

c) Which Treaties Are Covered by the Exception?

74 The ILC's Draft Art 44 para 3 lit a of 1963 had still spoken of a treaty "fixing a boundary". In response to comments by governments, the broader expression "establishing a boundary" was substituted so that the exception would embrace not only delimitation treaties but also treaties of cession.[146] Considering that it is the **object and purpose of the exception to protect the territorial integrity of States** by maintaining the security of boundaries, para 2 lit a also applies to a treaty in which a State cedes an exclave to the State whose territory surrounds it as an enclave. Such a treaty "establishes" a boundary in the negative sense.[147] Taking up a later formulation of the ILC, the exception extends to all "treaties establishing or modifying the territory of States".[148]

75 When again taking up Art 62 in the context of the Final Draft 1982, the ILC made an effort to further define the central term "boundary", stating that certain lines may be boundaries for one purpose and not for others, depending on the context in which the term was used. Regarding Art 62, categorizing a line as a "boundary" had a stabilizing effect: "[t]o say that a line is a 'boundary' within the meaning of article 62 means that it escapes the disabling effects of that article".[149]

76 As the UNCLOS had recently been drafted, the Commission considered whether certain **lines of maritime delimitations** were boundaries for the purposes of Art 62. It noted that only the outer limit of the territorial sea was a true limit of the territory

[145]The United States objected to Syria's rejection of the compulsory conciliation procedures pursuant to Art 66 lit b in conjunction with the Annex. It declared its intention to reject treaty relations with Syria under all provisions in Part V of the Convention to which those procedures related. As the United States has not acceded to the Convention, that intention has so far not been carried out.

[146]Final Draft, Commentary to Art 59, 259 para 11. See also ICJ *Frontier Dispute (Burkina Faso v Mali)* [1986] ICJ Rep 554 para 17.

[147]*Dahm/Delbrück/Wolfrum* (n 23) 750 fn 69.

[148]Final Draft 1982, Commentary to Art 62, 60 para 4.

[149]*Ibid* para 5.

of a State but not other lines such as those delimiting the continental shelf or the exclusive economic zone. Moreover, lines of maritime delimitation (as well as the delimitation of air space) might have special features and it was possible that the stabilizing effect of Art 62 did not extend to certain lines of delimitation, even if they constituted true boundaries. Ultimately, however, the ILC declined to interpret the VCLT and the UNCLOS in its commentary on the Draft VCLT II.[150]

77 Against this background, it is safe to assume that para 2 lit a embraces treaties which neighboring or opposite States conclude to delimit their **territorial seas**. It is less certain whether the same holds true for treaties on the delimitation of the continental shelf or the **exclusive economic zone** because those areas have a legal status very different from the territory of a State.[151]

78 One governmental comment raised the issue of a boundary fixed by reference to a geographical feature such as the thalweg of a river, which is then significantly altered as the result of a natural occurrence and suggested that a counter-exception should be included in para 2 lit a for such an event. The Special Rapporteur, however, advocated the solution of that issue by reasonable interpretation and application of the treaty in the light of the changed geographical facts and not by termination pursuant to Art 62.[152] The proposal was not pursued any further.

79 If only one part of a treaty concerns the establishment of a boundary, its other parts are potentially subject to the *rebus sic stantibus* principle, provided the conditions for their separability laid down in Art 44 paras 2 and 3 are met.[153] Given the importance which provisions on boundaries will almost inevitably have in a composite treaty, that will hardly ever be the case. In other words, whenever provisions on the **establishment of a boundary form an integral (*ie* inseparable) part** of any treaty, Art 62 para 2 lit a precludes the application of the *rebus sic stantibus* principle to the entire treaty. As a matter of fact, SR *Waldock* once suggested that the exception should be formulated as follows: "[a] fundamental change may not be invoked as a ground for terminating or withdrawing from a treaty provision fixing a boundary or effecting a transfer of territory".[154] The ILC, however, did not adopt that proposal.

80 Art 62 para 2 lit a does not embrace treaties establishing territorial status otherwise than by the drawing of a boundary. **Treaties on territorial regimes** such as those granting servitudes, long-term leases of territory, condominium agreements or other agreements on the exercise of territorial sovereignty are therefore not covered by the exception.[155] A proposal by the United States to extend the

[150] Final Draft 1982, Commentary to Art 62, 60 para 6.

[151] *H Pott* Clausula rebus sic stantibus (1992) 106 *et seq*; but see *Dahm/Delbrück/Wolfrum* (n 23) 750, who underline the need to also guarantee the safety of those treaties by applying para 2 lit a to them.

[152] *Waldock* V 43 para 8.

[153] However, see *Dahm/Delbrück/Wolfrum* (n 23) 750 (who overlook Art 44 paras 2 and 3).

[154] *Waldock* V 44 para 11.

[155] *Klein* (n 135) 288 *et seq* (who advocates the inclusion *de lege ferenda* of treaties providing for objective territorial regimes); *Dahm/Delbrück/Wolfrum* (n 23) 750.

exception to treaties of that sort[156] was clearly rejected by the Conference because it was too imprecise.[157] During that debate, the **1959 Antarctic Treaty**[158] was mentioned as one example of a treaty which did not establish any boundary nor any territorial regime in the strict sense but another kind of special regime that should not be subject to the operation of the *rebus sic stantibus* principle.[159] In its current formulation, Art 62 para 2 lit a does not cover the Antarctic Treaty. One can, however, argue that the revision clause in Art XII of that treaty is *lex specialis,* which excludes any invocation of Art 62 (→ MN 86 *et seq*).

2. Fundamental Change Illegally Caused by Party Invoking It (lit b)

81 Like its counterpart in Art 61 para 2, the illegality exception in para 2 lit b is a **compelling consequence of the *bona fides* principle**. What has been said on the interpretation of Art 61 para 2 applies *mutatis mutandis* also to Art 62 para 2 lit b (→ Art 61 MN 27–29). The exception prevents only the wrongdoer, *ie* the State (or States) to whom the causal internationally wrongful act is imputable according to the rules on State responsibility,[160] from invoking the fundamental change which it has brought about illegally, but not any of the other innocent parties. Nor does it apply to a fundamental change which a State has brought about lawfully.[161]

82 Para 2 lit b requires no more than that the act causing the fundamental change breaches any international obligation which the State invoking the change owes to any other party to the treaty. That **breach need not be "material"** in the sense of Art 60 para 3[162]; a simple breach attributable to that State in the sense of Art 2 ILC Articles on Responsibility of States for Internationally Wrongful Acts[163] suffices. One example is the later conclusion by a State of another treaty with different parties, which conflicts with an earlier treaty (Art 30 para 5). The State cannot invoke its obligations arising from the new treaty to establish a fundamental change

[156] A/CONF.39/C.1/L.335, UNCLOT III 184 para 540 subpara iii lit b. See the explanation given by the US delegate UNCLOT I 367 paras 11–14.

[157] UNCLOT III 184 para 543 lit e. *Waldock*, who was present as an expert consultant, showed sympathy for the US proposal. He stated that he himself had suggested to the ILC that para 2 lit a should be enlarged to cover territorial regimes. That had been rejected because "it would be too hard to find a form of words which would not unduly enlarge the exceptions." (UNCLOT I 381 para 32).

[158] 402 UNTS 71.

[159] See the explanation by the US delegate, UNCLOT I 367 para 13. See also the remarks by the Australian delegate, UNCLOT I 372 para 24.

[160] See the ILC Articles on Responsibility of States for Internationally Wrongful Acts, which mostly codify customary international law (n 129).

[161] *Jiménez de Aréchaga* (n 109) 78.

[162] However, see *Villiger* Art 62 MN 20.

[163] (n 129).

of circumstances in order to obtain release from its earlier treaty commitments *vis-à-vis* other parties (Art 30).[164]

Whether the causal act really violated any international legal obligation will often be difficult to ascertain and a matter of dispute. This applies for instance to the **de-recognition of one authority as the government of a State** and the recognition of another in its place. Art 62 can then only be used to terminate treaties concluded with the former government if the de-recognition was in conformity with international law.[165] **83**

At the Conference, Vietnam proposed an amendment to the effect that a change which was "deliberately provoked by the party invoking it" should be mentioned separately in the exception, but that was rejected as unnecessary[166]: when **a party had brought about the change *bona fide***, there was no reason to prevent it from invoking Art 62. When it had not done so *bona fide*, it had violated the treaty and para 2 lit b applied in any case.[167] Where the party could have prevented the occurrence of the change but failed to do so, para 2 lit b will only take hold in if the party was *bona fide* obliged pursuant to the treaty or any other rule of international law *vis-à-vis* any other party to prevent it.[168] **84**

When reconsidering Art 62 para 2 lit b in the context of the Draft Articles of the VCLT II, the ILC realized that **special problems might arise where an international organization was a party to a treaty**. Fundamental changes resulting from acts which took place inside the organization were not necessarily imputable to the organization as such but to its Member States. The ILC gave the following example: an international organization made substantial financial commitments in a treaty. If the organs possessing budgetary authority refused to make the necessary appropriations, the organization would simply violate the treaty in the sense of Art 62 para 2 lit b VCLT II. However, if a number of Member States left and, as a result, the organization's financial resources were considerably reduced when its commitments fell due, the question whether the organization could invoke a fundamental change of circumstances arose in different terms. The Commission therefore emphasized that any application of Art 62 VCLT II required that account be taken of Art 73 VCLT II, which reserves the determination of the international responsibility of an international organization to legal rules outside the VCLT II.[169] **85**

[164] *MN Shaw*/*C Fournet* in *Corten*/*Klein* Art 62 MN 36.

[165] For a practical example, see *DJ Scheffer* The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China, (1978) 19 HILJ 931 *et seq*. As the 1954 Mutual Defense Treaty between the United States China, 6 UST 433, contained a termination clause, the United States need not rely on Art 62. → Art 63 MN 23.

[166] UNCLOT III 184 para 540 subpara iii lit a and para 543 lit d.

[167] Remarks by *Waldock*, UNCLOT I 381 para 33. See also the remarks by Swiss delegate *Bindschedler*, *ibid* 368 para 30.

[168] *Villiger* Art 62 MN 23 goes too far in qualifying any failure to prevent the change as a breach of good faith.

[169] Final Draft 1982, Commentary to Art 62, 60 para 2. The ILC is at present considering the topic of responsibility of international organizations, see Report of the ILC (61st Session 2009), UN Doc A/64/10 (2009), 13 *et seq*.

3. Further Exceptions?

86 An earlier proposal had also excepted the **constituent instruments of international organizations** from the application of Art 62.[170] It was later omitted in view of the general provision in Art 5, which guarantees that any special rule in such a constituent instrument will prevail over Art 62 in case of conflict.[171] It may indeed be necessary to leave open the possibility for Member States to withdraw from an international organization on the ground of a fundamental change of circumstances where the constituent instrument makes no provision for withdrawal, neither permitting nor excluding it.

87 One pertinent case mentioned in the discussions of the ILC was the UN Charter.[172] Although the **UN Charter** is silent in this respect, it is widely accepted that a Member State may withdraw from the organization when a certain fundamental change of circumstances has occurred. The often mentioned example, which was indeed approved by the Plenary of the Founding Conference, concerns a Member State whose rights or obligations are changed by a Charter amendment that is put into force by a majority of the Member States pursuant to Art 108 UN Charter over the opposition of the first-mentioned Member State.[173] The second example (also approved by the abovementioned Plenary) concerns the failure to secure the necessary ratifications for an amendment which a Member State considers important, perhaps because it would adapt the UN Charter to a fundamental change of circumstances.[174] The suspension of the operation of individual articles of the UN Charter is only possible in accordance with Art 44 para 3. The US withholding of part of its regularly assessed contributions to the UN budget on the basis of *rebus sic stantibus* that amounted to a suspension of Art 17 para 2 of the UN Charter did not meet the strict requirements of Art 44 para 3.[175]

88 The application of Art 62 may be subject to further exceptions beyond the two listed in para 2 which can either be grounded on an interpretation of the specific treaty from which a party seeks release on account of a fundamental change of circumstances or on general international law. One possible instance is **human rights treaties** with no termination clause. While Art 62 does not contain any equivalent to Art 60 para 5 (→ Art 60 MN 81 *et seq*), the human rights treaty may implicitly prevent parties from invoking a fundamental change of circumstances.

89 The most relevant example is the ICCPR, which was interpreted by the Human Rights Committee in the sense that it does not permit denunciation or withdrawal at

[170] Draft Art 22 para 5 lit c in *Waldock* II 79 *et seq* (→ MN 16).

[171] See the remarks by *Waldock* [1963-I] YbILC 158 para 19.

[172] [1963-I] YbILC 138 para 25 – remarks by *Castrén*; *ibid* 139 para 39 – remarks by *A Verdross*.

[173] *W Karl/B Mützelburg/G Witschel* in *Simma* Art 108 MN 43.

[174] *Ibid* MN 44.

[175] *E Zoller* The 'Corporate Will' of the United Nations and the Rights of the Minority (1987) 81 AJIL 610, 626 *et seq*.

will.[176] One important argument was that the Covenant accords rights to the inhabitants of the territory of the States Parties of which they may not be deprived ('continuity of obligations'). It is **unclear whether the Committee would also exclude withdrawal on the basis of Art 62**. Although that would no less deprive the inhabitants of their rights, it would at least protect States Parties from unexpected excessive burdens and prevent them from disregarding their treaty obligations. The safety valve of Art 62 should therefore not *a limine* be denied to parties of human rights treaties.

90 After the entry into force of the Treaty of Lisbon, Art 50 TEU now permits any Member State to withdraw from the European Union. The question whether such a withdrawal would be possible on the basis of the *rebus sic stantibus* principle of public international law[177] has therefore lost its practical relevance. Still relevant is another question which Art 50 TEU does not answer, whether a Member State can withdraw from certain parts of the TEU or the TFEU, *eg* those on the single currency (the euro). Even assuming that the *rebus sic stantibus* principle of customary international law could be applied to the **treaties on which the EU is based**, the provisions on the single currency are not separable from the rest of the TFEU in the sense of Art 44 para 3.

IV. Para 3: Suspension as an Alternative

91 The proposal to permit suspension of the operation of the treaty as an alternative to termination and withdrawal originally came from the Government of Israel.[178] It was not adopted by the ILC for two reasons: first, mere suspension did not seem to be appropriate and practicable to remedy the consequences of a fundamental change of circumstances. Second, adding the possibility of suspension might weaken the strict philosophy of Art 62 because it might give the impression that the change of circumstances need not be quite as fundamental.[179]

92 The proposal was reintroduced in the Conference by Canada and Finland, each in the form of an amendment to the opening sentence of Art 62 para 1.[180] The Canadian delegate stated that the decision of the ILC against suspension as an alternative remedy was only plausible if one considered fundamental change as synonymous with irreversible, permanent or unalterable change – which few States would accept. Given the divergent views on Art 62 and paucity of practice in the matter, it would be **unwise to exclude the possibility of suspension**.[181]

[176]HRC, General Comment 26, 12 August 1997, UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1.

[177]*Feist* (n 32) 168 *et seq*.

[178]*Waldock* V 39.

[179]Explanation given by *Waldock* as Expert Consultant UNCLOT I 381 para 29.

[180]A/CONF.39/C.1/L.320 and L.333, UNCLOT III 184 para 540 subpara ii lit a and lit b.

[181]UNCLOT I 366 paras 7–9.

93 While some delegations welcomed the amendment because it introduced an element of flexibility and preserved the treaty, paving the way toward its renegotiation,[182] others opposed it because they saw no reason to maintain a treaty in force after it had been upset by a fundamental change of circumstances.[183] The Committee of the Whole ultimately approved the principle contained in the two amendments by the narrow margin of 31 votes to 26, with 28 abstentions.[184]

94 The Drafting Committee to which the matter was then referred suggested that the suspension alternative should be transferred to a separate para 3 at the end of the article. As its chairman explained, simply mentioning suspension in para 1 might give the impression that Art 62 extended to purely temporary fundamental changes, which had apparently not been the intention of the Committee of the Whole. Rather, they seemed to have wished a party to have a choice between invoking Art 62 for purposes of either suspension or termination/withdrawal.[185] While the Committee of the Whole approved the proposal made by the Drafting Committee, the Canadian delegate expressed misgivings. He questioned whether a party should have a choice between suspension and termination or withdrawal, indicating that non-permanent fundamental changes could not justify termination or withdrawal.[186]

95 This short exchange raises the question of how para 3 relates to para 1: are parties given a free choice to opt for termination/withdrawal or suspension, as the text of para 3 indicates? The closely related Art 61 (→ MN 111; → Art 61 MN 39) makes clear in its para 1 clause 2 that the temporary impossibility of performance can only justify the suspension of the operation of the treaty. Art 62 should be interpreted in the same way, in line with the Canadian conception. Thus, where there are **reasons to assume that the fundamental change of circumstances is not permanent, the parties may normally only invoke it as a ground for suspending the operation of the treaty**.[187] A party which opts for termination or withdrawal bears the burden of proof that the change is permanent.[188] When the change is initially of uncertain duration and only later turns out to be permanent, the parties may then pass on from suspension to termination or withdrawal.

96 The application of Art 62 should interfere as little as possible with the **principle of *pacta sunt servanda***. Where the legitimate interests of parties affected by a fundamental change can be sufficiently protected by suspension, terminating the treaty is not justified and should therefore not be allowed under Art 62.[189]

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[182] UNCLOT I 378 para 3 – Greek delegate; UNCLOT II 120 para 35 – German delegate.

[183] UNCLOT I 371 para 10.

[184] UNCLOT I 382 para 37.

[185] UNCLOT I 479 para 41.

[186] UNCLOT I 479 *et seq* para 44.

[187] *Pott* (n 151) 123 *et seq*.

[188] On the burden of proof → MN 30.

[189] → Art 60 MN 49, 57 *et seq* where it was stated that parties to a multilateral treaty (other than the innocent party to a bilateral treaty [→ Art 60 MN 43 *et seq*]) do not have a free choice on how to react to a fundamental breach either.

Suspension has the further advantage of providing the parties with an **opportunity to renegotiate on the necessary adaptation of the treaty**.[190] There may, however, be exceptional cases when it is unreasonable to tie a party to a treaty, even though it is uncertain whether the change is permanent. Where a change is only temporary, the aforementioned explanation given by the Drafting Committee (→ MN 89) should in any case remind one carefully to examine even with regard to a mere suspension whether the strict requirements of Art 62 para 1 are met: is that change really fundamental and does it radically transform the remaining obligations?

V. Legal Consequences

1. Potential Range: From Consensual Adaptation of the Treaty to Unilateral Withdrawal

97 With regard to the legal consequence, Art 62 follows the construction of both Art 60 and Art 61 (→ Art 61 MN 30 *et seq*): similar to a material breach and the supervening impossibility of performance, a fundamental change of circumstances neither automatically terminates the treaty nor gives any party the right to denounce or withdraw from it. Rather, it enables a party to nothing more than invoking that change within a reasonable period of time (Art 45 lit b) and thereby set in motion the procedure pursuant to Arts 65–66. The ILC hoped that this would lead to an **agreement between the parties on the necessary adaptation of the treaty** (→ MN 6). Maintaining in force a revised treaty whenever possible is indeed the most appropriate remedy, should a fundamental change of circumstances occur. While it is not expressly mentioned in Art 62, this remedy is implicit in the procedural provision of Art 65.[191]

98 If, however, only one other party refuses to accept revision of the treaty and objects to termination, withdrawal and suspension, the VCLT **does not provide any effective compulsory dispute settlement mechanism** leading to a decision binding all the parties (→ MN 2). Yet even the relatively harmless conciliation procedure pursuant to Art 66 lit b in conjunction with the Annex provoked reservations from several States, which in turn induced other States to raise objections. Underlining the inextricable link between Art 66 and the substantive provisions of Part V, some of them (such as Finland, the Netherlands and Japan) refused to accept treaty relations between themselves and reserving States also with regard to those substantive provisions.[192]

99 When the parties, after having exhausted the procedure under Arts 65 and 66, are unable to agree on whether the conditions of Art 62 are met in a specific case and

[190] See the statement by the German delegate, UNCLOT II 120 para 35.

[191] See the remark by the Finnish delegate, UNCLOT I 366–367 para 10 *in fine*.

[192] 2009 Multilateral Treaties Deposited with the Secretary-General, UN Doc ST/LEG/SER.E/26, Vol III 531 (Finland), 532 (Netherlands and Japan) (ch XXII.1).

how to react to the change, the **Convention leaves the fate of the treaty in the balance**. In such a case, the substantive options of Art 62 should not be held hostage by the imperfect procedures of Arts 65 *et seq*. and unilateral action permitted as a last resort. Thus, if *bona fide* attempts to settle an eventual dispute on the application of Art 62 have definitely failed, a party negatively affected by the change (→ MN 96) can notify its decision to terminate, withdraw from or suspend the operation of the treaty pursuant to Art 67. To deny such a party the option of unilateral exoneration would leave it with hardly any other choice but to breach the outdated treaty – precisely the predicament that Art 62 is intended to avoid (→ MN 5). The **impending risk of incurring international responsibility** for wrongfully invoking Art 62 will induce States not to do so without good reason.[193] However, here as in many other situations, the imperfection of the international legal order benefits the more powerful States.[194]

100 Under Art 62, any fundamental change of circumstances will have legal consequences only if it is invoked by a party, *ie* by a person having full powers in the sense of Art 7. The issue of whether to invoke it is a **political question**. Accordingly, a **court or tribunal – national or international – cannot apply Art 62 on its own authority** and on that basis find that a treaty has terminated.[195]

2. Which Party Can Invoke the Fundamental Change of Circumstances?

101 Art 62 does not specify which of the parties of a multilateral treaty – other than the one excluded under para 2 lit b – is entitled to invoke a change of circumstances and *vis-à-vis* what other parties it may do so. In answering these two questions, one has to bear in mind that Art 62 should be interpreted narrowly so as to disparage as little as possible the rule *pacta sunt servanda*. In view of para 1 lit b, only those **parties whose unfulfilled obligations have been radically transformed (*ie* have become excessively burdensome) by the change may make use of Art 62**.[196] Where the multilateral treaty establishes a cluster of essentially bilateral reciprocal (synallagmatic) obligations in the relations between the parties, only those bilateral relations affected by the change may be terminated or suspended.[197] Where the multilateral treaty establishes obligations for each party *vis-à-vis* all the other parties (erga omnes partes), then the change can be invoked *erga omnes partes*.

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[193] *Haraszti* (n 24) 85 *et seq*. But see *Fitzmaurice/Elias* (n 60) 198 *et seq* arguing that Art 62 does not provide any solution where the parties fail to agree.

[194] *Klein* (n 135) 287 *et seq*.

[195] See the 1923 decision by the Swiss Federal Tribunal referred to in the commentary on Art 28 Harvard Draft 1103 *et seq*. See also Restatement (n 14) reporters' note 1 (third paragraph).

[196] Japan submitted an amendment which would have clarified the matter, proposing to add at the end of para 1 lit b the words "to a serious disadvantage of the party invoking it" (A/CONF.39/C.1/L.336, UNCLOT III 184 para 540 subpara ii lit c). This amendment was rejected by the Committee of the Whole by 41 votes to 6, with 35 abstentions (*ibid* para 543 lit b). Most delegations seem to have considered it as superfluous.

[197] *Feist* (n 32) 168 *et seq*.

3. Equitable Compensation for Benefits Derived from Partial Performance?

102 One question that was discussed in the context of Art 61 (→ Art 61 MN 36 *et seq*) also came up with regard to Art 62 – the question of **equitable compensation for unjust enrichment** of those parties which had already derived benefits from the treaty without having performed their own obligations before the change of circumstances occurred. The Special Rapporteur placed before the ILC a proposal for the inclusion in Art 62 of a paragraph on that subject similar to para 4 of his redraft of Art 43 (now Art 61).[198] After having been transferred to Section 5 of the Convention on the consequences of the termination or suspension of the operation of a treaty, the idea of including a specific provision was ultimately abandoned in view of the difficulty to formulate a general rule appropriate for all cases (→ Art 61 MN 37–38).

VI. Codification of a Rule of Customary International Law and a General Principle of Law

103 When Art 62 was formulated in the 1960s, there was still some uncertainty as to whether and to what extent the principle of *rebus sic stantibus* formed part of customary international law. The PCIJ had reserved its position in the 1932 *Free Zones* case.[199]

104 In the 1973 *Fisheries Jurisdiction* case, the ICJ then found:

> "[i]nternational law admits that a fundamental change in the circumstances which determined the parties to accept a treaty [...] may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty."

The Court also recognized that Art 62 "may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances".[200] Twenty-four years later in the ***Gabčíkovo-Nagymaros* case**, the ICJ confirmed that Art 62 is in many respects declaratory of customary law relating to termination or suspension of the operation of a treaty.[201] In what respects that might not be the case is unclear.[202]

105 With regard to the procedural safeguards in Arts 65 *et seq*, the ICJ held that they "at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith".[203] Somewhat more reservedly, and without quoting the ICJ, the ECJ noted that the specific

[198] Remarks by *Waldock* [1966-I/1] YbILC 86 para 18. → Art 61 MN 8.

[199] PCIJ *Free Zones* (n 31) → MN 9.

[200] ICJ *Fisheries Jurisdiction* (n 88) para 36.

[201] ICJ *Gabčíkovo-Nagymaros Project* (n 64) paras 46 and 99.

[202] *MN Shaw/C Fournet* in *Corten/Klein* Art 62 MN 7. According to *Heintschel von Heinegg* (n 85) MN 26, Art 62 para 2 lit a is "probably" not part of customary international law.

[203] ICJ *Gabčíkovo-Nagymaros Project* (n 64) para 109; → Art 60 MN 87.

procedural requirements laid down in Art 65 do not form part of customary international law and found that a **prior warning indicating the intention of one party to suspend the operation of a treaty**, should a certain change of circumstances occur, was sufficient.[204]

106 With regard to substantive requirements of Art 62, the ECJ, relying on the aforementioned *Fisheries Jurisdiction* case, confirmed in 1998 that the provision in many respects codified a rule of customary international law, which could be invoked even by a supranational organization.[205] It further held that under para 1 it has the power to review a Council regulation suspending the operation of a treaty of the EC (now EU) with a third State; under para 2 that because of the complexity of the rules in question and the imprecision of some of the concepts to which they referred its **judicial review was limited to the question whether the Council made manifest errors of assessment** concerning the conditions for applying those rules; and under para 3 that a private enterprise which would benefit from the further application of the treaty with the third State could invoke the rules of customary international law, which governed the termination and suspension of treaty relations. In view of the deferential standard of review used by the ECJ, the precedential value of its judgment has been questioned.[206]

107 Recently, with regard to an action brought by the Commission against two Member States under Art 226 EC (now Art 258 TFEU) for failure to fulfil obligations under Art 307 EC (now Art 351 TFEU) with regard to pre-existing bilateral investment treaties, the ECJ held that the possibility of relying on mechanisms offered by international law, including those under Art 62 (which the Court did not expressly cite), such as suspension or even denunciation of the treaties at issue or of some of their provisions, was too uncertain in its effects to guarantee that the implementation of those treaties could at all times be kept within the limits of EU law.[207]

108 Being recognized as an element of the law of contract in many private law systems around the world, the *rebus sic stantibus* principle also qualifies as a **general principle of law** in the sense of Art 38 para 1 lit c of the ICJ Statute.[208]

[204]ECJ (CJ) *Racke* (n 85) paras 58 *et seq*. See also *Fitzmaurice/Elias* (n 60) 195 *et seq*.

[205]ECJ (CJ) *Racke* (n 85) paras 24 *et seq*. See *Fitzmaurice/Elias* (n 60) 183 *et seq*.

[206]*Fitzmaurice/Elias* (n 60) 185. See also the critical annotation by *J Klabbers* (1999) 36 CMLR 179 *et seq*.

[207]ECJ (CJ) *Commission v Austria* C-205/06, 3 March 2009, para 40; *Commission v Sweden* Case C-249/06, 3 March 2009, para 41. See the case note by *P Koutrakos* (2009) 46 CMLR 2059 *et seq*.

[208]*Fitzmaurice* II 57 para 144 subpara 3; *Jennings/Watts* (n 29) 1306; *Dahm/Delbrück/Wolfrum* (n 23) 752; see also *R Köbler* Die "clausula rebus sic stantibus" als allgemeiner Rechtsgrundsatz (1991).

VII. Relation to Other Rules of International Law

Art 62 is intended to serve as a last resort for exceptional cases only. Accordingly, its application must remain the *ultima ratio* to provide a legal way out of unbearable situations in cases where all other remedies fail.[209] Like most other provisions of the VCLT, the article codifies a residuary rule which will be superseded by specific provisions in the particular treaty affected by a change of circumstances. Some treaties include special *rebus sic stantibus* clauses, which take precedence over Art 62.[210] The **derogation clauses contained in various human rights treaties** which permit parties to derogate from their treaty obligations to the extent strictly required by the exigencies of an unforeseen emergency situation[211] also qualify as *leges speciales*.[212] Where a treaty includes a **revision clause** which enables the parties to accommodate the change, Art 62 does not apply (→ MN 52). **109**

The international legal rules of treaty interpretation are also relevant for handling a fundamental change of circumstances. By reasonably interpreting a treaty, undue hardship arising out of a change can often be avoided and resort to Art 62 thus excluded.[213] **Interpretation** may also lead to the result that the treaty gives any party an implied right of denunciation so that Art 54 lit a (possibly in conjunction with Art 56 para 1 lit b) makes the invocation of Art 62 unnecessary. Interpretation may even reveal that the treaty contains its own tacit *clausula rebus sic stantibus* in the sense that a certain change of circumstances shall operate as a resolutory condition extinguishing the treaty. It will then automatically terminate upon the occurrence of that change, leaving no room for Art 62.[214] **110**

Arts 61, 63 and 64 all regulate special instances of fundamental change, superseding the *lex generalis* of Art 62. On the other hand, Art 62 qualifies as *lex specialis* with regard to the **necessity defence in the law of State responsibility**[215] because it enables a State to obtain an orderly release from its treaty obligations. However, where Art 62 does not permit a State to terminate or suspend treaty obligations, it may still be possible for that State to justify their non-fulfilment on the basis of necessity.[216] **111**

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[209] See *MN Shaw*/*C Fournet* in *Corten*/*Klein* Art 62 MN 2; *Heintschel von Heinegg* (n 85) MN 29.

[210] For examples, see *Waldock* II 83 fn 159; *Jennings*/*Watts* (n 29) 1306 footnote 5. See also Art XIX (escape clause), Art XXI (national security exception - D Eisenhut Sovereignty, National Security and International Treaty Law (2010) 48 Archiv des Völkerrechts 431 *et seq*.), and Art XXIII:1(c) (situation complaint – *M Hilf* Das Streitbeilegungssystem der WTO, in M Hilf/S Oeter (eds) WTO-Recht (2005) 536 MN 76) of the GATT 1947/1994 and the waiver provision (Art IX:3, 4) of the WTO Agreement.

[211] See Art 15 ECHR; Art 4 ICCPR; Art 27 of the 1969 American Convention on Human Rights 1144 UNTS 123.

[212] *Feist* (n 32) 168 *et seq* → MN 83 *et seq* as to the applicability of Art 62 to human rights treaties.

[213] See *Fitzmaurice* II 57 para 143.

[214] *MN Shaw*/*C Fournet* in *Corten*/*Klein* Art 62 MN 28.

[215] See Art 25 ILC Articles on Responsibility of States (n 129).

[216] For the similar relationship of Art 61 with Art 23 of the Articles on Responsibility of States, → Art 61 MN 41 *et seq*.

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Article 63

Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except insofar as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Contents

A. Purpose and Function

This provision, which is closely related to Art 74, separates the political issue of diplomatic (and to a lesser extent also consular) relations between States[1] from the legal issues pertaining to their treaty relations. Treaties being important both "as a source of international law and as a means of developing peaceful co-operation among nations", irrespective of their different constitutional and social systems,[2] the international community has a strong interest in preserving their stability and making them **independent of the volatility of diplomatic (and consular) relations**.[3] This is why the severance (or absence) of such relations neither prevents the conclusion of treaties between States (Art 74), nor does it affect their legal relations under existing treaties (Art 63). Ultimately, Art 63 constitutes a confirmation of the principle of *pacta sunt servanda*.[4] **1**

On the other hand, the severance of diplomatic relations between States usually occurs because of **serious political differences which prevent further genuine co-operation** between them. This necessarily affects their readiness to faithfully fulfil their mutual treaty obligations, all the more since it will make the implementation **2**

[1] *H Blomeyer-Bartenstein* Diplomatic Relations, Establishment and Severance (1992) 1 EPIL 1070 *et seq*.

[2] See 1st recital of the Preamble of the VCLT.

[3] *N Angelet* in *Corten/Klein* Art 62 MN 2.

[4] Remarks by the Israeli delegate, UNCLOT I 383 para 52.

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of treaties difficult, often more onerous and sometimes even impossible. As the Convention includes provisions dealing with both the supervening impossibility of performance (Art 61) and the fundamental change of circumstances (Art 62), it was felt that clarifying the impact of a diplomatic rupture on existing treaties could not be avoided. Art 63 provides in essence that it shall have no effect unless it renders the application of the treaty impossible.

3 Some doubts remain whether this clarification was indispensable since the situation covered by the provision had not given rise to any problems or controversies in international practice.[5] Art 63 constitutes **"a proviso inserted *ex abundanti cautela*"**.[6] Its main function may be to provide municipal tribunals with the necessary clarification.[7]

4 Before the use of force was outlawed by Art 2 para 4 UN Charter, the severance of diplomatic relations was often an **intermediate ste on the road to war**. Although the VCLT refrains from regulating the effects which the outbreak of hostilities might have on treaties (→ Art 73, also → Art 62 MN 37), it takes up the diplomatic rupture in Art 63. The principle set out in the provision that the severance of diplomatic relations is irrelevant to treaty relations was generally and easily accepted in the drafting process, but the exception proved to be very contentious.

B. Historical Background and Negotiating History

5 Art 25 of the Harvard Draft treated the severance of diplomatic relations between States as an **instance of the impossibility** for those States of performing their treaties[8]:

> "Article 25. Effect of Severance of Diplomatic Relations
>
> If the execution of a treaty is dependent upon the uninterrupted maintenance of diplomatic relations between the parties thereto, the operation of the treaty is suspended as between any parties upon the severance of their diplomatic relations; in the absence of agreement to the contrary, however, the operation of the treaty as between such parties will be revived by the reestablishment of their diplomatic relations."

6 Both Draft Art 25 and present-day Art 63 express the same rule/exception relationship, assuming that the severance of diplomatic relations will normally not affect treaty performance unless the execution or application of the treaty exceptionally depends on the existence of those relations. However, whereas Art 63 is formulated in the negative, similar to Art 56 and Art 62, underlining the rule and narrowly circumscribing the exception, Draft Art 25 centers the exception and regulates it in broader positive terms. As the commentary on Draft Art 25

[5] Remarks by *El-Erian* [1966-I-2] YbILC 110 para 90.

[6] Remarks by the Japanese delegate at the Vienna Conference, UNCLOT I 383 para 48.

[7] Remarks by *Rosenne* [1964-I] YbILC 158 para 62.

[8] Harvard Draft 1055 *et seq*. See in particular 1056.

explained, the likelihood that a State would ever sever diplomatic relations with another State for the purpose of avoiding its treaty obligations was so improbable that it need not be taken into account when formulating the provision.[9]

Draft Art 25, in contrast to Art 63, also specified the **legal consequence where the exception should occur**. In that case, the operation of the treaty was to be automatically suspended. Based on the assumption that any interruption of diplomatic relations, unless followed by a declaration of war, would be relatively brief, the Harvard Draft added another automatic rule to the effect that the re-establishment of diplomatic relations would revive the operation of the treaty, unless the parties agreed otherwise.[10] 7

It was common ground in the ILC that the severance of diplomatic relations did not in itself terminate the treaty relationships between the States concerned. In his second report on the law of treaties, *Fitzmaurice* stated categorically that by reason of the **principle of *pacta sunt servanda*** the severance of diplomatic relations could never in itself justify the termination or suspension of treaties. Practical difficulties of implementation, which might be caused thereby could always be met by invoking the good offices of another State, or by appointing a protecting State.[11] 8

His successor as Special Rapporteur *Waldock*, while agreeing with *Fitzmaurice*'s rule, was less categorical because in his view, no State was obliged either to accept the good offices of another State or to recognize the nomination of a protecting State after diplomatic relations had been broken off.[12] Referring to Art 25 of the Harvard Draft, he proposed to insert the following clarifying provision into Part III of the Convention on the application of treaties and not to place it in the context of the termination of treaties: [13] 9

> "Art 65 A. – The effect of breach of diplomatic relations on the application of treaties[14]
> Subject to article 43[15] the severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty and, in particular, their obligation under article 55."[16]

Waldock explained that if the **severance of diplomatic relations rendered the performance of the treaty impossible**, that could be invoked as a ground for terminating it or suspending its operation.[17] 10

[9] Harvard Draft 1057 *et seq*.

[10] *Ibid* 1056 *et seq*.

[11] *Fitzmaurice* II 23 (text of Art 5 para 2 cl iii lit a), 42 para 34 (commentary).

[12] *Waldock* III 45 para 5. *Waldock* referred to Art 45 and 46 VCDR which required the consent of the receiving State in either case.

[13] *Waldock* III 45 para 4.

[14] *Waldock* III 44 (footnotes added).

[15] Supervening impossibility of performance.

[16] *Pacta sunt servanda*.

[17] *Waldock* III 45 para 45 para 6.

11 After the reference to Draft Art 43 on impossibility had been criticized by ILC members because of the implication that the severance of diplomatic relations could lead to the termination of the treaty and not only to the suspension of its operation,[18] the Drafting Committee redrafted Art 65 A, making two paragraphs out of the earlier single paragraph:

> "1. The severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty.
> 2. However, such severance of diplomatic relations may be invoked as a ground for suspending the operation of the treaty if it results in the disappearance of the means necessary for the application of the treaty [. . .]."[19]

12 The ILC preliminarily adopted that version after having replaced "means necessary" by "necessary channels".[20] For unknown reasons, the provision was included as Draft Art 64 in the ILC Draft of 1964 without the adopted amendment, again speaking of "means necessary". The commentary, however, made clear that the exception in para 2 had in mind cases where the application of the treaty was dependent upon the existence of diplomatic channels.[21]

13 Whereas Draft Art 64 para 1 was unanimously approved by Governments, several of them criticized para 2 as not being strict enough, leaving States with too much scope for invoking the severance of diplomatic relations as a pretext for suspending performance of a treaty.[22]

14 The Special Rapporteur thereupon suggested that the exception should be reformulated so as to be closely linked again with Draft Art 43 on the supervening impossibility of performance but at the same time make clear that the severance of diplomatic relations could be no more than a temporary obstacle to treaty performance: "[i]f the severance of diplomatic relations should result in a temporary impossibility of performing the treaty in consequence of the disappearance of a means indispensable for its execution, article 43 applies."[23]

15 The Drafting Committee to which the matter was referred proposed to drop the reference to any exception, retaining just the plain rule that "[t]he severance of diplomatic relations between parties to a treaty does not in itself affect the legal relations between them by the treaty."[24] This proposal was based on the assumption that supplementing the simple rule by a specific reference to the impossibility of performance would unduly enlarge the scope of the article. As the words "in itself" indicated, a State remained free to argue that the severance of diplomatic relations

[18] Remarks by *Jiménez de Aréchaga* and *Rosenne*, [1964-I] YbILC 157 para 55, 158 para 60.

[19] [1964-I] YbILC 239 para 5. Art 65A para 3 on partial impossibility, which was later dropped in view of Art 44 para 3 has been omitted here.

[20] [1964-I] YbILC 239 para 15.

[21] [1964-II] YbILC 192 para 5.

[22] *Waldock* VI 78 para 3.

[23] *Ibid* 78 para 4.

[24] [1966-I/2] YbILC 212 paras 9–10.

brought about the supervening impossibility of performance, but only if it could make out a case in accordance with Draft Art 43 (now Art 61).[25]

16 The ILC adopted this abbreviated version of the article by 17 votes to none, with one abstention.[26] It became Art 60 of its Final Draft.[27] The Commission gave two reasons for the elimination of the impossibility exception. It first referred to the reformulation of Draft Art 58 (now Art 61) pursuant to which the supervening impossibility of performance was linked to the disappearance or destruction of an indispensable object whereas the severance of diplomatic relations related to means rather than to an object.[28] Secondly, the use of third States and even direct channels of communication had become so common that the absence of the normal diplomatic channels could no longer be considered "as a disappearance of a 'means' or of an 'object' indispensable for the execution of a treaty."[29]

17 At the Vienna Conference, the ILC's Draft Art 60 was considered as too incomplete a statement of the rule governing severance of diplomatic relations. Moreover, it did not sufficiently take into account the **political sentiment of States and the psychological climate of international relations**.[30] Thus, most delegations reacted favourably to an amendment jointly submitted by Italy and Switzerland to add at the end of the draft article the words "unless those legal relations necessarily postulate the existence of normal diplomatic relations", even though that exception might already be implicit in the ILC's text.[31] The Committee of the Whole adopted the principle of this amendment by 62 votes to none, with 25 abstentions, the exact wording being left to the Drafting Committee.[32] The Drafting Committee omitted the adjective "normal", having been criticized as potentially creating uncertainty on the scope of the exception.[33] The Conference adopted the final text of Art 63 by 103 votes to none.[34]

18 A Chilean amendment proposing to add a second paragraph to Draft Art 60 with the rule now embodied in Art 74[35] was adopted in its substance but transformed into a separate provision (Draft Art 69*bis*).[36] The Hungarian amendment that led

[25]Explanations given by the Chairman of the Drafting Committee and the Special Rapporteur [1966-I/2] YbILC 212 paras 10–11.

[26]*Ibid* 213 para 27.

[27][1966-II] YbILC 260.

[28]Final Draft, Commentary to Art 60, 260 para 3.

[29]*Ibid* 261 para 4.

[30]See the remarks by the delegates of Malaysia and Congo, UNCLOT I 383 para 58, 384 para 61.

[31]A/CONF.39/C.1/L.322, UNCLOT III 185 para 549 subpara a.

[32]UNCLOT I 386 para 83.

[33]See the criticism by the delegates from Hungary and Singapore UNCLOT I 383 para 47, 384 para 64.

[34]UNCLOT II 122 para 53.

[35]UNLCOT III 185 para 549 [d].

[36]UNCLOT I 480 paras 53 *et seq*.

to the inclusion of a rule on the severance of consular relations will be discussed *infra* (→ MN 24 *et seq*).

C. Elements of Article 63

I. Severance of Diplomatic Relations

19 The general rule set out in the first half of **Art 63 embodies the progress made in international relations since the 19th century**. At that time, the severance of diplomatic relations was an act of extreme gravity, often a prelude to a declaration of war. It ushered in a period of stony silence and could be considered as excluding the further implementation of most treaties between the parties, except for those few that were specifically intended to apply in cases of diplomatic rupture. Today, even States maintaining no diplomatic relations with each other can and often do communicate unofficially via their permanent missions to the United Nations.[37]

20 The "severance of diplomatic relations" presupposes the prior existence of normal diplomatic relations.[38] Art 63 uses that term in the technical sense in which it also appears in Art 41 UN Charter and in Art 2 para 3 VCCR[39] and which is synonymous with the term "breaking off of diplomatic relations" preferred in Art 45 VCDR. The ILC obviously saw no need to define the term, although one of its members had indicated that its precise meaning was unclear.[40]

21 "Severance of diplomatic relations" means their termination, which effectively ends all direct official communications between the two governments. This can be done by mutual consent, but will **mostly be effected by a unilateral act** of one of the governments, either as an expression of political protest, as a political sanction (*eg* against abuse of diplomatic privilege) or as a means to implement a decision or recommendation of an international organization (*eg* a UNSC resolution pursuant to Art 41 UN Charter).[41] Normally, diplomatic relations are terminated by express notification. There are, however, also **implied forms** such as the actual closure of one's own mission together with the demand that the other government also closes its mission – actions which clearly manifest the intention of one government to break off diplomatic relations with the other.[42]

22 From the formal severance of diplomatic relations, **less severe forms of diplomatic frictions have to be distinguished**, such as the temporary recall of an ambassador for consultations, his permanent recall without a request for the *agrément* for a successor or the notification that the ambassador of another State is

[37] See the remarks by *Bartoš* and *Tunkin*, [1966-I/2] YbILC 109 paras 80, 84.

[38] Final Draft, Commentary to Art 60, 260 para 1.

[39] See Final Draft, Commentary to Art 60, 261 para 5.

[40] Remarks by *Bartoš*, [1966-I/2] YbILC 109 para 80.

[41] *BS Murty* The International Law of Diplomacy (1989) 253; *Blomeyer-Bartenstein* (n 1) 1071.

[42] *Murty* (n 42) 253.

persona non grata. In all these cases, the diplomatic relations as such remain unimpaired and the diplomatic mission continues to function under the direction of a *chargé d'affaires*.[43] While Art 63 technically embraces only the formal severance of diplomatic relations, it clearly implies that those lesser forms of diplomatic frictions do *a fortiori* not affect the treaty relations between the parties.[44] The question, however, remains whether diplomatic frictions short of the severance of diplomatic relations can also trigger the application of the exception (→ MN 39).

23 In contrast to Art 25 of the Harvard Draft,[45] Art 63 does not cover the non-existence of diplomatic relations due to the **non-recognition (or de-recognition)** of a government, an issue that the ILC preferred to discuss under the topic of State succession.[46]

II. Severance of Consular Relations

24 It was the Hungarian Government that drew the ILC's attention to the severance of consular relations, a move envisaged by the pertinent Convention on Consular Relations,[47] and suggested that its effect on the application of treaties should also be dealt with either in the present or a separate article.[48] The Special Rapporteur expressed his reservations because the severance of consular relations could not be placed on the same footing as the severance of diplomatic relations. He also referred to the large number of consular conventions, which would have to be taken account of.[49] This led the ILC not to adopt the Hungarian suggestion.

25 Hungary thereupon submitted an amendment to the Vienna Conference to insert the words "and consular" between the words "diplomatic" and "relations".[50] The Hungarian delegate explained that the amendment was intended to fill an important gap in the draft text of the ILC. Consular relations between States often existed in the absence of diplomatic relations. If Art 63 was limited to diplomatic relations, a State having only consular relations with another State might sever them and invoke the article as an escape clause for ridding itself of its obligations under a treaty with that other State it no longer wished to perform.[51] The Committee of the Whole

[43] *Murty* (n 42) 254 *et seq*; *Blomeyer-Bartenstein* (n 1) 1071.

[44] *N Angelet* in *Corten/Klein* Art 62 MN 16.

[45] See the pertinent comment in the Harvard Draft 1060 *et seq*.

[46] Final Draft, Commentary to Art 60, 260 para 1. On de-recognition see *R Jennings/A Watts* Oppenheim's International Law Vol I Parts 2–4 (9th edn 1992) 1309 footnote 2.

[47] Art 2 para 3, 27 VCCR.

[48] *Waldock* VI 77.

[49] *Waldock* VI 79 para 9.

[50] A/CONF.39/L.334, UNLCOT III 185 para 549 [b].

[51] UNCLOT I 382 paras 45 *et seq*. The Hungarian delegate impliedly referred to the interpretive maxim '*inclusio unius est exclusio alterius*'.

adopted the Hungarian amendment in principle by a vote of 79 to none, with 11 abstentions.

26 After the Drafting Committee had replaced the "and" in the Hungarian proposal by an "or", which seemed more in conformity with the sponsor's intention, and included a reference to consular relations in the Italo-Swiss amendment, the text of Art 63 was finalized and approved without a vote by the Committee of the Whole.

27 The **interpretation of the consular relations variant of Art 63 follows the interpretation of the diplomatic relations variant**: although it technically also only extends to the formal severance of consular relations, lesser frictions in consular relations will *a fortiori* not affect the treaty relations between the parties (→ MN 22).

III. Regular Consequence: Irrelevance for Legal Relations Established by Treaty

28 There was consensus in the ILC and at the Vienna Conference that the severance of diplomatic or consular relations between the parties to a treaty, no matter whether bilateral or multilateral,[52] should in itself as a general rule have no effect on the legal relations established between them by the treaty, no matter how deeply disturbed their political relations might be.[53]

29 Conversely, some treaties such as the Geneva Conventions of 1949 for the protection of victims of war only become applicable for the most part, if there are no diplomatic relations between the parties. However, it was considered as unnecessary to include a clarification in Art 63 which referred to these treaty types.[54]

IV. Exceptional Consequence: Relevance for Legal Relations Established by Treaty

1. Conditions Under Which Exception Applies

a) Impossibility of Performance

30 The real issue both within the ILC and at the Conference was the exception to the general rule: in what exceptional cases and in what regard should the severance of diplomatic or consular relations affect the legal relations between the parties to a treaty? The problem was how to **circumscribe that exception so narrowly that it could not develop into a threat to the stability of treaty relations**.

[52] Final Draft, Commentary to Art 60, 260 para 1.

[53] *Ibid* 260 para 2.

[54] See comments by the Israeli government quoted by *Waldock* VI 77, and his own reaction, *ibid* 78 para 6.

There was a general feeling that in some cases, the application of a treaty would become impossible if the parties no longer had diplomatic or consular relations with each other. However, the question of how to define these exceptional cases exactly without providing the parties with an easy pretext for evading their treaty obligations proved very difficult. **31**

When the Italian and Swiss delegations introduced the amendment (→ MN 17) containing the exception they referred to **two different categories of treaties whose performance would inevitably be affected by the severance of diplomatic relations**: first, "treaties in which diplomatic relations were the only technical means of execution, through the essential communications that they established in such matters as consultation, extradition [. . .]"; second, treaties such as the VCDR whose direct and exclusive subject was diplomatic relations.[55] Treaties in the second category were allegedly "nullified" by the severance of diplomatic relations.[56] The latter allegation obviously goes too far – the VCDR itself presupposes a continuing treaty relationship after diplomatic ruptures.[57] On the other hand, most provisions of that Convention are simply inapplicable in the absence of diplomatic relations because their regulatory object disappeared. **32**

Opinions on the issue were divided in the ILC. Some members felt that the "frosty atmosphere" in consequence of the breaking off of diplomatic relations alone could make the suspension of the application of treaties inevitable.[58] Other members observed that instances in which diplomatic ruptures rendered treaty performance impossible were extremely rare, because the permanent missions of States at the UN could always be used as informal channels of communication.[59] A third group of members rejected the intermediate solution that had consisted in linking Art 63 by cross-reference to Art 61 on the impossibility of performance. To them, that did not seem feasible because the latter provision was too narrow, covering only instances of absolute impossibility.[60] **33**

These difficulties ultimately led the ILC to drop any express exception from its Draft Art 60 (now Art 63, → MN 15 *et seq*). When the Conference reintroduced such exception, it revived the **problem of indeterminacy**, which the ILC had tried to avoid, without providing any solution. The only safe assumption is that the exception refers to **instances of impossibility of performance, arguably going beyond those covered by the narrow provision of Art 61**.[61] Whereas Art 61 **34**

[55]UNCLOT I 382 para 44. Extradition treaties and treaties of judicial assistance were examples already mentioned by *Rosenne*, [1964-I] YbILC 21 para 12.

[56]UNCLOT I 384 para 62.

[57]See *ibid.* Art 45 on the duty of the receiving State to respect and protect the premises of the mission *etc*

[58]*Ago* and *Yasseen*, [1964-I] YbILC 239 paras 7 and 9.

[59]*Bartoš*, *Tunkin* and *Tsuruoka*, [1966-I/2] YbILC 109, paras 76 *et seq*, 84, 89, 104. See also *Aust* 307 *et seq*.

[60]*Jiménez de Aréchaga*, *El-Erian*, *Amado*, [1966-I/2] YbILC 108, paras 85 *et seq*, 94, 101. See also *Ago*, *MK Yasseen*, *ibid* paras 60 and 73.

[61]See *F Capotorti* L'extinction et la suspension des traités (1971) 134 RdC 417, 530.

concerns the disappearance of an object, Art 63 deals with the **disappearance of avenues of communication**, with both being defined as "indispensable" for the execution or application of the treaty. If one extends the term "object" in Art 61 to a legal situation, the existence of diplomatic or consular relations might be covered (→ Art 61 MN 14, also → MN 57). **"Indispensable" in any event means absolutely required**, which is a rather strict standard.[62]

35 There is apparently only one case where the exception was invoked in practice (but ultimately not applied because its strict conditions were not met) and which can serve as a guideline for future interpretation: in the ***HALB* case *(LAFICO v Burundi)***, the arbitral tribunal held that the severance of diplomatic relations did not affect the multiple mixed commissions in which the two States Parties (Libya and Burundi) cooperated for the well-being of their citizens, although these all more or less had 'political connotations'. Accordingly, an inter-State stock corporation whose only stockholders were the States of Libya (later succeeded by the Libyan company LAFICO) and Burundi and which was the principal instrument of cooperation between these two States could continue to function, and the treaty on which it was based could continue to be implemented, despite Burundi's having severed diplomatic relations with Libya. The exception in Art 63 should not be interpreted broadly, or else the provision would illicitly be turned into an instrument of destabilization of international relations.[63]

36 In the ***Tehran Hostage* case**, the ICJ held without referring to Art 63 that the Treaty of Amity, Economic Relations, and Consular Rights of 1955[64] between the United States and Iran had remained in force and applicable despite diplomatic relations having been severed before the judgement was handed down. The Court expressly stated that

> "[a]lthough the machinery for the effective operation of the 1955 Treaty has, no doubt, now been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions remain part of the corpus of law applicable between the United States and Iran."[65]

Obviously, the Court saw no reason to assume that the operation of the Treaty of Amity had been suspended due to the indispensability of diplomatic relations for its application (→ MN 41).

37 One instance where the exception could be applied would be a treaty stipulating that diplomatic remedies had to be exhausted before recourse to other dispute settlement procedures were permitted. After the severance of diplomatic relations, the exhaustion requirement could no longer be fulfilled.[66] Another example is Art 1

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[62] *Villiger* Art 63 MN 7.

[63] *HALB Case (LAFICO v Burundi)* (1990) 24 RBDI 517, 536 paras 38 *et seq*. See also *N Angelet* in *Corten/Klein* Art 62 MN 31.

[64] 284 UNTS 93.

[65] ICJ *United States Diplomatic and Consular Staff in Tehran (United States v Iran)* [1980] ICJ Rep 3 para 54.

[66] See the remarks by *Ago* and *Rosenne*, [1964-I] YbILC 157 para 53, 158 para 61.

of the 1954 Convention Relating to Civil Procedure, which provides that in civil and commercial matters, the service of documents on persons abroad shall be effected in the contracting States at the request of the Consul of the requesting State.[67] This provision can only be applied if consular relations exist.[68] A third example would be a treaty on immunities granted to consuls, which would become inapplicable for as long as consular relations are interrupted.[69]

38 The **rules of *pacta sunt servanda* and good faith** (Art 26) advise a narrow interpretation of the indispensability requirement in any event: the parties to a treaty must exhaust all reasonable means to surmount the obstacles put in their way by their political rupture and continue performing the treaty. What is "reasonable" depends on the circumstances of each case, introducing some indeterminacy. Thus, the question what efforts the parties are obliged to make so as to keep the treaty operational despite the absence of diplomatic or consular relations may find different answers, depending on one's viewpoint, on the developmental stage of international law in general at the given time and on the importance that the further application of the treaty might have for other States or the international community as a whole (*eg* concerning the maintenance of international peace and security).[70] It seems questionable whether today *Waldock*'s position could be upheld that the parties to a treaty were completely free to reject the good offices offered by a third State or the nomination of a protecting power, if their acceptance would enable them to continuously fulfil their treaty obligations (→ MN 9).[71]

39 If one extends the rule of irrelevance set out in Art 63 *a fortiori* to **lesser forms of diplomatic friction** short of any formal severance of diplomatic relations (→ MN 22), one cannot but also apply the exception in those cases in which that friction makes the application of a treaty impossible.[72] Either Art 63 would have to be applied analogously, or in conjunction with Art 61, the latter being broadly interpreted as also embracing the disappearance of a legal situation (→ MN 34).

b) Special Rules for Certain Treaty Types?

40 During the debates in the ILC, the question came up of whether **certain types of political treaty** should expressly be excepted from the scope of the general rule that treaty relations remain unaffected by the severance of diplomatic relations. Treaties of alliance were adduced as an example of treaties that would undeniably be

[67] 286 UNTS 266.

[68] See also *N Angelet* in *Corten/Klein* Art 62 MN 3.

[69] Final Draft 1982, Commentary to Art 63, 62 para 1.

[70] See the difference between *Fitzmaurice* and *Waldock* on whether the parties were obliged to make treaty implementation possible by using the good offices of other States (→ MN 8–9).

[71] But see *N Angelet* in *Corten/Klein* Art 62 MN 32.

[72] *N Angelet* in *Corten/Klein* Art 62 MN 27 *et seq*.

affected by a diplomatic rupture.[73] However, the Commission decided against mentioning any exception and left the question of the termination or suspension of the operation of such treaties to be governed by the general provisions of Part V, Section 3 of the Convention.[74]

41 In contrast, **treaty obligations concerning the peaceful settlement of disputes** were pointed out in the comments of the UK Government as an example for kinds of treaty obligations that ought never be capable of being suspended by reason only of the severance of diplomatic relations. In view of the outstanding importance of those obligations for the maintenance of pacific international relations, the ILC contemplated the insertion of a clarification to the effect that they would in no circumstances be affected by the severance of diplomatic relations.[75] However, this was considered as unnecessary because so many methods of negotiation remained open to States even in the absence of diplomatic relations that their severance would never bring about the impossibility of performance in any case.[76] In the *Tehran Hostage* case, the ICJ made clear that the compromissary clause in a treaty of amity forming the basis of its jurisdiction had remained unaffected by the severance of diplomatic relations between the parties.[77]

42 Ultimately, therefore, **Art 63 excepts no treaty types**, neither in the negative sense (that they are normally affected by the severance of diplomatic relations) nor in the positive sense (that they are never thus affected). Rather, all treaty types are treated alike: they are all covered by both the general rule and the exception, provided that they meet the latter's strict conditions.

43 This also holds true for treaties between States forming the constituent instrument of an international organization (Art 5). Art 63 VCLT II only regulates the severance of diplomatic or consular relations between States Parties to such a treaty because relations of that kind can only exist between States. The ILC commented, however, that any severance of relations between a State and an international organization left their treaty relations unaffected, pursuant to the principle of Art 63, which was merely an **application of the general principles of the law of treaties**.[78]

c) Law of Treaties Leaves Discretion of States as to Maintenance of Diplomatic and Consular Relations Unaffected

44 The negotiating States were obviously unwilling to let the law of treaties impose limits on their **political discretion concerning the maintenance of diplomatic or**

[73] See the remarks by *Waldock*, *Ago*, and *Yasseen* [1966-I/2] YbILC 106 para 39, 108 paras 59, 72.

[74] Final Draft, Commentary to Art 60, 261 para 4.

[75] *Waldock* VI 79 para 7.

[76] *Ibid*. See also the remarks by *Ago* and *Yasseen* [1966-I/2] YbILC 108 para 61, 109 para 74.

[77] ICJ *Tehran Hostage* (n 66) para 54 → MN 36.

[78] See Final Draft 1982, Commentary to Art 63, 62 paras 2–3. See also *C Clavé* in *Corten/Klein* Art 63 MN 1 *et seq*.

consular relations.[79] The exception in Art 63 in essence provides that this discretion shall prevail over potentially conflicting treaty obligations requiring the existence of diplomatic or consular relations.[80] After the adoption of Art 63 by the Committee of the Whole at the Vienna Conference, the Australian delegation voiced doubts concerning the Hungarian amendment, which had introduced the reference to consular relations (→ MN 27 *et seq*), stating that "[i]f the existence of consular relations were needed for the application of a treaty, severance might be regarded as a breach."[81] If that criticism was correct, the consular relations variant of the exception to Art 63 would be incompatible with the general principle of law that a party cannot take advantage of its own wrong, which is itself an offshoot of the principle of *bona fides* (→ Art 61 MN 28). The question would also be raised if the same was true for the diplomatic relations variant.

45 The fact that no other delegation supported the Australian view clearly indicates that the **severance of both diplomatic and consular relations was regarded as a highly political decision**, which should not be preempted by any treaty relation. While the prohibition of the abuse of rights[82] also sets limits to that discretion, it will be difficult to prove that the severance of diplomatic or consular relations was effected merely for the purpose to obtain release from certain treaty commitments (→ MN 6 and 11). Apart from that rather theoretical case of abuse, the severance by a party to a treaty of diplomatic or consular relations with another party never violates any international obligation owed to any other party, in contrast to the bringing about of the impossibility of performance in the sense of Art 61 para 2 or a fundamental change of circumstances in the sense of Art 62 para 2 lit b.[83]

2. Indeterminacy of Exact Legal Consequence if Exception Applies

46 Art 63 does **not specify the legal consequences** in the event that the exception applies. It states only that if the existence of diplomatic or consular relations was indispensable for the application of the treaty, then their severance would affect the treaty relations. However, in what way this is so remains unclear and was not properly clarified either in the ILC or at the Conference even though such clarification had been suggested in the Committee of the Whole.[84]

47 One can safely assume that in those few cases in which the existence of diplomatic or consular relations is indeed indispensable for the application of the

[79] See Art 2 VCDR and Art 2 VCCR both of which imply the free political discretion of every State to decide on the entry into and maintenance of diplomatic and consular relations with any other State (*N Angelet* in *Corten/Klein* Art 62 MN 4 with n 7).

[80] *N Angelet* in *Corten/Klein* Art 62 MN 4 who assumes that every treaty whose application requires the existence of diplomatic or consular relations is subject to the implicit proviso that all the parties retain the right to sever those relations according to their free discretion.

[81] UNCLOT I 480 para 60.

[82] *A Kiss* Abuse of Rights in MPEPIL (2008).

[83] *N Angelet* in *Corten/Klein* Art 62 MN 24.

[84] UNCLOT I 383 para 47.

treaty, their severance will only lead to the suspension and not the termination of that treaty.[85] Such severance will theoretically always be reversible and thus temporary, although its duration may be practically indefinite and last for a very long time.[86] As the "except in so far" construction in Art 63 indicates, any severance of diplomatic or consular relations should have the least possible effect on treaty relations and that translates into **their suspension only, and not their termination**. There is no reason why Art 63 should go further in this respect than the related provision in Art 61 para 1 cl 2. The formal maintenance in force of treaties whose operation is suspended for indefinite periods does not impose any unreasonable burden on the parties who are always free to agree on their termination in accordance with Art 54 lit b, 58.

48 Surprisingly, the question was never raised, and the text of Art 63 does not clarify whether the exception, where its conditions are met, automatically suspends the operation of the treaty or whether it only entitles the parties to invoke the severance as a ground for obtaining that result. The latter is the consequence foreseen in Arts 60–62, **initiating the procedure pursuant to Arts 65–68**. There is no reason why the exception in Art 63 should in contrast thereto have automatic suspensive effect. During the drafting process, the close connection of Art 63 and Art 61 was in plain view, and that might have been the reason why the drafters and the negotiators tacitly assumed that the legal consequences should be the same whenever the severance of diplomatic or consular relations resulted in the impossibility of performing a certain treaty.

49 And yet, when the ILC returned to Art 63 in the context of Final Draft 1982, it stated in the pertinent commentary that "the effects of a treaty on immunities granted to consuls are suspended for as long as consular relations are interrupted."[87] In this example, the ILC seems to have assumed that the suspension occurs automatically, perhaps because the case was so obvious that no objection in the sense of Art 65 para 3 was to be expected upon notification of the intention to suspend the operation of that treaty.

50 The question if and to what extent the existence of diplomatic or consular relations is truly indispensable for the application of a certain treaty can, however, just as easily give rise to disputes as the question if the requirements of Arts 60, 61 or 62 are met. The endeavour to avoid any automatism and instead give room to an orderly settlement procedure prior to effecting any *fait accompli* is just as important in the case of Art 63 as in all the others. Accordingly, as in all the other cases regulated by Part V of the Convention, where a party considers the existence of diplomatic or consular relations as indispensable in the sense of the exception to the rule of Art 63, it may do no more than **invoke their severance** as a ground for

[85] See *ibid*. See also the remarks by *Jiménez de Aréchaga* [1964-I] YbILC 1964 I, 157 para 55. But see *N Angelet* in *Corten/Klein* Art 62 MN 25 *et seq*.

[86] The United States severed diplomatic relations with Iran in April 1980 and they have not yet been re-established.

[87] Final Draft 1982, Commentary to Art 63, 62 para 1.

suspending the operation of the treaty, thereby initiating the procedure under Art 65.[88] This avenue is open to both parties, the one who unilaterally severed the relations and the other who is the addressee of such severance.

Where the severance of diplomatic or consular relations is indispensable for the application of only certain treaty provisions, the exception only justifies their suspension ("except in so far as"), provided that these provisions are separable in the sense of Art 44 para 3.[89] **51**

V. Codification of Rule of Customary International Law

Both the rule and the exception laid down in Art 63 are **today part of customary international law**.[90] While there is no express statement of the ICJ to this effect, the Court in the *Tehran Hostage* case held that the severance of diplomatic relations left the applicability of the 1955 Treaty of Amity between the United States and Iran unaffected, although its effective operation was impaired (→ MN 36). As the VCLT was inapplicable in that case, neither the United States nor Iran being a party to it, the ICJ, which did not cite Art 63, can only have applied an analogous rule of customary international law.[91] **52**

One can safely assume that the part of Art 63 concerning the severance of consular relations now also forms part of customary international law. The irrelevance of the severance of diplomatic relations with its much more important political overtones applies *a fortiori* to the severance of consular relations, apart from cases in which the severance causes an impossibility of performance.[92] **53**

The exception set out in Art 63 can also be qualified as a corollary of the principle *impossibilium nulla est obligatio,* which is a general principle of law. **54**

Accordingly, when returning to Art 63 in the context of its Final Draft 1982, the ILC explained that the provision was "merely an application of the general principles of the law of treaties".[93] **55**

VI. Relationship with Other Rules of International Law

Like the other provisions in the same section of the Convention, Art 63 sets out a **subsidiary rule**, which is subject to any *lex specialis* in the pertinent treaty, such as Art 2 para 3 VCCR and Art 45 VCDR.[94] Based on both Art 63 and Art 74, the **56**

[88] *Villiger* Art 63 MN 8–9.

[89] *N Angelet* in *Corten/Klein* Art 62 MN 29; *Villiger* Art 63 MN 7.

[90] *Villiger* Art 63 MN 10.

[91] See *N Angelet* in *Corten/Klein* Art 62 MN 9, 14. → MN 7 *et seq* for further references.

[92] *N Angelet* in *Corten/Klein* Art 62 MN 13.

[93] Final Draft 1982, Commentary to Art 63, 62 para 3.

[94] Final Draft, Commentary to Art 60, 260 para 2.

German Model Treaty 2009 concerning the Encouragement and Reciprocal Protection of Investments contains an article that expressly provides that it "shall be in force irrespective of whether or not diplomatic or consular relations exist between the Contracting States."[95] Moreover, the parties are of course free to agree *ad hoc* that one or more treaties in force between them shall be suspended or even terminated in consequence of the severance of diplomatic or consular relations, pursuant to the pertinent provisions of the Convention (Art 54 lit b, Art 57 lit b, Art 58).

57 The **relation of Art 63 with Art 61 on the one hand and Art 62** on the other hand is somewhat unclear.[96] The indispensability exception to Art 63 constitutes *lex specialis* with regard to Art 61, adding an instance of the impossibility of performance that would not necessarily meet the requirements of the general rule set out in the latter provision.[97] Art 63 also constitutes an exhaustive *lex specialis* with regard to Art 62 to the extent that the severance of diplomatic or consular relations can be qualified as a fundamental change of circumstances.[98] Neither para 1, nor para 2 lit b or para 3 of Art 62 applies to that special kind of fundamental change. The question whether a State may invoke the severance of diplomatic or consular relations as a ground for suspending the operation of a treaty is exhaustively regulated by the rule plus exception in Art 63.

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[95] Art 11 of the German Model Treaty available at http://www.huethig-jehle-rehm.de/imperia/md/content/hjr/produktinfo/cfmueller/978-3-8114-9610/9783811496101_sonstige_informationen_90.pdf (last visited 12 July 2011).

[96] This was criticized by the Congolese delegate, UNCLOT I 384 para 61.

[97] See also *Jennings*/*Watts* (n 47) 1309 MN 652 footnote 2. However, see *N Angelet* in *Corten*/*Klein* Art 62 MN 22; *C Clavé* in *Corten*/*Klein* Art 63 MN 4.

[98] See the remarks by *S Rosenne*, [1963-I] YbILC 152 para 21.

Article 64

Emergence of a new peremptory norm of general international law ("jus cogens")

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Contents

A. Purpose and Function

Since it was agreed that the Convention envisages the emergence of new *ius cogens* under the condition that the international community as a whole accepts the new rules as peremptory (→ Art 53 MN 26), the ILC was bound to consider the legal effects of these new peremptory rules on prior treaties. These prior treaties were legally valid at the time of their conclusion but have not been adapted to the new legal situation. The mere fact that Art 64 operates in a different section than Art 53 is revealing with regard to the function and purpose of Art 64 in contrast to Art 53. Whereas Art 53 stipulates a rigid regime of absolute nullity of the entire treaty in conflict with prior *ius cogens*, Art 64 is much more forgiving: new *ius cogens* has no retroactive effect, *ie* the treaty – or its affected treaty provisions in case of their separability (Art 44 → MN 13) – terminates the very moment the conflict occurs. The reason for Art 64's mild sanction regime is obvious: the contracting parties did not want to outlaw themselves by acting contrary to fundamental rules of the international community; rather, the treaty is refuted by subsequent legal developments due to the international community's interest in the conformity of the entire international legal order with *ius cogens*.[1] **1**

What today appears to be a self-evident legal consequence of a conflict with newly emerging *ius cogens* is a significant modern interpretation and clarification **2**

[1] *CL Rozakis* The Concept of jus cogens in the Law of Treaties (1976) 149.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*, DOI 10.1007/978-3-642-19291-3_67, © Springer-Verlag Berlin Heidelberg 2012

of the traditional **inter-temporal law doctrine** (→ MN 14–15): where *ius cogens* is at stake, the durability and stability of a time-honored legal title are outweighed by the present-day concept of indispensable fundamental legal rules and the overriding interest of the international community as a whole.[2]

3 Even though Art 64 concerns the non-retroactivity of new rules of **general international law** (in particular international customary law → Art 53 MN 30–34) having the character of *ius cogens*, the provision is related to Art 28 (non-retroactivity of treaties). In addition, Art 4 (**non-retroactivity of the VCLT**) affects the application of Art 64: if a new peremptory norm had emerged before the Convention entered into force on 29 January 1980, Art 64 would not regulate the relation between this 'new' peremptory norm and the prior treaty (for the customary law status of Art 64 see → MN 18).

B. Historical Background and Negotiating History

4 Naturally, the negotiating history of Art 64 is closely linked to that of Art 53 (for the historical background of the *ius cogens* concept and the negotiating history of Art 53, see → Art 53 MN 4–17) given that praise and criticism of the *ius cogens* concept left their marks on the debate concerning the legal effect of newly emerging *ius cogens*.[3] However, two issues dominated the debate surrounding Art 64: the retroactivity of the invalidating effect of new *ius cogens* and the separability of treaties.

5 ILC Special Rapporteur *Fitzmaurice* favoured the idea that it is first and foremost up to each party to call for the termination of the treaty or to reciprocally brush it aside if it conflicts with a new peremptory norm.[4] In his first attempt to capture the issue of newly emerging *ius cogens*, SR *Waldock* associated himself with *Fitzmaurice*'s approach but left the details to the ILC Drafting Committee.[5] The latter introduced Draft Art 22 *bis,* which reflects the wording of the current Art 64.[6] The major concern throughout the drafting process was to clarify that newly established *ius cogens* cannot have **retroactive effects** on prior treaties, which was the main focus of the ILC Final Draft.[7]

6 In the process of adjusting the legal effects of new *ius cogens* on prior treaties, an additional paragraph was proposed, which put into play the **principle of separability** in order to preserve those parts of the treaty that comply with the new legal

[2] *M Kotzur* Intertemporal Law in MPEPIL (2009) para 13.

[3] For a critical approach, see *eg* the statement by the representative of Australia UNCLOT I 387 paras 15–17.

[4] *Fitzmaurice* IV 46 (Draft Art 21); *A Orakhelashvili* Peremptory Norms in International Law (2006) 152.

[5] Draft Art 21 para 4, *Waldock* II 79 and [1963-I] YbILC 133 para 50.

[6] [1963-I] YbILC 256 para 27.

[7] [1963-I] YbILC 256 para 28 (Draft Art 22 *bis* para 1); [1963-II] YbILC 211 (commentary to Draft Art 45, para 1); Final Draft, Commentary to Art 61, 73 para 4.

situation.[8] Even though the ILC eventually dropped the plan of dealing with the issue of separability in a paragraph attached to the general rule on new *ius cogens*,[9] the topic was back on the table at the Vienna Conference. Uncertainty about the application of the principle of separability led to an amendment proposed by the Finnish delegation:

> "If a new peremptory norm of general international law of the kind referred to in article 50 is established, any existing treaty or, under the conditions specified in article 41, those of its provisions which are in conflict with that norm, become void and terminate."[10]

Lastly, the issue of separability was solved by subjecting the general rule on new *ius cogens* to the general rule dealing with the conditions of separability (Art 44).

The final text of the current Art 64 was adopted in the Committee of the Whole by 84 votes to 8, with 16 abstentions.[11] **7**

C. Elements of Article 64

I. New Peremptory Norm of General International Law

New peremptory norms of general international law (*ius cogens superveniens*) may emerge gradually under the condition set out in Art 53 (→ Art 53 MN 26–53). The rule formulated in Art 64 supports a **positivistic interpretation** of Art 53, given that peremptory norms, like all other rules of international law, are subject to law-making procedures and, as a result thereof, legal developments within the international community as a whole. **8**

II. Existing Treaty

1. Treaty

→ Art 2 MN 3–36 **9**

2. Prior to the Emergence of *ius cogens*

On the international plane, a treaty comes into existence when at least two parties have expressed their consent to be bound by the treaty (→ Art 11 MN 1), **10**

[8] SR *Waldock* [1963-I] YbILC 296 para 81 (Draft Art 22 *bis* para 2): "Under the conditions specified in article 46, if only certain clauses of the treaty are in conflict with the new norm, those clauses alone shall become void." See also later on [1963-II] YbILC 211, [1966-I/1] YbILC 87 (Draft Art 45 para 2).

[9] [1966-I/1] YbILC 87, 131.

[10] See the amendment UNCLOT III 186 para 560 (UN Doc A/CONF.39/C.1/L.294) and the statement by the representative of Finland UNCLOT I 386 para 5.

[11] UNCLOT II 125 para 80.

irrespective of whether the treaty has entered into force. The respective treaty exists **prior** to the peremptory norm if the acceptance of its peremptory character by the international community as a whole crystallizes after the parties have expressed their consent to be bound.

11 Given that the emergence of *ius cogens* is a considerably slow process with extended periods of legal uncertainty, there is no exact **point in time** when the new peremptory norm takes legal effect.[12] The **retrospective evaluation** of the legal situation constitutes a major challenge when applying Art 64 in conjunction with Art 53. The evaluation, however, is necessary because of the different legal effects of Art 64 and Art 53 (→ Art 53 MN 57–58).

III. Normative Conflict

12 → Art 53 MN 54–55

IV. Separability of Treaty Provision

13 According to Art 44 para 5, no separation of treaty provisions is permitted in cases falling under Art 53. By way of not referring to Art 64, Art 44 is applicable to treaties that have been valid at the time of their conclusion but subsequently conflict with newly emerging peremptory rules. Consequently, the ground of invalidity, *ie* the subsequent *ius cogens* conflict, affects only conflicting treaty provision whereas the remaining treaty provisions are legally valid, provided that they are separable from the affected provision (Art 44 para 3).

D. Legal Consequences

I. Voidness *ex nunc* (Inter-temporal Law)

14 The treaty, or in case of separability the treaty provision that conflicts with a newly emerging *ius cogens* provision is void *ex nunc* ('becomes void'), *ie* it does not produce any legal effects from the moment when the normative conflict occurred irrespective of whether the conflict has been established on a later date. The treaty remains the legally valid basis of rights and obligations as well as acts and facts, which arose in the period between its conclusion and the emergence of the new peremptory norm. Consequently, the parties are not obliged to eliminate the consequences as far as possible of any act performed in this period of time (see Art 71

[12] See the statement by the representative of Greece UNCLOT I 388 para 23 and the comments of the United States [1966-II] YbILC 44.

paras 1 and 2). In cases of **continuing and future activities of treaty implementation and execution** (*acta/facta pendentia* and *acta/facta futura*), the new peremptory norm takes effect and adjusts, from this date, the legal situation by eliminating contractual rights and obligations and by impeaching continuing or future implementing acts (→ Art 28 MN 23).[13]

15 In the light of the foregoing, it can be said that Art 64 rejects, in the case of new *ius cogens*, a rigid understanding of the **inter-temporal law doctrine** according to which all acts and facts have to be exclusively appreciated in the light of the law contemporary to it.[14] Instead, the rule set out in Art 64 reflects the progressive – even though contested[15] – legal opinion of *Max Huber* on **inter-temporal law** in the famous *Island of Palmas* case. In the award, the arbitrator differentiates between the creation of a right on the one hand and the continuing existence of a right on the other hand:

> "As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called inter-temporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the acts creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law."[16]
>
> This modern understanding of inter-temporal law was also pointed out by a joint declaration of Judges *Shi* and *Koroma* of 2007 in the *Genocide* case before the ICJ. Both judges emphasized that "in some respects the interpretation of a treaty's provision cannot be divorced from developments in the law subsequent to its adoption."[17]

II. Termination

16 Art 64's reference to the termination of the treaty (or the affected treaty provision) – *ie* to the point in time when the treaty or its provision stops producing legal effects – clarifies that the conflicting treaty becomes void *ex nunc* (→ Art 70 MN 22).

[13]See the statement by the representative of Cuba UNCLOT I 387 para 11.

[14]First element of *Max Huber*'s definition of inter-temporal law in the *Island of Palmas Case (Netherlands v United States)* 2 RIAA 829, 845 (1928), but see for the second element n 16; in favour of the first element but against the progressive second element of *Huber*'s definition (n 16) [1964-I] YbILC 199, 202 (commentary to Draft Art 69) with further references.

[15]*PC Jessup* The Palmas Island Arbitration (1928) 22 AJIL 735, 740; see also [1964-I] YbILC 199, 202 (commentary to Draft Art 69) with further references.

[16]Second element of *Max Huber*'s definition of inter-temporal law in the *Island of Palmas Case* (n 14) 845.

[17]ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (joint declaration *Shi* and *Koroma*) [2007] ICJ Rep 279, para 2.

E. Procedure

17 Art 66 refers explicitly to Art 64, making the procedure for judicial settlement of a dispute concerning the voidness of certain treaty provisions or the entire treaty a compulsory prerequisite for the non-performance of that provision or of the entire treaty. Before the party submits the dispute to the ICJ, the procedural steps envisaged in Art 65 have to be followed. The procedural requirement led to several reservations and objections (→ Art 53 MN 17).

F. Customary International Law Status

18 Considering the **lack of international practice** in dealing with newly emerging *ius cogens* – not least because of the nebulous point in time when the new peremptory rule has finally entered the international legal sphere – it is difficult to determine Art 64's customary law status.[18] This is at least valid for the ***ex nunc* invalidating effect** of new peremptory rules on prior treaties. Admittedly, the generally accepted prominent role of *ius cogens* within the international legal order suggests that the international community as a whole does not tolerate the execution of historic treaties unhampered by *ius cogens*.[19] Perhaps, this is why international courts indicate their willingness to apply Art 64 as if it reflects customary law:

> In the *Gabčíkovo-Nagymaros* case, the ICJ abstained from examining "the scope of Art 64 Vienna Convention on the Law of Treaties" because neither of the parties to the dispute, Hungary and Slovakia, contended that new peremptory norms of environmental law had emerged since the conclusion of disputed 1977 Treaty.[20] Given that Slovakia acceded to the Convention in May 1993 (and considered itself bound since 1 January 1993), this rather brief statement may mean that the Court takes the customary status of Art 64 for granted.
>
> In *Prosecutor v Kallon and Kamara*, the Appeals Chamber of the Special Court for Sierra Leone had to consider arguments against the legality of Art 10 of the Court's Statute, the latter of which is part of an international agreement concluded between Sierra Leone and the UN: "That this court will normally not claim jurisdiction to exercise a power of review of a treaty or treaty provisions on the ground that it is *unlawful* seems evident, except, perhaps in cases where it can be said that the provisions of Article 53 or Article 64 of the Vienna Convention on the Law of Treaties apply."[21] Given that neither Sierra Leone nor the UN are parties to the VCLT, the Court continues: "This court cannot question the validity of Article 10 of its Statute [] unless it can be shown that, in the terms of Article 53 and Article 64 of the Vienna Convention or of customary law it is void."[22]

[18] *Villiger* Art 64 MN 10: "emerging rule of customary law".

[19] *A Langerwall* in *Corten/Klein* Art 64 MN 7 "corollaire logique".

[20] ICJ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, para 112.

[21] Special Court for Sierra Leone *Prosecutor v Kallon and Kamara* (Appeals Chamber) (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty) SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), 13 March 2004, para 61.

[22] *Ibid* para 62.

Furthermore, international courts do not linger over the question when exactly the *ex nunc* invalidating effect of new *ius cogens* on prior treaties became a rule of international customary law. This suggests that international jurisprudence considers Art 64 (and its customary equivalent) closely connected with Art 53 (and its customary equivalent). The moment the international community as a whole identifies a specific rule as *ius cogens*, no treaty provision contrary to this new peremptory rule remains valid; this is particularly so when the peremptory character of this rule is absolutely undisputed: **19**

> The Inter-American Court of Human Rights observed in *the Aloeboetoe et al case*: "The Court does not deem it necessary to investigate whether or not that agreement is an international treaty. Suffice it to say that even if that were the case, the treaty would today be null and void because it contradicts the norms of *jus cogens* superveniens. In point of fact, under that treaty [dated September 19, 1762] the Saramakas undertake to, among other things, capture any slaves that have deserted, take them prisoner and return them to the Governor of Suriname,[23] who will pay from 10 to 50 florins per slave, depending on the distance of the place where they were apprehended. Another article empowers the Saramakas to sell to the Dutch any other prisoners they might take, as slaves. No treaty of that nature may be invoked before an international human rights tribunal."[24] Where the Inter-American Court of Human Rights can be faulted is in not having considered the separability of the 1762 treaty provision.

Given that the **non-retroactivity of international norms** is a well-established rule of international customary law (→ Art 28 MN 5) and given that any deviation from this rule must be agreed, Art 64 reflects international customary law when it precludes the invalidating effect of new *ius cogens* on prior treaties *ex tunc*. **20**

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See also the bibliography attached to the commentary on Art 53.

[23] Suriname is party to the VCLT since 1991 (insertion added).

[24] *Aloeboetoe et al v Suriname* (Reparations (Art 63(1) of the American Convention on Human Rights)) Ser C No 15 (1993) para 57.

Section 4
Procedure

Article 65

Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Contents

A. Purpose and Function

Art 65 provides for a **procedure** to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty. Arts 65–68 **1**

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determine the different procedural steps to be followed when a State wants to denounce a treaty. The rules also deal with the **settlement of disputes,** which arise in the course of the procedure.

2 The procedural safeguards aim to promote the **stability of treaties** and the **security of international relations**. The provisions seek to prevent that States use arbitrary grounds for termination or suspension of a treaty as a pretext to escape treaty obligations. For instance, the US Restatement of the Law claims that the procedure according to Arts 65–68 applies "with special force where the right to suspend or terminate is claimed on grounds of *rebus sic stantibus*, since that basis for termination is particularly subject to self-serving and subjective judgments by the state invoking it".[1] The mere unilateral assertion by a State that a treaty is invalid will not suffice to terminate it. It is decisive that a procedure is provided through which States Parties can agree that the facts constituting a justified reason for terminating a treaty are fulfilled.[2] By emphasizing the stability of treaty regimes, the procedural requirements also contribute to the efficiency of treaty law.[3]

3 While Art 65 is specifically confined to the diplomatic process, Art 66 provides for a mechanism of dispute settlement should more severe controversy arise. Thus, Section 4 is not only a procedural expression of the maxim *pacta sunt servanda* but also of the obligation of peaceful settlement of disputes under Art 2 para 3 UN Charter.[4]

4 From a different perspective, Part V has been inserted as a **corrective for the introduction of new and disputed rules** on the invalidity of treaties, especially with a view to *ius cogens*. According to this interpretation, the procedural rules of Part V aim to clarify the concept of *ius cogens* and the exact scope and content of the new rules on invalidity through impartial organs, in contrast to a unilateral and decentralized interpretation by States Parties.[5] It was against this background that certain States – especially France – argued in favour of a more jurisdictional framing of Art 65.[6] Thus, the procedure is also expected to make the idea of *ius cogens* more precise that has been introduced by the VCLT.[7]

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[1] Restatement (Third) of Foreign Relations Law of the United States para 336 comment f.

[2] Final Draft, Commentary to Art 62, 262 para 1; *Aust* 300; *M Cosnard* in *Corten/Klein* Art 65 MN 1 *et seq*; *Villiger* Art 65 MN 6.

[3] *M Cosnard* in *Corten/Klein* Art 65 MN 1.

[4] *Villiger* Art 65 MN 6.

[5] *H Briggs* Procedures for Establishing the Invalidity or Termination of Treaties under the International Law Commission's 1966 Draft Articles on the Law of Treaties (1967) 61 AJIL 976, 977; *M Cosnard* in *Corten/Klein* Art 65 MN 3.

[6] *SE Nahlik* La Conférence de Vienne sur le droit des traités, une vue d'ensemble (1969) 15 AFDI 24, 42–47.

[7] *M Cosnard* in *Corten/Klein* Art 65 MN 3; *R Dupuy* Codification et règlement des différends (1969) 15 AFDI 70, 71. This approach is clearly reflected in a statement by the representative of the United Kingdom at the Vienna Conference, UNCLOT I 305: "The Conference would be failing in its duty if it did not prescribe some clear-cut mechanism whereby the existence and content of peremptory rules of general international law could be properly identified and defined. The dangers of article 50 as it stood would not be very much greater for old established and developed

The structure of Art 65, especially paras 2 and 3, also reflects the **principle of State consent**. The treaty cannot be terminated unilaterally. Termination requires at least acquiescence on the part of the other States Parties expressed within a specific procedure.[8] 5

> The basic principle has long been established in international law and has been referred to *eg* in the *Free Zones of Upper Savoy and the District of Gex* case. In this case between France and Switzerland, the PCIJ had to decide whether the Treaty of Versailles had abrogated earlier treaties concluded between Switzerland and France. In an order of 19 August 1928, the Court held that an article which could be interpreted as involving the abolition of a treaty régime "could not be operative as between France and Switzerland, unless Switzerland's consent were not necessary for such abolition".[9]

Art 65 must be read together with Arts 66–68, all of which regulate the procedure applicable in the case of invalidity, termination or suspension of the operation of treaties. SR *Waldock* considered the article as a "key article for all those cases where a claim is made to set aside or put an end to a treaty on a ground not expressly or impliedly provided for in the treaty."[10] Some delegations in Vienna even saw the article as essential for the overall success of the entire convention.[11] 6

The ILC did not base Art 65 on a customary rule. The proceedings within the ILC suggest that Art 65 and Arts 66–68 were considered as a **progressive development of international law**.[12] In addition, it has been submitted that the technical character of Part V, with its detailed provisions, speaks against customary nature.[13] 7

Since 1969, the **customary law character** of Art 65 has remained unclear. There is a dearth of any significant State practice.[14] Court decision has not been unequivocal either. In the *Gabčíkovo-Nagymaros Project* case, the ICJ noted that Arts 65–67 VCLT, "if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith."[15] 8

> Especially in the United Kingdom there is some practice speaking in favour of the article's customary nature. Although the VCLT had not yet entered into force in 1973, the UK relied on Arts 65–68 VCLT in the *Fisheries Jurisdiction* case.[16] In the case of *R v Foreign and*

States than for others. Treaties concluded between, or applying as between, newly independent States might also be placed in jeopardy by the operation of that article."

[8] *M Cosnard* in *Corten/Klein* Art 65 MN 9.

[9] PCIJ *Free Zones of Upper Savoy and the District of Gex* PCIJ Ser A No 22, 18 (1929).

[10] *Waldock* II 87.

[11] UNCLOT I 404 (Netherlands), 408 (Norway), 411 (Liberia), 429 (United Kingdom), 423 (Finland), 429 (Italy), 437 (Philippines, Pakistan).

[12] Final Draft, Commentary to Art 62, 263 para 6; *Waldock* [1963-I] YbILC 280; *Villiger* Art 65 MN 27; *Briggs* (n 5) 977, 980.

[13] *M Cosnard* in *Corten/Klein* Art 65 MN 6.

[14] *M Cosnard* in *Corten/Klein* Art 65 MN 10.

[15] ICJ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, para 109.

[16] ICJ *Fisheries Jurisdiction (United Kingdom v Iceland)* (Jurisdiction of the Court) [1973] ICJ Rep 3, para 44.

Commonwealth Office, ex parte International Transport Workers Federation the UK government claimed that Art 60 did not automatically entail the suspension or termination of a treaty concluded with Georgia. Instead, it relied on the procedure according to Art 65.[17] In contrast, the European Court of Justice found in the case of *Racke* that the specific procedural requirements laid down in Art 65 do not form part of customary international law. Therefore, it concluded that the suspension of the cooperation agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia without prior notification or waiting period was in line with international law.[18]

9 In sum, there are some indications that Art 65 is developing into a norm of customary international law.[19] However, thus far, States have in general apparently not acted according to these rules.[20]

B. Historical Background and Negotiating History

10 Before the conclusion of the VCLT, States were not obliged to follow specific procedures with respect to invalidity, termination, withdrawal from or suspension of a treaty under customary international law, although notification was usually expected.[21] Likewise, treaties that were drafted before the VCLT did not include rules on the settlement of disputes.[22] Pertinent examples of this are the 1958 Geneva Convention on the Law of the Sea,[23] the 1961 Vienna Convention on Diplomatic Relations[24] and the 1963 Vienna Convention on Consular Relations.[25]

11 The proceedings within the ILC suggest that Art 65 as well as Arts 66–68 were considered as a progressive development of international law (→ MN 7).[26] The search for an appropriate dispute settlement mechanism was brought up in the first drafts and remained controversial during the whole drafting process.

12 Starting with his second report in 1963, SR *Waldock* introduced a Section IV consisting of four draft articles (Draft Arts 23–26) on the "[p]rocedure for annulling, denouncing, terminating, withdrawing from or suspending a treaty and the severance of treaty provision".[27] After discussions in both the ILC and the Drafting

[17] Divisional Court of the Queen's Bench (United Kingdom) *R v Foreign and Commonwealth Office, ex parte International Transport Workers Federation*, reprinted in *G Marston* United Kingdom Materials on International Law 69 (1998) 69 BYIL 433, 455–456.

[18] ECJ (CJ) *Racke* C-162/96 [1998] ECR I-3655, paras 58–60.

[19] *Villiger* Art 65 MN 27.

[20] *Aust* 300; *Villiger* Art 65 MN 30.

[21] *MM Gomaa* Suspension or Termination of Treaties on Grounds of Breach (1996) 176; *R Jennings/A Watts* Oppenheim's International Law Vol I (9th edn 1992) 643; *Villiger* Art 65 MN 1.

[22] *Villiger* Art 65 MN 1.

[23] 1833 UNTS 397.

[24] 500 UNTS 95.

[25] 596 UNTS 261.

[26] Final Draft, Commentary to Art 62, 263 para 6; *Waldock* [1963-I] YbILC 280.

[27] *Waldock* II 85 *et seq*.

Committee, the content of these articles was reduced to two articles distinguishing between "[p]rocedure under a right provided for in the treaty" (Draft Art 50)[28] and "[p]rocedure in other cases" (Draft Art 51).[29] Although the basic differentiation is maintained in the VCLT, only one procedure is laid down in Part V Section 4. Draft Art 51 later turned into Draft Art 62, which was the draft article for Art 65 VCLT. During the second reading, *Waldock* made additional proposals reflecting the comments by governments.[30] After further revisions, Art 51 was renumbered Art 62 and adopted by the ILC together with a commentary in 1966.[31]

The discussions during the drafting process clarified that the question of procedure was closely related to matters of substance because of its function as a safeguard against arbitrary termination of a treaty. Legal security was a predominant motive in the reports of different Special Rapporteurs[32] as well as in the **13**

[28][1963-II] YbILC 214: "1. A notice to terminate, withdraw from or suspend the operation of a treaty under a right expressly or impliedly provided for in the treaty must be communicated, through the diplomatic or other official channel, to every other party to the treaty either directly or through the depositary. 2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect."

[29][1963-II] YbILC 214: "1. A party alleging the nullity of a treaty, or a ground for terminating, withdrawing from or suspending the operation of a treaty otherwise than under a provision of the treaty, shall be bound to notify the other party or parties of its claim. The notification must: (a) Indicate the measure proposed to be taken with respect to the treaty and the grounds upon which the claim is based; (b) Specify a reasonable period for the reply of the other party or parties, which period shall not be less than three months except in cases of special urgency. 2. If no party makes any objection, or if no reply is received before the expiry of the period specified, the party making the notification may take the measure proposed. In that event it shall so inform the other party or parties. 3. If, however, objection has been raised by any other party, the parties shall seek a solution of the question through the means indicated in Article 33 of the Charter of the United Nations. 4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes. 5. Subject to article 47, the fact that a State may not have made any previous notification to the other party or parties shall not prevent it from invoking the nullity of or a ground for terminating a treaty in answer to a demand for the performance of the treaty or to a complaint alleging a violation of the treaty."

[30]*Waldock* V 1–50.

[31][1966-II] YbILC 185: "1. A party which claims that a treaty is invalid or which alleges a ground for terminating, withdrawing from or suspending the operation of a treaty under the provisions of the present articles must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the grounds therefor. 2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 63 the measure which it has proposed. 3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in article 33 of the Charter of the United Nations. 4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes. 5. Without prejudice to article 42, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation."

[32]*Fitzmaurice* II 20–70; *Waldock* II 35–93; *Waldock* V 46–50.

considerations of the ILC. The commentary attached to Draft Art 62 stressed that many ILC members therefore regarded the article as a key provision for dealing with the invalidity, termination or suspension of the operation of treaties. The dangers of misuse were considered to be particularly serious in relation to claims to denounce or withdraw from a treaty by reason of an alleged breach by the other party or by reason of a fundamental change of circumstances. Consequently, "in order to minimize these dangers the Commission has sought to define as precisely and as objectively as possible the conditions under which the various grounds may be invoked."[33]

14 Draft Art 65 was turned into its present form by changes made during the Vienna Conference to Draft Art 62 as adopted by the ILC in 1966. The Committee of the Whole discussed Draft Art 62 at its 1968 session. While the Conference adopted paras 2–5 with the wording proposed by the ILC, the only substantive change concerned para 1. Although several governments proposed amendments, only a drafting proposal by France[34] concerning para 1 was adopted, which the Drafting Committee included in the text for adoption by the Committee of the Whole that year.[35]

15 The French representative considered the amendment it had proposed to be necessary since the Convention distinguishes between void and voidable treaties:

> "Although that difference was not expressly stated anywhere in the draft convention, the difference of terminology used in the two groups of articles was evident, and the Committee must consider whether that difference affected the obligation to notify other parties of a claim of invalidity or an allegation of a ground for termination, withdrawal or suspension. [. . .] [T]he French delegation had pointed out that the actual text of article 62 gave no clear answer to that important question. [. . .] The possible consequences [. . .] would be to enable any party to a treaty unilaterally to claim invalidity on the very grounds which were most difficult to establish, and to open the way to States other than the parties to benefit by the invalidity provided for by those articles. It had been claimed that the International Law Commission had meant article 62 to apply to all the provisions of Part V, but the French delegation considered that no ambiguity should be allowed to remain on such a fundamental point, and it had introduced its amendment with the sole purpose of clarifying the text in accordance with the generally recognized meaning."[36]

16 Regarding Art 65 para 2, the provision for **cases of special urgency** has been controversial. The formulation was introduced in Draft Art 51 (the predecessor of Art 65 VCLT) on the first reading in 1964. Because of discussions in the Drafting Committee, SR *Waldock* explained the reasons for including the phrase "except in cases of special urgency" in his fifth report, in which he deals with governments' proposals:

> "The Finnish Government also suggests that in paragraph 1(b) a time-limit should be fixed within which the other party's reply would have to be given in cases of 'special urgency';

[33] Final Draft, Commentary to Art 62, 262 para 1.

[34] UN Doc A/CONF.39/C.1/L.342, UNCLOT III 191–192.

[35] UNCLOT I 489, UNCLOT III 192.

[36] UNCLOT I 403.

> and it suggests a limit of two weeks or one month. This question [. . .] was considered in the Drafting Committee which, however, thought it difficult to fix in advance a rigid time-limit to apply to all cases of 'special urgency'. In practice, cases of special urgency are likely to be cases arising from a sudden and serious violation of the treaty by the other party; and it seems possible to conceive of cases where even a time-limit of two weeks might be too long in the particular circumstances of the violation."[37]

17 The drafting history of Art 65 para 3 is particularly complex. SR *Waldock*'s proposals were considerably changed during the drafting process, reflecting severe – political – disagreement, especially in relation to any kind of **compulsory jurisdiction of the ICJ**.[38] *Waldock*'s original suggestion in Art 25[39] was changed by the Drafting Committee into what is now in principle the version of para 3.[40] While some members of the ILC favoured compulsory jurisdiction if an objection was raised to a claim to terminate or suspend treaty provisions, the majority of the Commission was not willing to accept such a progressive development of the law. The recurrence to Art 33 UN Charter was considered sufficient and the traditional means of dispute settlement seemed to be the most that States were willing to accept.[41] Since the ILC did not favour a particular form of dispute settlement, leaving the choice to the parties, it paid respect to the equality of States[42] and the principle of State consent. According to the commentary

> "the Commission did not find it possible to carry the procedural provisions beyond this point without becoming involved in some measure and in one form or another in compulsory solution to the question at issue between the parties. If after recourse to the means indicated in Article 33 the parties should reach a deadlock, it would be for each Government to appreciate the situation and to act as good faith demands. There would also remain the right of every State, whether or not a Member of the United Nations, under certain conditions, to refer the dispute to the competent organ of the United Nations."[43]

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[37] *Waldock* V 49–50.

[38] *S Rosenne* Developments in the Law of Treaties 1945–1986 (1989) 305.

[39] *Waldock* II 87: "4. If, however, objection has been raised by any party, the claimant party shall not be free to carry out the action specified in the notice referred to in paragraph 1, but must first – (a) seek to arrive at an agreement with the other party or parties by negotiation; (b) failing any such agreement, offer to refer the dispute to inquiry, mediation, conciliation, arbitration or judicial settlement by an impartial tribunal, organ or authority agreed upon by the States concerned. 5. If the other party rejects the offer provided for in paragraph 4(b), or fails within a period of three months to make any reply to such offer, it shall be considered to have waived its objection; and paragraph 3 shall then apply. 6. If, on the other hand, the offer provided for in paragraph 4(b) is accepted, the treaty shall continue in force, pending the outcome of the mediation, conciliation, arbitration or judicial settlement of the dispute; provided always, however, that the performance of the obligations of the treaty may be suspended provisionally – (a) by agreement of the parties; or (b) in pursuance of a decision or recommendation of the tribunal, organ or authority to which the mediation, conciliation, arbitration or judicial settlement of the dispute has been entrusted."

[40] *Rosenne* (n 38) 305.

[41] *C Rozakis* The Concept of *ius cogens* in the Law of the Treaties (1976) 154.

[42] *S Rosenne* The Settlement of Treaty Disputes under the Vienna Convention of 1969 (1971) 31 ZaöRV 1, 9.

[43] Final Draft, Commentary to Art 62, 263 para 5.

The reason for the ILC's reluctance to provide any further compulsory rules was explained by SR *Waldock*:

> "The difficulty in article 51 was that despite its safeguards, its provisions on negotiations and its reference to Article 33 of the Charter, it did not deal with the possibility of a deadlock. Clearly, under article 50, if no settlement was reached after exhausting the procedures specified in article 51, the parties would be left to act on their own responsibility. That looseness was inherent in the rules of contemporary international law on the adjudication of disputes."[44]

It was also held with regard to existing State practice, such as the discussions in the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation between States, and the Charter and the Protocol of the Organization of African Unity, Draft Art 62 "represented the highest measure of common ground that could be found among governments as well as in the Commission on this question."[45]

18 The matter became dramatically important and was then turned over to the political process:

> "Although the Commission had not thought that it would go beyond Article 33, it had nevertheless considered the possibility of the parties reaching a deadlock, in which case it would be for each Government 'to act as good faith demands', as stated in paragraph (5) of the commentary. Many delegations thought the provisions insufficient; that was a matter for the Conference to decide. It was to be hoped that [it] would succeed in working out a procedure acceptable to all States."[46]

As one observer has described:

> "It was on this point that all subsequent attention became focused, and indeed the success or failure of the Vienna Conference came to depend upon whether any acceptable answer could be found to the dilemma."[47]

19 Essentially, States Parties created two blocs in Vienna. One bloc was composed of Western States preferring strict procedural safeguards. The other encompassed States of the Eastern World and African and Asian States opposing either any procedural safeguards or compulsory dispute settlement by impartial third parties.[48] The discussions focused on the question of the appropriate organ to settle the dispute after the parties had reached a deadlock. The opposition of Eastern European States in this respect had already been revealed in the discussions concerning the principle of peaceful dispute settlement within the UN Special Committee on Principles of International Law concerning Friendly Relations and Co-operation

[44] [1966-I/2] YbILC 149.

[45] Final Draft, Commentary to Art 62, 262 para 4.

[46] UNCLOT I 441.

[47] *Rosenne* (n 38) 305.

[48] *Rozakis* (n 41) 152 n 5.

among States.[49] It was supported by African and Asian States, which mistrusted international dispute settlement procedures after the controversial ICJ decision in the second phase of the *South West Africa* cases.[50] One must keep in mind that during the 1960s the ICJ's decision in the second phase of the *South West Africa* cases had raised severe criticism of the Court and undermined its position.[51] The reluctance to grant the ICJ compulsory jurisdiction in this respect was guided by "the accentuated degree of reserve felt by many delegations from all continents towards the International Court of justice as an institution."[52] International judicial process was considered to be expansive yet slow and there was criticism of the composition of the Court that was considered to be dominated by Western lawyers. It was feared that a traditional institution such as the ICJ would not be aware of the demands of newly independent states and their understanding of international law.[53] Finally, it was felt that not every dispute would be sufficiently grave to call for a judicial settlement by the ICJ.[54]

During the first session of the Vienna Conference a stalemate could only be prevented by a Japanese proposal clearly distinguishing between disputes on norms of *ius cogens* and all other disputes.[55] However, despite strong support, the amendment was rejected,[56] although it had paved the way for the solution introduced in the second session of the Conference.[57] In fear of an utter failure of the Conference, States agreed on the so-called 'all States' formula, according to which the Western States accepted the adoption of a UN General Assembly declaration on universal participation in, and accession to the VCLT[58] in return for some African and Asian

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[49]*P-H Houben* Principles of International Law Concerning Friendly Relations and Co-operation among States (1967) 61, 710–716; *Sinclair* 228.

[50]ICJ *South West Africa (Ethiopia v South Africa, Liberia v South Africa)* (Second Phase) [1966] ICJ Rep 6.

[51]*Elias* 189.

[52]*Rosenne* (n 42) 9.

[53]*Sinclair* 228.

[54]*Rosenne* (n 42) 9 with reference to proposals by Japan (UN Doc A/CONF.39/C.1/L.339, UNCLOT III 188) and Switzerland (UN Doc A/CONF.39/C.1/L.377, UNCLOT III 193).

[55]UN Doc A/CONF.39/C.1/L.339, UNCLOT III 188: "If objection has been raised by any other party, the parties concerned shall seek the settlement of the dispute out of the claim in the following manner: (a) In a case where the dispute relates to a claim under article 50 or article 61, the dispute shall be referred to the International Court of Justice for decision at the request of either of the parties to the dispute; (b) In all other cases, the parties to the dispute shall first of all seek a solution of the dispute though the means indicated in article 33 of the Charter of the United Nations. If no solution has been reached within twelve months, the dispute shall be referred to arbitration by a tribunal provided for in the Annex to the present Convention, unless the parties to the dispute agree to refer the dispute to the International Court of Justice."

[56]UNCLOT II 307.

[57]*Rozakis* (n 41) 154.

[58]Western States were critical of the participation of entities they did not recognize, such as North Korea or North Vietnam; see *Rozakis* (n 41) 154 n 10. "*Draft Declaration on Universal Participation in and Accession to the Convention on the Law of Treaties: The United Nations Conference*

States accepting Draft Art 62 *bis* with a compulsory settlement of disputes over norms of *ius cogens*, a new Annex, and a Declaration on Art 15.[59]

21 The disagreement on the question of whether a treaty would still remain in force pending the completion of the settlement process was of lesser importance.[60] Here, Switzerland proposed that "throughout the duration of the dispute, in the absence of any agreement to the contrary between the parties or of provisional measures ordered by the court of jurisdiction, the treaty should remain in operation between the parties to the dispute."[61] The United States[62] and Japan[63] made similar suggestions. In contrast, a proposal submitted by 19 States[64] did not address the issue for political reasons, which turned out to be the basis for the final compromise[65]: Art 66 does not expressly regulate the matter.[66]

22 Regarding Art 65 para 4, no substantial problem arose in the drafting process, the discussions being restricted to the question of where the provision should be placed.[67] The same holds true for Art 65 para 5. Although it was discussed at the Vienna Conference whether Art 65 para 5 should be deleted for not being in line with para 1,[68] the issue was eventually not taken up.[69]

23 In 1969, the plenary of the Conference adopted Art 62 by 106 votes to none with two abstentions.[70] The article was later renumbered as Art 65. Some States made their approval of the provision depend on the adoption of Draft Art 62 *bis* which became Art 66 VCLT.

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on the Law of Treaties, Convinced that multilateral treaties which deal with the codification and progressive development of international law or the object and purposes of which are of interest to the international community as a whole, should be open to universal participation, *Aware* of the fact that Article [. . .] of the Convention on the Law of Treaties authorizes the General Assembly to issue special invitations to States not members of the United Nations, the specialized agencies or parties to the Statute of the International Court of Justice, to accede to the present Convention, *1. Invites* the General Assembly to give consideration, at its twenty-fourth session, to the matter of issuing invitations so as to ensure the widest possible participation in the Convention on the Law of Treaties; 2. *Expresses* the hope that the States Members of the United Nations will endeavor to achieve the object of this declaration; 3. *Requests* the Secretary-General of the United Nations to bring the present declaration to the notice of the General Assembly; 4. *Decides* that the present declaration shall form part of the Final Act of the Conference on the Law of Treaties."

[59]UNCLOT II 187.

[60]*Rosenne* (n 38) 305.

[61]UN Doc A/CONF.39/C.1/L.347, UNCLOT III 187.

[62]UN Doc A/CONF.39/C.1/L.355, UNCLOT III 190.

[63]UN Doc A/CONF.39/C.1/L.339, UNCLOT III 188.

[64]UN Doc A/CONF.39/C.1/L.352/Rev.3 and Add.1, Add.2, UNCLOT III 189.

[65]*RS Kearney/RE Dalton* The Treaty on Treaties (1970) 64 AJIL 495, 555.

[66]*Rosenne* (n 38) 306.

[67]*Rosenne* (n 38) 307.

[68]Proposal by Uruguay UN Doc A/CONF.39/C.1/L.343, UNCLOT III 187; proposal by Switzerland UN Doc A/CONF.39/C.1/L.347, UNCLOT III 187.

[69]*Rosenne* (n 38) 309.

[70]UNCLOT II 173.

C. Elements of Article 65

Art 65 applies only to **disputes relating to Arts 46–64**, *ie* Part V of the Convention, and is referred to in Art 42. Thus, it does not contain a general dispute clause and therefore does not apply to issues of application or interpretation of a treaty.[71] It is also not applicable to treaty termination due to supervening custom since supervening custom is not foreseen as a ground for termination under the VCLT.[72] Art 60 para 2 lit a (→ Art 60 MN 52–56) and those parts of Arts 54–59 where all parties may consent to terminate, withdraw from or suspend the operation of a treaty must be considered as *leges speciales*.[73] **24**

In line with Art 42 para 2 (→ Art 42 MN 26), States Parties to a treaty may deviate from Arts 65–68.[74] **25**

The provisions of paras 2 and 3 (→ MN 34–48) are decisive for preventing the unilateral termination of a treaty. They aim to protect the **principle of State consent** in the law of treaties. A treaty cannot be terminated, suspended or declared invalid without the consent of the other States Parties. If consent is lacking, a dispute arises, which must be solved through diplomatic or juridical means (→ MN 5). **26**

I. Invoking a Defect in Consent or a Ground for Impeaching the Validity of a Treaty Under the Provisions of the Present Convention (para 1)

It is disputed in legal literature whether all **grounds for invalidity** are covered by Arts 65–68 or whether the absolute causes are excluded because they apply automatically.[75] On the one hand, the wording of para 1 ("invoking") seems to restrict the application of the provision to those cases where a party may invoke causes – thus potentially excluding invalidity because of an infringement of *ius cogens*. Moreover, Arts 53 and 64 do not explicitly require any judicial proceedings[76] and as a matter of juridical logic, voidness *ab initio* does not depend on its invocation.[77] However, an analysis of the provisions demonstrates that all causes of invalidity are addressed.[78] The *travaux préparatoires* reveal that France introduced an amendment to what is **27**

[71] *Villiger* Art 65 MN 10, 25.

[72] *N Kontou* The Termination and Revision of Treaties in the Light of New Customary International Law (1994) 151; on supervening custom as a ground for termination *ibid* 145 *et seq*.

[73] *Villiger* Art 65 MN 5.

[74] On the applicability of Art 42 para 2 to Arts 65–68 see [1966-II] YbILC 237; *MG Kohen* in *Corten/Klein* Art 42 MN 17.

[75] *M Cosnard* in *Corten/Klein* Art 65 MN 12; *M Schröder* Treaties, Validity in MPEPIL (2008) MN 23.

[76] *C Tams* Enforcing Obligations *erga omnes* in International Law (2005) 147 n 137.

[77] *A Paulus* Die internationale Gemeinschaft im Völkerrecht (2001) 350; *Tams* (n 76) 147 n 137.

[78] *B Conforti/A Labella* Invalidity and Termination of Treaties: The Role of National Courts (1990) 1 EJIL 44, 65.

now Art 65 in order to clarify that the provision applies to all provisions of Part V.[79] On the basis of a systematic interpretation, it would be difficult otherwise to explain why Art 66 provides two different procedures and explicitly refers to *ius cogens*, thus stressing that the procedural requirements also apply in cases where the wording might suggest an automatic termination of the treaty.[80] From a teleological point of view, the aim to prevent an arbitrary use of grounds for termination of a treaty as a pretext to escape treaty obligations equally applies to all grounds for termination including infringements of *ius cogens*. The danger of abuse is as high as in all other cases. Eventually, the logical distortions result from the decentralized structure of the international order,[81] which requires that the objective concept of nullity is combined with a procedural safeguard to put it into effect.[82]

II. Party (para 1)

28 According to Art 2 para 1 lit g, "party" means a State that has consented to be bound by the treaty and for which the treaty is in force (→ Art 2 MN 46–47). Thus, it is not only the injured party who may invoke the invalidity of a treaty but also any other party to the treaty who may be affected by a breach of the treaty. Particularly in cases of impeaching the validity of a multilateral treaty, other affected States Parties can thus set the procedure in motion.[83]

29 Since only a party to the treaty at issue, not a third-party State, may start the procedure, Arts 65 and 66 reject the idea of an ***actio popularis*** where norms with an *erga omnes* character are at issue. The use of the concept 'party' according to Art 2 para 1 lit g makes it clear that only States Parties are competent to launch the formal procedures of Arts 65–68.[84] This interpretation has been contested in relation to ***ius cogens*** because the invocation of a treaty's invalidity entirely depends on the will of the very same parties who caused or contributed to the violation of a peremptory norm.[85] Indeed, the restriction that only States Parties to an agreement have standing seems to contradict the concepts of *ius cogens* and of those corresponding norms with an *erga omnes* character. As a somewhat irritating consequence, hypothetically speaking, Czechoslovakia would not have standing under the dispute settlement procedure of the Vienna Convention to have the 1938 Munich Agree-

[79] Statement by France, UNCLOT I 403; see above n 35.

[80] *Conforti/Labella* (n 78) 46 *et seq*; *DW Greig* Invalidity and the Law of Treaties (2006) 89.

[81] Statement of the representative of Luxembourg [1966-II] YbILC 20–21.

[82] *M Cosnard* in *Corten/Klein* Art 65 MN 14.

[83] *Villiger* Art 65 MN 11.

[84] *Greig* (n 80) 164; *A de Hoogh* Obligations *erga omnes* and International Crimes (1996) 48; *Paulus* (n 77) 350; *M Ragazzi* The Concept of International Obligations *erga omnes* (1997) 205 *et seq*; *Tams* (n 76) 147; *Villiger* Art 65 MN 11.

[85] *Rozakis* (n 41) 119 *et seq*.

ment[86] declared void.[87] Still, it is a most probable situation that a treaty violating a preemptory norm is directed against a non-party, such as the Munich Agreement or the 1939 Treaty of Non-Aggression between Germany and the Soviet Union.[88] Thus, it is a non-party whose legal interest in contesting the validity of the treaty is strongest.[89] In addition, excluding the possibility of an *actio popularis* seems to contradict the community approach linked with the concept of *ius cogens*.[90] Since *ius cogens* aims to guarantee the values of the international community, it would seem appropriate that the international community as represented by an individual State could enforce the norm before the ICJ. Any other interpretation seems to render Art 53 inoperative, reducing the possibility to apply the concept of *ius cogens* to a minimum. Moreover, it seems contradictory that individual States contribute to the creation of *ius cogens*, which depends on the acceptance and recognition of the international community of States, but are not entitled to participate in the process of its application.[91] Therefore, some States argued in favour of general standing at the Vienna Conference, although it was not always clear whether this would necessarily imply standing before a court or a general right or even obligation to protest against a violation of *ius cogens*.[92] Nonetheless, the restrictive approach of the VCLT is a result of adding Art 66 to the text in a compromise in order to prevent the Convention from failing.[93] According to the package deal, Art 66 lit a was coupled with Art 65 in order to restrict the availability of the jurisdiction of the ICJ to parties to a treaty the validity of which is contested by one of them.[94] Arts 65 and 66 were thus considered as procedural safeguards also against misuse by third-party states.[95] Moreover, subject to Art 42 para 2, non-parties have **other – political – avenues** outside the dispute settlement procedure of the VCLT to point to the invalidity of a treaty violating a preemptory norm. Thus, they may appeal to the Security Council if the situation endangers international

[86]Agreement for the Cession by Czechoslovakia to Germany of Sudeten German Territory, with Annex, and Declarations 142 BFSP 438.

[87]See, for this example, *Greig* (n 80) 161; see however Art 1 of the 1973 Prague Treaty between Germany and Czechoslovakia [1974] German BGBl II 990–993, according to which both States consider the Munich Agreement to be void. This might be considered as State practice in favour of standing of at least the State concerned; *P Weil* Le droit international en quête de son identité (1992) 237 RdC 268.

[88]143 BFSP 503.

[89]*Greig* (n 80) 162.

[90]*Tams* (n 76) 147.

[91]*De Hoogh* (n 84) 48; *cf Paulus* (n 77) 349.

[92]Statement of the representative of Israel, UNCLOT I 310; statement of the representative of Switzerland, UNCLOT I 324.

[93]*Greig* (n 80) 163; *Rosenne* (n 38) 305; *Sinclair* 231 *et seq*. Another pertinent example is the *East Timor* case: Portugal, which contested the validity of the Timor Gap Treaty before the ICJ, was not a State Party to the treaty concluded between Australia and Indonesia; *cf* ICJ *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, para 18.

[94]*Greig* (n 80) 162 *et seq*; see also *Tams* (n 76) 147.

[95]Statement of the representative of Chile, UNCLOT I 299.

peace and security, and may start dispute settlement procedures under Art 33 UN Charter. They may issue a protest, and States claiming a legal interest in a dispute may intervene in proceedings before the ICJ according to Art 62 ICJ Statute – the Court will then decide upon the request.[96] Third-party States may also be obliged under Art 41 Draft Articles on State Responsibility not to recognize as lawful the legal consequences of a treaty violating a norm of *ius cogens*. In addition, Art 48 Draft Articles on State Responsibility may apply. If an *actio popularis* should develop into customary international law, the interpretation of the VCLT might change in the light of subsequent state practice.[97]

III. Notification (para 1)

30 A notification is a communication by one State Party to another State Party or to other parties of an intention to raise either a **defect in its consent** to be bound by that treaty, or the ground for **impeaching the validity** of the treaty, **terminating** it, **withdrawing** from it or **suspending** its operation. According to Art 67 para 1, the notification must be made in writing (→ Art 67 MN 7–9). It must fulfill the formal requirements of Art 78 (→ Art 78 MN 6–7). In the case of a bilateral treaty, it must be addressed to the other party of the treaty, in the case of a multilateral treaty to all other parties. Inasmuch as the conclusion of a treaty must be transparent and public, it is necessary for reasons of legal security that the termination of a treaty fulfills the same requirements of transparency.[98] Thus, a simple complaint about a breach is not sufficient for the purposes of Arts 65–68 since it might only have been issued to prevent repetition.[99]

31 The use of the word "notification" instead of "notice of claim", which had been proposed by SR *Waldock,*[100] underlines the **diplomatic character** of the procedure under Art 65 in contrast to the litigation character predominant in Art 66.[101]

32 The notification must fulfill three **prerequisites** in order to fulfill its function to inform the other parties. First, it must explain the party's claim. Such a claim would raise the grounds either of defect in consent or of breach of the treaty by the other party.[102] Second, according to the wording of the second sentence of Art 65 para 1, it "shall indicate the measures proposed to be taken". According to *Waldock*, 'measure' signifies "a step or legal act performed with respect to the treaty".[103] This might include revision of the treaty, termination, withdrawal, denunciation or

[96] *S Kadelbach* Zwingendes Völkerrecht (1992) 331.
[97] *De Hoogh* (n 84) 48; *Paulus* (n 77) 350.
[98] *M Cosnard* in *Corten/Klein* Art 65 MN 21.
[99] *Gomaa* (n 21) 164.
[100] *Waldock* II 86–89 (Draft Art 25).
[101] *Rosenne* (n 38) 299.
[102] *Villiger* Art 65 MN 13.
[103] *Waldock* [1966-I/2] YbILC 150.

suspension of the operation,[104] but might also refer to the consequences of invalidity or termination.[105] Thus, the party will have to state whether it will terminate or suspend the operation of the treaty in whole or in part.[106] Third, it must explain the reason for the measure that includes the explanation that the claim and the measure proposed are proportional.[107] In view of the principle of *pacta sunt servanda*, the reasons must be legal reasons as distinct from political motives.[108] Since the claim of a breach of treaty or a defect in consent deviates from the principle of *pacta sunt servanda*, the State Party that invokes these grounds must state the reasons for its claim and bear the risk that its claim will be considered to be unfounded.[109]

33 States may dispense with the requirement to state specific reasons for terminating a treaty. Thus, the 1979 Argentine–Austrian Double Taxation Agreement[110] was validly unilaterally terminated by Argentina according to its Art 29 without Argentina stating any specific reason for this measure.[111]

IV. Objection (para 2)

34 According to para 2, the other party or in the case of a multilateral treaty, the other States Parties, may raise objections stating their protest. It is a bone of contention in literature whether States Parties are only entitled to object to the measures proposed[112] or also to the claim and the reasons for it.[113] The wording of the second sentence in para 1 suggests that the objection may cover reasons as well as measures proposed.[114] In the light of the function of Arts 65–68 to prevent an arbitrary termination of a treaty, objections to all aspects raised in the notification should be permissible.

35 Not every critical statement issued by a State Party must be considered an objection because a State may for political reasons wish to express criticism but might still (implicitly) consent to the measures proposed.[115]

[104] *Kadelbach* (n 96) 331; *Villiger* Art 65 MN 13.
[105] *Rozakis* (n 41) 111.
[106] *Gomaa* (n 21) 160.
[107] *Villiger* Art 65 MN 13.
[108] *Kadelbach* (n 96) 331.
[109] *Kadelbach* (n 96) 333.
[110] [1983] Austrian BGBl No 11.
[111] [2008] Austrian BGBl III No 80.
[112] *Rosenne* (n 38) 301.
[113] *Villiger* Art 65 MN 14.
[114] *Gomaa* (n 21) 172.
[115] *Rosenne* (n 38) 301 *et seq*.

V. Length of Period to Reply (para 2)

36 After the receipt of the notification, States Parties shall have at least **three months** to reply, except for cases of special urgency where the time period can be shorter.

37 The 3-month time limit serves different purposes. The party in breach will be in a position to reflect upon its conduct and provide an answer to the allegations or enter into negotiations. Under a multilateral treaty, the other States Parties will be able to take appropriate steps in order to adapt to the new situation. Moreover, the notifying party might reassess its request and withdraw the notification.[116]

38 According to SR *Waldock*, the 3-month time limit was chosen in order to provide some clarity and guidance on what a "reasonable time period" would mean.[117] In view of the legal uncertainty accompanying the delay of the termination or suspension process, the period must not be too long.[118] The period begins after the notification has been received by the States Parties (Art 77 para 1 lit e, Art 78; → Art 77 MN 24, Art 78 MN 6).[119] The precise length of time might vary "according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith."[120]

> In the *Gabčíkovo-Nagymaros Project* case the Court held that in view of Arts 65–68 and general principles of good faith, the termination of the treaty by Hungary only six days after the notification was premature.[121]

39 In **cases of special urgency**, the time period can be shorter than 3 months. Cases of special urgency include "the sudden and serious breach of a treaty" according to Art 60 (→ Art 60 MN 34) or situations "where unexpectedly a treaty can no longer be performed" according to Art 61 (→ Art 61 MN 16).[122] If these conditions are fulfilled the time period can even be shorter than two weeks according to the *Waldock* report.[123] If a State Party relies on the urgency of the situation, it must explicitly state the time limit and explain the reason for it. Thus, the exception provides the notifying party with certain discretion in deciding whether the prerequisites for urgency are fulfilled. The discretion should, however, be exercised in good faith.[124]

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[116] *Gomaa* (n 21) 160 *et seq*.

[117] *Waldock* [1966-I/2] YbILC 158. The term "reasonable" was used in earlier drafts, *cf Fitzmaurice* II 35 (Draft Art 20), 36 (Draft Art 23); *Fitzmaurice* III 29 (Draft Art 23).

[118] *M Cosnard* in *Corten/Klein* Art 65 MN 25.

[119] *Gomaa* (n 21) 161; *Villiger* Art 65 MN 16.

[120] ICJ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 96, para 49.

[121] ICJ *Gabčíkovo-Nagymaros Project* (n 15) para 109.

[122] *Rosenne* (n 42) 38; *Villiger* Art 65 MN 17.

[123] *Waldock* V 48–49.

[124] *Waldock* [1966-I/2] YbILC 158; *Gomaa* (n 21) 161; *Villiger* Art 65 MN 17.

A situation of urgency may be seen in the circumstances of the case of *Racke* where parties had not complied with a ceasefire agreement. In light of the question whether, "having regard to Article 65 of the Vienna Convention, it was permissible to proceed with the suspension of the Cooperation Agreement with no prior notification or waiting period, this Court observes that, in the joint statements of 5, 6 and 28 October 1991, the Community and the Member States announced that they would adopt restrictive measures against those parties which did not observe the ceasefire agreement of 4 October 1991 which they had signed in the presence of the President of the Council and the President of the Conference on Yugoslavia; moreover, the Community had made known during the conclusion of that agreement that it would bring the Cooperation Agreement to an end in the event of the ceasefire not being observed." However, the Court also stressed that the procedural requirements of Art 65 do not constitute customary international law.[125]

40 States Parties to a treaty may agree on longer time limits (→ MN 49). Disarmament and arms control agreements, for instance, might require longer notice periods. Since national security, often characterized as a supreme interest in such treaties, is directly concerned, such treaties emphasize the need for predictability.

Art XIX para 2 of the 1990 Treaty on Conventional Armed Forces in Europe requires States Parties who want to withdraw from the treaty to give notice of their decision at least 150 days prior to the intended withdrawal.

VI. Legal Consequences (para 2)

41 If a **party raises an objection within the period of three months**, Art 65 para 3 applies, obliging the parties to seek a solution through the means indicated in Art 33 UN Charter (→ MN 45–48). Before the notification takes effect, the notifying State Party may revoke its notification at any time, according to Art 68.

42 If the **parties cannot find a solution** under Art 65 para 3, Art 66 will apply.

43 If **no objection is raised** within the 3-month period, the notifying party may unilaterally take the measure proposed. The measures taken must conform to the requirements of Art 67 para 2 (→ Art 67 MN 10–14).

44 The treaty in question is not terminated just because a State initiates the procedure according to Arts 65–68.[126] Nor will the treaty be provisionally suspended.[127] The *travaux préparatoires* do not give a clear answer to the question, leaving room for an interpretation according to which the operation of the treaty

[125]ECJ (CJ) *Racke* (n 18) paras 58 *et seq*.

[126]*Rosenne* (n 42) 44; *Rozakis* (n 41) 165.

[127]*EAR Elreedy* The Main Features of the Concept of Invalidity in the Vienna Convention on Treaties (1971) 27 Revue égyptienne de droit international 13, 31; *Kadelbach* (n 96) 332; see however *A Bernardini* Qualche riflessione su norme internazionali di ius cogens e giurisdizione della Corte nella Convenzione di Vienna sul diritto dei trattati (1975) 14 Communicazioni e Studi 81, 87 *et seq*; *J de Arechaga* International Law in the Past Third of the Century [1978/I] 159 RdC 42, 81.

may be suspended even though the treaty itself remains in force during the settlement procedure.[128] On the other hand, a teleological interpretation speaks against such a provisional suspension of the treaty. Otherwise, the purpose of these provisions to prevent arbitrary termination of a treaty would at least be temporarily endangered. This interpretation is backed by the wording of Art 65 para 1, according to which a party may only "invoke" the different defects and grounds.[129] A right even to a provisional suspension would go much further. Thus, a treaty that might later be declared null and void *ab initio* must first be applied by the parties. In the case of ICJ proceedings a party may, however, ask for provisional measures or the Court may indicate such measures *proprio motu* according to Art 41 ICJ Statute. Moreover, the parties are free to agree to suspend the treaty provisionally.[130] The reduction of the period in cases of special urgency is another means of compensation. In relation to third parties, both parties to the proceedings will be responsible if the treaty is void *ab initio*.[131]

VII. Seek a Solution (para 3)

45 If an objection is raised within the period of 3 months, Art 65 para 3 applies, according to which the parties shall seek a solution through the means indicated in Art 33 UN Charter. According to its wording, the article addresses all States Parties concerned.

46 SR *Waldock* rejected the suggestion that instead of "solution", it would be preferable to use the words "settlement of dispute" because the expression "solution" would be more neutral and not determine whether a dispute actually exists.[132] Again, the essentially diplomatic character of the procedure under Art 65 is stressed.[133]

VIII. The Means Indicated in Article 33 UN Charter (para 3)

47 The expression "the means indicated in article 33 of the Charter of the United Nations" was chosen because, unlike Art 33 UN Charter, Art 65 VCLT does not deal with disputes which might jeopardize the maintenance of international peace and security.[134]

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[128] *Rosenne* (n 38) 306.

[129] *Villiger* Art 65 MN 8.

[130] *Rozakis* (n 41) 165–166.

[131] *Kadelbach* (n 96) 332.

[132] *Waldock* [1966-I/2] YbILC 151.

[133] *Rosenne* (n 38) 303.

[134] *Waldock* [1963-I] YbILC 183; *Rozakis* (n 41) 157; *Villiger* Art 65 MN 20.

Starting with the VCLT, the clause is frequently used in multilateral treaties. A pertinent example is Art 279 UNCLOS.[135]

Art 33 UN Charter[136] lists various **means of peaceful settlement of disputes** including negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or resort to regional agencies or arrangements. The parties are free in their choice between the various means mentioned in Art 33 UN Charter.[137] **48**

IX. Other Agreements on Settlement of Disputes (para 4)

Art 65 para 4 makes it clear that **existing agreements** on the settlement of disputes between the parties are not affected.[138] The paragraph guarantees that the will of the parties as expressed in their treaties is not ignored so that a certain settlement procedure would be imposed upon them. In addition, parties may choose other forms of dispute settlement or may waive the procedure foreseen in the VCLT.[139] For instance, parties may agree on compulsory jurisdiction of the ICJ in a treaty. **49**

In the *Fisheries Jurisdiction* case between the United Kingdom and Iceland, the United Kingdom asserted that Iceland had relied on a change of circumstances without complying with the procedure according to Arts 65 and 66 VCLT.[140] According to the ICJ, however, "the procedural complement to the doctrine of changed circumstances [was] already provided for in the 1961 Exchange of Notes, which specifically calls upon the parties to have recourse to the Court in the event of a dispute relating to Iceland's extension of fisheries jurisdiction."[141]

X. Notification in Answer to Another Party (para 5)

According to para 5, a party who faces a claim from another party to perform the treaty or that the former has violated the treaty, may itself respond by a notification even though it has remained silent until then. Thus, the provision guarantees that a State can still **raise obvious grounds for termination** although it had thus far not **50**

[135] 1833 UNTS 396.

[136] Art 33 UN Charter: "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. 2. The Security Council shall, when it deems necessary, call upon the parties to settle their disputes by such means."

[137] *Villiger* Art 65 MN 20.

[138] *Aust* 301.

[139] *Villiger* Art 65 MN 22.

[140] ICJ *Fisheries Jurisdiction* (n 16) para 44.

[141] *Ibid* para 45.

made a pertinent notification.[142] However, Art 45 is still applicable, which regulates the conditions upon which a State is debarred from invoking a particular ground.[143] This provision takes note of the complex process of political contestations through which invalidity of a treaty becomes manifest in international law over time. Invalidity will not always be immediately apparent.[144]

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[142] *Waldock* [1966-I/2] YbILC 151.

[143] *Aust* 301.

[144] *M Reisman/D Pulkowski* Nullity in International Law in MPEPIL (2008) MN 36.

Article 66

Procedures for judicial settlement, arbitration and conciliation

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Contents

A. Purpose and Function

Art 66 complements and reinforces Art 65 para 3, especially in cases in which State Parties are not already bound by a dispute settlement mechanism. Although its **practical relevance** is **limited**,[1] it was of eminent political importance and probably saved the Vienna Conference when the conference was about to fail.[2] Art 66, which was not included in the ILC's draft articles, opened an avenue for a number of States to accept the articles on invalidity and termination, which they considered to be a progressive development of treaty law, because it provided for procedural safeguards (→ Art 65 MN 17–20).[3] **1**

[1] *Villiger* Art 66 MN 12.

[2] *S Rosenne* The Settlement of Treaty Disputes under the Vienna Convention of 1969 (1971) 31 ZaöRV 1, 61.

[3] *Aust* 301.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
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2 Art 66 does not represent customary international law. The disputed nature of Art 66 is reflected in **numerous reservations** by certain States. Brazil, China and Vietnam issued a general reservation against Art 66. Algeria, Armenia, the Byelorussian SSR, Cuba, Saudi Arabia, Tunisia, the Ukrainian SSR and the USSR filed reservations against the obligatory elements of Art 66 stating that a dispute settlement would require the consent of both parties. Guatemala made a reservation that it would not apply Art 66 insofar as it was incompatible with Guatemala's constitution. The Byelorussian SSR, the Ukrainian SSR and the USSR also issued a reservation against the Annex to Art 66. Syria did not ratify the rules on obligatory conciliation included in the Annex to Art 66. Belgium, Denmark, Finland, Portugal and Tanzania made a reservation that they considered Art 66 to be applicable only in cases in which the other State Party accepts compulsory settlement of disputes under Art 66, as well. Canada, Germany, the Netherlands, New Zealand and the United Kingdom issued interpretative declarations that "nothing in article 66 of the Convention is intended to oust the jurisdiction of the International Court of Justice where such jurisdiction exists under any provisions in force binding the parties with regard to the settlement of disputes."[4] Numerous Eastern European and former communist States withdrew their reservations against Art 66 after the dissolution of the USSR. These include Bulgaria, the Czech Republic, Hungary, Mongolia and Slovakia.

3 Various States made **objections to the reservations** issued. General objections were raised by Egypt, Sweden and Tanzania. Austria, Denmark and Finland objected to the reservation by Guatemala because its unspecific nature would be contrary to the objects and purposes of the Convention. Canada objected to the reservation of Syria. Germany filed an objection to the reservations made by Algeria, the Byelorussian SSR, Tunisia, the Ukrainian SSR, the USSR and Vietnam, stressing that it considers "articles 53 and 64 to be inextricably linked to article 66(a)".[5] Japan issued an objection to the reservations of the Byelorussian SSR, Syria, the Ukrainian SSR and the USSR. The Netherlands objected to the reservations by Algeria, the Byelorussian SSR, Guatemala, Syria, Tunisia, the Ukrainian SSR and the USSR. New Zealand and the United States issued objections to the reservations by Syria and Tunisia. Sweden objected to the reservations by Guatemala, Syria and Tunisia, and the United Kingdom raised an objection to the reservations by Algeria, the Byelorussian SSR, Cuba, Guatemala, Syria, Tunesia, the Ukrainian SSR and the USSR.

4 In its 2006 judgment in the *Armed Activities on the Territory of the Congo* case, the ICJ found that the rules contained in Art 66 VCLT are **not declaratory of customary international law**.[6]

[4]Declaration of the United Kingdom.

[5]Objection made by the Federal Republic of Germany.

[6]ICJ *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic epublic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, para 125.

B. Historical Background and Negotiating History

The drafting history of Art 66 is closely linked to Art 65 (→ Art 65 MN 10–23). Art 66 was proposed during the Vienna Conference in the course of the dispute about the consequences of Art 65 para 3. The consequences of the parties not being able to find a solution under the procedures of Art 65 para 3 were considered to be unclear.[7] Several proposals were made during the conference.[8] The so-called 19-State proposal,[9] which suggested a new Art 62 *bis,* foresaw a compulsory procedure. "The sponsors of the joint amendment considered that the convention should provide for a compulsory procedure for the settlement of disputes"[10] arising under Art 65 para 3. When in 1969, States adopted Art 65,[11] many delegations stressed the direct link with the other procedural provisions.[12] The 19-State proposal, however, did not receive the required two-thirds majority, with a result of 62 : 37 : 10.[13] A new Art 62 *bis*, a new Annex and a Declaration on Art 15 were part of the compromise of the 'all States' formula of the 34th plenary meeting (→ Art 65 MN 20) to circumvent the stalemate. Art 66 as part of the package deal was voted for with 61 votes in favour, 20 against and 26 abstentions, thus achieving the lowest number of affirmative votes at the Vienna Conference.[14] **5**

C. Elements of Article 66

I. Opening Sentence

Art 66 only takes effect if **no solution** has been reached under Art 65 para 3 (→ Art 65 MN 45–48). In terms of Art 65 para 3, no solution is found if there is a deadlock in the negotiations, if a party disagrees with a proposed procedure for **6**

[7]Statement of the representative of Norway, UNCLOT I 818: "But agreement had stopped there, and the Commission had been unable to solve the real problem, namely when the parties, after having followed the procedure laid down in article 62, could not reach an agreement on their dispute. What would become of the principle of the sovereign equality of States or the notion of mutual consent, which were the very basis of the negotiation, signature and ratification of treaties, if, without the requisite safeguards, the parties were allowed subsequently to rid themselves of their treaty obligations simply by claiming that a treaty was invalid under the convention?" See also the statement of the representative of Italy *ibid* 430.

[8]UNCLOT I 473.

[9]UN Doc A/CONF.39/C.1/L.352/Rev.2, UNCLOT III 193; UN Doc A/CONF.39/C.1/L.352/Rev.3, Corr.1, Add.1 and Add.2, UNCLOT III 244–245.

[10]Statement of the representative of the Netherlands, UNCLOT I 405.

[11]UNCLOT II 136.

[12]Statement of the representative of the United Kingdom, UNCLOT II 136.

[13]UNCLOT II 153.

[14]UNCLOT II 254 *et seq*, 347 *et seq*; *Villiger* Art 66 MN 1.

settlement or does not take part in a procedure at all.[15] The party that relies on Art 66 has to prove that the prerequisites for Art 66 are fulfilled.[16] Art 66 is considered to be **subsidiary** to Art 65. Moreover, all other procedures provided for in other instruments would prevail and the parties may deviate from Art 66 in any new instrument.[17]

7 The article only applies to **disputes relating to Part V** of the Convention. It does not apply to other questions of interpretation, application or any other provision of the VCLT.[18]

8 The **time limit** of 12 months following the date on which the objection was raised may be prolonged by the parties.[19]

II. Any One of the Parties

9 The notion 'party' within Art 66 does not refer to the definition in Art 2 para 1 lit b but denotes a **party to the dispute**.[20] The procedure may be started unilaterally by any one of the parties to the dispute, including the notifying as well as the objecting State.[21] This interpretation has been criticized for being too strict and inefficient.[22] Nonetheless, it is in line with the reluctance in the ILC and the Vienna Conference to create any kind of compulsory jurisdiction (→ Art 65 MN 17–19). Only a State that is a party to the treaty and the dispute in question can start the procedure according to Art 66, since the article is confined to those disputes that have already crystallized through the proceedings under Art 65 (→ Art 65 MN 28–29).[23]

III. Dispute on the Interpretation of Articles 53 and 64 (lit a)

10 Art 66 lit a only concerns cases of dispute on the application or interpretation of Arts 53 and 64, which deal with ***ius cogens***. The parties may choose between two options: either they refer the case to an arbitral tribunal (→ MN 12–13), or they bring the case before the ICJ (→ MN 14–18). Thus, the Annex to Art 66 does not apply to disputes concerning *ius cogens*.

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[15] *C Rozakis* The Concept of *ius cogens* in the Law of the Treaties (1976) 170; *Villiger* Art 66 MN 2 *et seq*.

[16] *Rozakis* (n 15) 170; *Villiger* Art 66 MN 2.

[17] *S Rosenne* Developments in the Law of Treaties 1945–1986 (1989) 310.

[18] *Rosenne* (n 17) 310.

[19] *Villiger* Art 66 MN 4.

[20] *Rozakis* (n 15) 170; *Villiger* Art 66 MN 3; see however *S Kadelbach* Zwingendes Völkerrecht (1992) 333.

[21] *Villiger* Art 66 MN 5.

[22] *Rozakis* (n 15) 119–120; *T Minagawa Ius cogens* in Public International Law (1984) 12 Hitotsubashi Journal of Law and Politics 1611.

[23] *Rozakis* (n 15) 171.

Art 66 is not applicable retroactively to disputes concerning the violation of *ius cogens* norms.[24] **11**

1. Arbitration

An agreement by common consent to submit the dispute to arbitration implies that an actual ***compromise*** has been concluded on the establishment of an arbitral tribunal.[25] The mere understanding that a dispute should be referred to arbitration would not be sufficient since under these conditions, it still remains uncertain whether a dispute will be resolved: the States may be at odds on the question of how to install the actual tribunal.[26] **12**

Arbitral tribunals as a means for the peaceful settlement of disputes are mentioned in Art 66 lit a as well as Art 65 para 3. Thus, it may be assumed that a party who has tried unsuccessfully to reach a solution through arbitration under Art 65 para 3 might unilaterally bring the case before the ICJ.[27] **13**

2. International Court of Justice

Unless the parties have agreed to submit the dispute to arbitration, they may bring the dispute before the ICJ, even unilaterally. Thus, the VCLT has established one **compulsory form of settlement** in cases of disputes over *ius cogens* and the invalidity of treaties.[28] **14**

The Court's jurisdiction is confined to the application and interpretation of Arts 53 and 64, *ie* a **conflict between *ius cogens* and a treaty**.[29] In such a case the Court would just have to rule on the existence of the *ius cogens* norm and, in a second step, decide on the incompatability of the treaty and the norm. As a consequence, it could arrive at the conclusion that the treaty is null and void.[30] If the Court finds that a multilateral treaty contravenes a norm of *ius cogens*, the Court's finding on invalidity is only binding upon the parties to the dispute according to Art 59 ICJ Statute.[31] However, other parties will be justified in relying on the Court's findings in order to claim non-compliance with the treaty or invalidity of the treaty.[32] Thus, the danger that "the Court should become a kind **15**

[24] ICJ *Armed Activities on the Territory of the Congo* (n 6) para 125.
[25] *Rozakis* (n 15) 174 *et seq*; *Villiger* Art 66 MN 6.
[26] *Rozakis* (n 15) 175.
[27] *H Ruiz-Fabri* in *Corten/Klein* Art 66 MN 27; *Villiger* Art 66 MN 7.
[28] *Rozakis* (n 15) 168 *et seq*.
[29] *Villiger* Art 66 MN 9.
[30] *Ibid*.
[31] SR *Reuter* [1982-I] YbILC 158.
[32] *Rosenne* (n 17) 311; *Villiger* Art 66 MN 9.

of international legislature"[33] seems exaggerated, especially because it has not found any basis in practice until now.

16 Art 66 lit a still relies on the principle of consent as a basis for the jurisdiction of the Court insofar as both parties must have accepted the jurisdiction of the ICJ either on the basis of the VCLT or on another basis. There is no room for an *actio popularis* (→ Art 65 MN 29).[34] In the *Armed Activities on the Territory of the Congo* case, the Democratic Republic of the Congo contended that Art 66 would also apply outside the mechanisms of Art 65 concerning the validity of a treaty, thus establishing jurisdiction "to settle [any] dispute arising from the violation of peremptory norms (*jus cogens*) in the area of human rights."[35] On the rationale of Art 66, a compulsory jurisdiction of the ICJ could be established in all cases of violation of peremptory norms. Rwanda rejected this interpretation.[36] The Court did not directly address the issue but held that the VCLT was inapplicable *ratione temporis* and thus refuted any contention that Art 66 might even be applicable retroactively in cases of peremptory norms. However, in a kind of *obiter dictum,* the ICJ underlined its reasoning of the *East Timor* case[37] "that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties."[38] Thus far, the international law-making process has not led to a legal rule according to which a peremptory norm would trump the principle of consent as a basis for jurisdiction that is grounded in international practice and the principle of equality of states.

17 The prerequisite of a **written application** is in line with Art 36 para 1 and Art 40 para 1 ICJ Statute.[39] In its decision, the Court will have to examine that all prerequisites of Art 66 lit a are fulfilled in order to find that it has jurisdiction.[40]

18 The jurisdiction of the Court is confined to the application or interpretation of Arts 53 or 64. It does not comprise the application or interpretation of another treaty, or other provisions of the VCLT.[41]

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[33] Statement of the representative of France, UNCLOT II 191.

[34] *Kadelbach* (n 20) 332 n 40; *H Ruiz-Fabri* in *Corten/Klein* Art 66 MN 29; see however *EP Nicoloudis* La nullité de ius cogens et le développement contemporain du droit international public (1974) 182.

[35] ICJ *Armed Activities on the Territory of the Congo* (n 6) paras 1, 15, 120.

[36] *Ibid* para 121.

[37] ICJ *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, para 29.

[38] ICJ *Armed Activities on the Territory of the Congo* (n 6) para 125.

[39] *Rozakis* (n 15) 171–172; *Villiger* Art 66 MN 8.

[40] *Rozakis* (n 15) 173.

[41] *Rosenne* (n 17) 310.

IV. Dispute on the Application and Interpretation of the Other Articles of Part V (lit b)

Art 66 lit b regulates procedures for conciliation of **all other disputes under Part V**. In the case of disputes concerning the application or interpretation of the other articles of Part V, any party may set in motion the procedure specified in the Annex to the Convention. Such a dispute would concern Arts 46–52 and 54–63. The procedure may be started unilaterally. The other parties are nonetheless under a duty to take part in the process.[42] **19**

The first step of this procedure consists of a request to the UN Secretary-General. The following steps are described in detail in the **Annex** to Art 66 (→ Annex). **20**

Selected Bibliography

See the bibliography attached to the commentary on Art 65.

[42] *H Ruiz-Fabri* in *Corten/Klein* Art 66 MN 33 *et seq*; *Villiger* Art 66 MN 10.

Annex to Article 66

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.
2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

   The State or States constituting one of the parties to the dispute shall appoint:

   (a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
   (b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

   The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

   The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

   If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

   Any vacancy shall be filled in the manner prescribed for the initial appointment.
3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.
4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

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5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

Contents

A. Purpose and Function

1 The Annex provides for a Conciliation Commission consisting of five conciliators which can make reports or proposals for the settlement of a dispute. In the light of Art 31 VCLT, the Annex constitutes an **integral and binding part of the Convention**.[1] It is a supplement to Art 66 lit b and must therefore be set apart from Art 66 lit a which foresees arbitration or a decision of the ICJ in cases concerning the application or interpretation of Arts 53 or 64.[2]

2 The Annex establishes a dispute settlement procedure somewhere in between diplomatic means and arbitral or judicial procedures.[3] The procedure according to the Annex in terms of its results is a **non-compulsory procedure** because the parties are free to accept or to refuse the proposed solution to the dispute. This is in line with the classical model of conciliation, as enshrined in the 1961 Resolution of

[1] *S Rosenne* Developments in the Law of Treaties (1989) 311; *C Rozakis* The Concept of ius cogens in the Law of Treaties (1976) 178.

[2] *Villiger* Annex MN 2.

[3] *JP Cot* Conciliation in MPEPIL (2008) MN 3.

the Institut de Droit International on International Conciliation[4] and the 1995 General Assembly Resolution,[5] which has consistently emphasized the optional aspects.[6]

The approach taken by the VCLT has been described as a **"carrot-and-stick approach"**. Conciliation becomes compulsory establishing an element of obligation and pressure which might push the parties to accept the recommendations of the Commission which in line with the traditional approach remain non-binding.[7] The idea of compulsory conciliation between two parties of a multilateral treaty is contradictory. The Commission is not restricted to legal standards which could be generalized and thus be applicable to all parties of a convention. Although the interpretation of the convention concerns all States Parties, conciliation aims very much at the parties to the concrete dispute. For instance, in contrast to judicial proceedings there is in principle no room for third-party intervention.[8] A remedy included in the Annex may be seen in the fact that the Commission may invite other States Parties to the contested treaty to submit their views upon consent of the parties to the dispute. 3

Starting with the VCLT, there was a **revival of conciliation in treaty provisions** which is, however, not reflected in practice despite the introduction of compulsory dispute settlement procedures.[9] There is **no practice** on using the conciliation commission according to the Annex, which is in line with a general reluctance of States to turn to conciliation as a means of dispute settlement.[10] Taken together with the *travaux préparatoires* of the VCLT and the reasons for including the Annex, this underlines the criticism raised against provisions on conciliation in multilateral treaties by *Hersch Lauterpacht*: 4

> "Insofar as it is in effect used as a pretext for concealing the determination of the States to remain free from the obligation of obligatory judicial settlement, it is harmful [. . .] [which] lends ample support to the view that conciliation, although non-existent in practice, has become an obstacle to progress by reducing the fundamental postulate of the obligatory rule of law to one of many means of settlement of equivalent nature."[11]

From another perspective, the mere existence of the rules conciliation under the VCLT is sufficient for their success in preventing States Parties from raising arbitrary claims since they might face compulsory settlement of disputes.[12] 5

[4]See IDI Res 2/1961, 11 September 1961 (1961) 49-II AnnIDI 385.

[5]UN Model Rules for the Conciliation of Disputes between States, UNGA Res 50/50, 11 December 1995, UN Doc A/RES/50/50.

[6]*Cot* (n 3) MN 13.

[7]*Ibid* MN 15.

[8]*Ibid* MN 16–17.

[9]*M Aznar-Gomez* in *Corten/Klein* Annexe MN 22; *Cot* (n 3) MN 8 *et seq*, 12; *M Kohen La* Codification du droit des traités (2000) 104 R.G.D.I.P. 577, 605.

[10]*Cot* (n 3) MN 35 *et seq*.

[11]*H Lauterpacht* The Function of Law in the International Community (1933) 266–267; see also *Cot* (n 3) MN 38.

[12]*Sinclair* 235.

Pertinent examples of treaties providing for conciliation on the basis of the example of the Vienna Convention include: the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character,[13] the 1978 Vienna Convention on Succession of States in Respect of Treaties,[14] the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,[15] the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[16] Conciliation may be combined with other dispute settlement forms, such as in the 1985 Vienna Convention on the Protection of the Ozone Layer,[17] the 1992 Convention on Biological Diversity[18] and Annex V sec I of the 1982 United Nations Convention on the Law of the Sea.[19]

6 The procedure enshrined in the Annex must be seen as a **progressive development** of the law not reflecting customary international law.[20]

B. Historical Background and Negotiating History

7 The Annex was part of the compromise of the 'all States' formula of the 34th plenary meeting (→ Art 65 MN 20) to overcome the stalemate caused by the dispute over a compulsory procedure for dispute settlement. Therefore, it was not discussed in the same depth as other provisions of the Convention. This seems to have caused some inconsistencies.[21] Since it is close to the annex of the formerly proposed Draft Art 62 *bis*, identical passages of both annexes can be interpreted on the basis of the *travaux préparatoires* for the rejected annex (→ Art 66 MN 5).[22]

8 When the Annex was adopted, there were numerous States, *inter alia* the Federal Republic of Germany, which were not members of the United Nations. Thus, the assumption of the Annex that States Parties to the VCLT would at the same time be UN Member States was problematic. The Federal Republic of Germany, for instance, abstained on the vote on Art 66 and the Annex.[23] However, given the contemporary membership of the UN, this problem is no longer decisive.

9 The Annex does not represent customary international law.[24] Art 66 and the Annex were adopted with the lowest number of affirmative votes: 61 : 20 : 26.[25]

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[13] UN Doc A/CONF.67/16 (not yet in force).

[14] 1946 UNTS 3.

[15] UN Doc A/CONF.117/14 (not yet in force).

[16] 25 ILM 543 (not yet in force).

[17] 1513 UNTS 323.

[18] 1760 UNTS 79.

[19] 1833 UNTS 3.

[20] *MJ Aznar Gomez* in *Corten/Klein* Annex MN 8.

[21] *Rosenne* (n 1) 314–315.

[22] *Rosenne* (n 1) 311.

[23] UNCLOT II 254 *et seq*, 347 *et seq*.

[24] *Rosenne* (n 1) 313; *ME Villiger* Customary International Law and Treaties (1985) MN 539.

[25] UNCLOT II 254 *et seq*, 347 *et seq*.

C. Elements of the Annex

I. Establishing a Conciliation Commission (paras 1 and 2)

Conciliation can be defined as "a method for the settlement of international disputes of any nature according to which a commission set up by the parties, either on a permanent basis or on an *ad hoc* basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the parties, with a view to its settlement, such aid as they may have requested."[26] **10**

Under the Annex a Conciliation Commission is **set up upon a request made to the Secretary-General** according to Art 66 lit b. A permanent Conciliation Commission is not foreseen.[27] **11**

The VCLT chooses one of the well-established models of forming a Conciliation Commission[28]: the Commission is composed of **five qualified jurists** who act as conciliators. For this purpose, the UN Secretary-General keeps a **list of conciliators**. Each party is entitled to appoint two conciliators from the list or from outside within 60 days. Thus, the Annex guarantees equality between the parties.[29] These conciliators will appoint the fifth person within a period of the same length. After the elapse of these periods the UN Secretary-General is entitled to appoint a conciliator or the chairman within another sixty days. While it has been common practice since establishing the Permanent Court of Arbitration to provide for a pre-established list, it is an important novelty to bestow the UN Secretary-General with a **residuary competence** for cases of deadlock.[30] This is an essential prerequisite for compulsory conciliation which could otherwise be undermined. A refusal by one of the parties will nevertheless endanger the outcome of the conciliation procedure.[31] The parties may prolong the periods for appointment upon agreement.[32] This rule aims to prevent that a deadlock is reached while establishing the Commission. The same applies to vacancies arising after the Commission has taken up its work.[33] The equality of the parties, the appointment of the fifth member and the residual competence of the Secretary-General aim to guarantee the commission's **impartiality**.[34] **12**

The provision was informed by **international experience**, such as the obstructions in conciliation proceedings which were at issue in the ICJ's advisory opinion **13**

[26] 1961 IDI Resolution on International Conciliation (n 4).
[27] *Villiger* Annex MN 6.
[28] For other models see *Cot* (n 3) MN 23.
[29] *Villiger* Annex MN 7 *et seq*.
[30] *Rosenne* (n 1) 313.
[31] *Cot* (n 3) MN 24.
[32] *Villiger* Annex MN 11.
[33] *Rozakis* (n 1) 179–180.
[34] See *Cot* (n 3) MN 23.

on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*.[35] It confers on the UN Secretary-General a competence which, according to the ICJ, the Secretary-General could not exercise under the 1947 Peace Treaties.[36] The provision is a precedent for other dispute settlement mechanisms, above all for the 1982 UN Convention on the Law of the Sea.[37]

14 Paragraph 2 assumes that it will be possible to identify to which side of a dispute a State will belong. The assumption has been criticized as unlikely.[38] In the comparable case of designating a judge *ad hoc* before the ICJ, Art 31 para 5 ICJ Statute provides that "[s]hould there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court."

II. Procedure and Intervention (para 3)

15 The Conciliation Commission must provide for its own procedure. In view of the principles of equality of States, the provisions must meet the basic requirements of a fair procedure because only on that basis will the equality between the parties be guaranteed.[39]

16 Parameters for the procedure derive from para 5: the Commission shall hear the parties and examine the claims and objections. This is in line with the general practice in international law according to which a conciliation procedure will include a **written** and an **oral phase**, as well as rules applying to evidence. However, practice has occasionally deviated from these principles. For instance, in the *Jan Mayen Case* in 1981,[40] no pleadings were held since the conciliators had already taken part in all the earlier negotiations.[41] However, the wording that the Commission "shall hear the parties" suggests that at least a written phase cannot be dispensed with.

17 Paragraph 3 provides that all decisions and recommendations of the Commission shall be made by a **majority vote** of the five members.

18 The provision allows for the possibility that the Commission may allow **other States Parties** to the contested treaty upon consent of the parties to the dispute to submit their views. The requirement of consent, however, probably renders

[35] ICJ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) [1950] ICJ Rep 65.

[36] *Rosenne* (n 1) 313.

[37] See *mutatis mutandi* Annex V Arts 2–3 UNCLOS.

[38] *Rosenne* (n 1) 314.

[39] *RS Kearney/RE Dalton* The Treaty on Treaties (1970) 64 AJIL 495, 554; *Villiger* Annex MN 13.

[40] *Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen* 27 RIAA 1, 20 ILM 797 (1981); see *G Ulfstein* Maritime Delimitation between Greenland and Jan Mayen Case (Denmark v Norway) in MPEPIL (2008).

[41] *Cot* (n 3) MN 26.

the provision ineffective.[42] The restriction to parties to the treaty is in line with the restrictive application *ratione personae* of Arts 65 and 66 (→ Art 65 MN 28 – 29, Art 66 MN 9).

III. Functions of the Conciliation Commission (paras 4–6)

Paragraphs 4 and 5 provide that the Commission shall try to initiate an **amicable settlement**. According to para 6, the report may include conclusions on questions of law. These provisions indicate the **applicable standards**: the non-binding proposals which the Commission can make may be based on legal considerations, but they need not consist of a strict legal application of international law.[43] On the one hand, the compulsory character of conciliation under the VCLT brings the report of the conciliation commission close to an advisory opinion which would prompt a strict application of international law. On the other hand, the basic principles of conciliation speak in favour of a more lenient application of the law because the aim of the procedure is to reach a compromise acceptable to both parties. Such a compromise might require the Commission to take into account elements of equity. Thus, the strict application of international law may be harmful to conflict solution.[44] **19**

Paragraph 4 is seen as a basis for the Conciliation Commission to recommend provisional measures for preventing irreparable damage.[45] **20**

Paragraph 5 reflects the nature of conciliation between diplomatic and arbitral means in that the Commission only makes proposals. Correspondingly, para 6 provides that the report of the Commission may include conclusions on the facts or on questions of law but it does not include any obligatory rules on the content of the report.[46] In any case, the content will not have any binding force on the parties; para 6 states explicitly that the Commission has only recommendatory competences. Comparable rules were already laid down in Art XIV of the 1899 First Hague Convention and Art XXXV of the 1907 First Hague Convention. This provision is in line with the nature of conciliation proceedings which are closer to the diplomatic method of dispute settlement than legal methods.[47] Conciliation does in general not lead to binding conclusions. It does not carry any legal authority. Commentators doubt its political weight.[48] Therefore the definite settlement of the dispute still depends on the will of the parties. **21**

[42] *Rozakis* (n 1) 180.
[43] *Cot* (n 3) MN 3.
[44] *Ibid* MN 27.
[45] See *Rosenne* (n 1) 316.
[46] *Villiger* Annex MN 15, 17.
[47] *N Butler* Arbitration and Conciliation Treaties in MPEPIL (2008) MN 2.
[48] *Cot* (n 3) MN 3.

22 The UN Secretary-General receives the report in order to transmit it to the parties. The parties are free to decide whether the report should be published.[49] Since conciliation within a multilateral convention might affect interests of other States Parties, publicity might become necessary or might even be a means to push the parties to agree with the proposal of the Commission. Therefore, the Annex does not include a prohibition to use the report in later proceedings in contrast to what is usually provided for in traditional conciliation proceedings.[50]

IV. The Role of the Secretary-General (para 7)

23 Paragraph 7 foresees that the Secretary-General shall provide the Commission with assistance and facilities. The expenses of the Commission shall be borne by the United Nations. In order to get approval by the UN General Assembly for these provisions, the Vienna Conference adopted another resolution on Art 66.[51]

Selected Bibliography

N Butler Arbitration and Conciliation Treaties in MPEPIL (2008).
JP Cot Conciliation in MPEPIL (2008).
H Lauterpacht The Function of Law in the International Community (1933).
RS Kearney/RE Dalton The Treaty on Treaties (1970) 64 AJIL 495.
ME Villiger Customary International Law and Treaties (1985).
For further references see the bibliography attached to the commentary on Art 65.

[49] *Rosenne* (n 1) 316.

[50] *Cot* (n 3) MN 31.

[51] *The United Nations Conference on the Law of Treaties,*

Considering that under the terms of paragraph 7 of the Annex of the Vienna Convention on the Law of Treaties, the expenses of any conciliation commission that may be set up under Article 66 of the Convention shall be borne by the United Nations,

Requests the General Assembly of the United Nations to take note of and approve the provisions of paragraph 7 of the Annex.

Article 67

Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. **The notification provided for under article 65, paragraph 1, must be made in writing.**
2. **Any act of declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.**

Contents

A. Purpose and Function

Art 67 concerns the notification of a State's intention to terminate the treaty, *etc* as well as the final act through which the treaty is in fact terminated *etc*. It accompanies Art 65 by adding further **binding procedural requirements**. If these requirements are not fulfilled, the instruments concerned will not have any legal effect.[1] **1**

Art 67 seeks to address the uncertainties that result from the diplomatic practice of declaring the withdrawal from a treaty in public speeches that are not clearly directed to the other States concerned. Thus, para 2 aims to guarantee **stability of treaties** and **legal security** in international relations based on the maxim *pacta sunt servanda*.[2] The article supports the aim of Arts 65–67 to prevent abusive uses of the grounds for termination.[3] As *Fleischhauer* in his function as a German representative to the Vienna Conference pointed out, "[t]he very principle of *pacta sunt servanda* called for the greatest caution and the manifold political, financial, economic and technical interests, which were at stake made it unthinkable that **2**

[1] *Villiger* Art 67 MN 2.

[2] *Aust* 301–302; *MM Gomaa* Suspension or Termination of Treaties on Ground of Breach (1996) 164; *Villiger* Art 67 MN 5.

[3] *D Rouget* in *Corten/Klein* Art 67 MN 1.

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any doubts should be permitted as to whether that procedure had been initiated, and, if so, on what precise grounds".[4]

> A pertinent historical example – given by the representatives of Germany in the Plenary Assembly[5] – for the uncertainties connected with oral notification can be found in the *Eastern Greenland* case of the PCIJ. The case dealt with issues of sovereignty over Eastern Greenland and, in particular, with the question of whether the so-called Ihlen Declaration was legally binding on Norway. In this declaration, the Norwegian Foreign Minister *Ihlen* had stated orally to the Danish Minister that "the plans of the Royal [Danish] Government respecting Danish sovereignty over the whole of Greenland [. . .] would be met with no difficulties on the part of Norway."[6]

3 Although there is no explicit rule included in Art 67, States may deviate from its provisions.[7]

4 The proceedings within the ILC suggest that Art 67 as well as the other procedural provisions in Arts 65–68 were considered as a progressive development of international law.[8] However, the provisions may be **developing into customary international law**.[9] In the *Gabčíkovo-Nagymaros Project* case, the ICJ noted that Arts 65–67 VCLT, "if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith" (→ Art 65 MN 8).[10]

> There is supporting State practice even from the period before the entry into force of the VCLT. For instance, in 1973 Austria issued a verbal note to Switzerland stating its intention to suspend the 1875 Treaty of Establishment.[11]

B. Historical Background and Negotiating History

5 Art 67, which was based on Art 63 Final Draft,[12] emanated from Art 50 of the 1963 Draft.[13] The Final Draft had considerably modified SR *Waldock*'s original

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[4]UNCLOT II 156.

[5]*Ibid*.

[6]PCIJ *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53, 22–23 (1933).

[7]*Waldock*, UNCLOT II 445; *Villiger* Art 67 MN 8.

[8]Final Draft, Commentary to Art 62, 263 para 6; *Waldock* [1966-I/2] YbILC 280.

[9]*Gomaa* (n 2) 160; *Villiger* Art 67 MN 9.

[10]ICJ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, para 109.

[11]*B Simma* Termination and Suspension of Treaties: Two Recent Austrian Cases (1978) 21 GYIL 87.

[12][1966-II] YbILC 185: "1. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 51 shall be carried out through an instrument communicated to the other parties. 2. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers."

[13][1963-II] YbILC 214: "1. A notice to terminate, withdraw from or suspend the operation of a treaty under a right expressly or impliedly provided for in the treaty must be communicated,

proposal. Art 50 was concerned with the procedure on terminating the treaty, *etc*. The procedure, however, was sufficiently dealt with by what is now Art 78. However, the ILC decided that the article regulate what kind of instrument was required for terminating a treaty, *etc*.[14]

The delegation of the Federal Republic of Germany proposed an amendment that became Art 67 para 1,[15] with the aim of making the written form mandatory for notification. A comparable proposal had already been made by Switzerland[16] in the Committee of the Whole but was not accepted because the notifications under Art 62 were supposed to be linked to Art 73.[17] The German delegation, however, considered the provision to be necessary because neither in the Convention nor in general international law was there a requirement to make such a notification in writing. The German representative stated that **6**

> "[i]t was true that notifications need not always be made in written form and that sometimes such a requirement might be going too far. On the other hand, international practice showed that there had been cases in which oral notifications had created uncertainties and difficulties for all the parties concerned. [...] The State receiving the notification provided for in article 62, paragraph 1, or the depositary through whom the notification was carried out, must know exactly where they stood. [...] Any written form should be allowed for the purpose of initiating the procedure – note verbale, memorandum or other instrument, even without a formal signature by the Head of State, Head of Government or Minister for Foreign Affairs; and specific full powers should not be required."[18]

C. Elements of Article 67

I. Notification in Writing (para 1)

Art 67 para 1 deals with the notification under Art 65 para 1 and requires that the notification is issued **in written form**. A notification under Art 65 para 1 is a communication by one State Party to the other State Party or parties of an intention to raise either a defect in its consent to be bound by that treaty, or the ground for impeaching the validity of the treaty, terminating it, withdrawing from it or suspending its operation. It must fulfil the formal requirements of Art 78.[19] **7**

through the diplomatic or other official channel, to every other party to the treaty either directly or through the depositary. 2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect."

[14][1966-II] YbILC 263.

[15]UN Doc A/CONF.39/L.37, UNCLOT III 270.

[16]UN Doc A/CONF.39/C.1/L.349 and Corr.1, UNCLOT III 194.

[17]Statement of the representative of Germany, UNCLOT II 156.

[18]*Ibid*.

[19]*Villiger* Art 67 MN 3.

8 Any written form will suffice. This includes *note verbale*, memorandum or other instruments even without formal signature. Subject to para 2, specific full powers are not necessary.[20] The requirement of written form underlines the seriousness of the process. The VCLT requires written form only in those cases where the content of a treaty or its existence is at stake (see Art 2 para 1 lit a, Art 23 paras 1 and 4, Art 35).[21]

9 The article does not define who is entitled to issue the notification so that Art 7 VCLT applies.[22]

II. Communication in Cases of Article 65 paras 2 and 3 (para 2)

10 Art 67 para 2 deals with communication concerning any act of declaring invalid, terminating, withdrawing from or suspending the operation of a treaty under the Convention. The provision also applies to similar treaty clauses.[23]

11 An instrument communicated to other parties describes any kind of written document.[24] These documents may even be **informal**. This can be inferred from the fact that para 2 also regulates the case that the document is not signed by a competent state representative.[25] This is in line with the German proposal, which did not aim to establish strict formal requirements, thus providing for a balance between legal security and considerations of practicality. Taking into account the seriousness of the final act as a legal act terminating a treaty, the dearth of formal requirements is, however, surprising.

12 The second sentence deals with evidence of authority to issue an act that aims to declare the treaty's invalidity, termination, *etc*. Since such an act is of particular importance, the article provides that States may require the notifying State's representative to produce **full powers** if the instrument is not signed by the head of State, head of government or foreign minister. According to Art 2 para 1 lit c, "full powers" signifies a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing of consent of the State to be bound by a treaty or for accomplishing any other act with respect to a treaty. There are no further formal requirements, such as any special form of words.

13 Although according to practice, the date for the instrument to become effective is usually specified in the instrument or based on the specific treaty, it may also be

[20] *S Rosenne* Developments in the Law of Treaties 1945–1986 (1989) 303.

[21] *D Rouget* in *Corten/Klein* Art 67 MN 10.

[22] *D Rouget* in *Corten/Klein* Art 67 MN 16.

[23] *Villiger* Art 67 MN 4.

[24] *D Rouget* in *Corten/Klein* Art 67 MN 14.

[25] *Villiger* Art 67 MN 5.

implicitly deduced from the period of notice prescribed in the termination provisions of the treaty. The parties may also agree on a later date.[26]

It has been suggested that the link between Art 65 para 3 and Art 67 has only been established because of a drafting mistake. It would seem difficult to imagine why an act according to Art 67 para 2 would still be necessary after the procedures according to Art 66 had taken place.[27] However, in line with the statement of SR *Waldock,* it can be assumed that there are still constellations in which an act under Art 67 might be issued after such a procedure, *eg* in order to implement the decision of a tribunal or commission.[28] **14**

III. Legal Effects

If a State does not comply with the formal requirements, the acts will take **no effect** unless the other States Parties accept the validity of the notification and declaration of termination explicitly or tacitly.[29] Accordingly, States may deviate from Art 67 and provide for other formal requirements.[30] **15**

> The unilateral declaration made by the Iranian Revolutionary Council on 10 November 1978 terminating the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran[31] was invalid. Iran did not issue an instrument, *ie* formal written notice, as required by the treaty itself and the VCLT.[32] One arbitrator held that "[a] plea of termination in defense to a claim for breach of a treaty does not appear to constitute the instrument of notice required under Articles 65, paragraph 2, and 67, paragraph 2, of the Vienna Convention, to make the termination effective."[33] It seems that Iran has accepted this interpretation, since in 1996 its based its action against the United States in the *Oil Platforms* case on the 1955 treaty.[34]

Art 67 para 2 does not contain a **time limit**.[35] The lack of such a time limit, within which a State must notify its intention to terminate a treaty or to declare it invalid, *etc* has been criticized in literature.[36] However, subject to Art 45 lit b, the **16**

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[26] *Aust* 302.

[27] *Villiger* Art 67 MN 6 with a reference to *A Verdross/B Simma* Universelles Völkerrecht: Theorie und Praxis (3rd edn 1984) §§ 839–840.

[28] *Waldock* UNCLOT I 445.

[29] *D Rouget* in *Corten/Klein* Art 67 MN 7.

[30] *Villiger* Art 67 MN 8.

[31] 284 UNTS 93.

[32] Iran–United States Claims Tribunal *Sedco Inc v National Iranian Oil Co et al* Case No 129, Award No ITL 59-129-3 (separate opinion *Brower*) 84 ILR 484, 531 (1986); Iran–United States Claims Tribunal *American International Group Inc et al v Iran et al* Case No 2, Award No 93-2-3 (concurring opinion *Mosk*) 84 ILR 645, 663 (1983).

[33] *American International Group v Iran* (n 32), concurring opinion *Mosk* 663.

[34] ICJ *Oil Platforms (Iran v United States)* (Preliminary Objection) [1996] ICJ Rep 803, para 1.

[35] *Villiger* Art 67 MN 8.

[36] *D Rouget* in *Corten/Klein* Art 67 MN 22.

VCLT takes account of the nature of international relations by not providing for such a time limit. Reasons for the invalidity of a treaty may not be evident at once but are established through a long political and legal process (→ Art 65 MN 27).

Selected Bibliography

See the bibliography attached to the commentary on Art 65.

Article 68

Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.

Contents

A. Purpose and Function

Art 68 accompanies Arts 65 and 67 by dealing with notifications and instruments according to these provisions. By allowing for revocation at any time without any formal requirements, the article aims to support the rule ***pacta sunt servanda***.[1] It gives room for genuine negotiations between the States Parties after one party has declared its intention to terminate the treaty, *etc*.[2] Likewise, the article has been inserted in the interest of the **good faith** of the receiving State since unilateral revocation is only permissible before the notification or instrument has taken effect.[3] **1**

Already before the adoption of the VCLT, there was pertinent State practice concerning *eg* the withdrawal of a denunciation of the Warsaw Convention by the United States.[4] **2**

Although the ICJ has only included Arts 65–67 in its statement in the *Gabčíkovo-Nagymaros Project* case in which it declared that these articles reflect customary international law,[5] it may be assumed that the same holds true for Art 68 since these provisions aim to promote the stability of treaty relations as well.[6] **3**

[1] *Villiger* Art 68 MN 2 *et seq*.

[2] *D Rouget* in *Corten/Klein* Art 68 MN 2.

[3] *Villiger* Art 68 MN 5.

[4] Contemporary Practice of the United States Relating to International Law (1966) 60 AJIL 826.

[5] ICJ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, para 109.

[6] *D Rouget* in *Corten/Klein* Art 68 MN 3.

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B. Historical Background and Negotiating History

4 The question of revocation has already been addressed in the second report of SR *Fitzmaurice*. *Fitzmaurice* saw a conflict between the interest in the stability of treaties, which speaks in favour of allowing for such a revocation and, on the other hand, the interest of the other States Parties, which might already have provided for preparatory measures for anticipating the consequences of termination. Therefore, *Fitzmaurice* intended to make the revocation depend on the consent of the other States Parties.[7] However, neither *Waldock* nor the ILC agreed with this when proposing Draft Art 24 para 3:[8]

> "The previous Special Rapporteur's draft had a proviso requiring the assent to the revocation of any other party 'which, in consequence of the original notification of termination or withdrawal, has itself given such a notification or has otherwise changed its position'. While the idea behind this proviso is clearly sound, it seems doubtful whether the proviso is really necessary; for any other State, which had followed the example of the first State in giving notice of termination or withdrawal, would equally have a right to revoke the notice."[9]

Waldock's draft was even more condensed in Art 50 para 2 of the 1963 ILC Draft.[10] The arguments raised by *Fitzmaurice* were rejected:

> "A query was raised in the Commission as to a possible need to protect the interests of the other parties to the treaty, should they have changed their position by taking preparatory measures in anticipation of the State's ceasing to be a party. The Commission, however, considered that the right to revoke the notice was really implicit in the provision that it was not to become effective until after the expiry of a certain period. The other parties would be aware that the notice was not to become effective until after the expiry of the period specified and would, no doubt, take that fact into account in any preparations which they might make."[11]

5 Comments by the governments of Poland, Sweden and the United States, however, demonstrated that States saw their interest endangered by a wide freedom to revoke. They considered it the purpose of the notification to allow other parties to prepare for the termination of the treaty.[12] *Waldock* aimed to address these concerns through a modification.[13] Still, the ILC did not agree:

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[7] *Fitzmaurice* II 34; *cf D Rouget* in *Corten/Klein* Art 68 MN 5.

[8] [1963-II] YbILC 86: "Unless the notice is one that takes effect immediately or the treaty otherwise provides, a notice of termination, withdrawal or suspension may be revoked at any time – (a) before the date specified in the treaty for the notice to take effect; or (b) failing any such specific provision, before the expiry of the period of time prescribed in the treaty or in article 17, paragraph 3, of this part for the giving of the notice".

[9] *Waldock* II 86.

[10] [1963-II] YbILC 214: "Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect".

[11] [1963-II] YbILC 214.

[12] [1966-II] YbILC 46.

[13] *Ibid*: "Unless the treaty otherwise provides: (a) A notice to terminate, withdraw from or suspend the operation of a treaty given in pursuance of a right provided for in the treaty becomes operative

> "The Commission appreciated that in their comments certain Governments had questioned the desirability of stating the rule in a form which admitted a complete liberty to revoke a notice of denunciation, termination, withdrawal or suspension prior to the moment of its taking effect. It also recognized that one of the purposes of treaty provisions requiring a period of notice is to enable the other parties to take any necessary steps in advance to adjust themselves to the situation created by the termination of the treaty or the withdrawal of a party. But, after carefully re-examining the question, it concluded that the considerations militating in favour of encouraging the revocation of notices and instruments of denunciation, termination, *etc* are so strong that the general rule should admit a general freedom to do so prior to the taking effect of the notice or instrument. The Commission also felt that the right to revoke the notice is really implicit in the fact that it is not to become effective until a certain date and that it should be left to the parties to lay down a different rule in the treaty in any case where the particular subject-matter of the treaty appeared to render this necessary. Moreover, if the other parties were aware that the notice was not to become definitive until after the expiry of a given period, they would, no doubt, take that fact into account in any preparations which they might make. The rule stated in the present article accordingly provides that a notice or instrument of denunciation, termination, *etc* may be revoked at any time unless the treaty otherwise provides."[14]

At the Vienna Conference, no further amendments were foreseen. The provision was adopted by 94:0:8 votes. **6**

C. Elements of Article 68

I. Notification, Instrument

The terms "notification" and "instrument" must be read in line with their use in the foregoing articles. Thus, a notification as provided for under Art 65 para 1 is a communication by one State Party to the other State Party or parties of an intention to raise either a defect in its consent to be bound by that treaty, or the ground for impeaching the validity of the treaty, terminating it, withdrawing from it or suspending its operation. **7**

"Instrument" describes any kind of written formal or informal document. Thus, the term "instrument" covers the objection mentioned in Art 65 paras 2 and 3 as well as the act referred to in Art 67 para 2. **8**

II. Revocation

A notification or an instrument may be taken back **at any time**. Art 68 does not prescribe any formal requirements for revoking an instrument, thus facilitating the process.[15] In relation to Art 67 para 2, it might be assumed that those mentioned are **9**

by its communication to the other parties; (b) After such communication, the notice may be revoked only with the consent of the other parties".

[14]Final Draft, Commentary to Art 64, 264 para 2.

[15]*Villiger* Art 68 MN 3; *D Rouget* in *Corten/Klein* Art 68 MN 15.

also entitled to revoke the instrument. Likewise, States are required to address the revocation to all States Parties.[16] Art 78 applies.[17]

III. Before Taking Effect

10 The revocation of the instrument according to Art 67 para 2 is particularly problematic for the other States Parties, which might have already prepared for the termination of the treaty. Therefore, revocation is no longer permissible when the other party has received the instrument under Art 78 VCLT and **has begun to undertake measures in response**, such as adapting the national legal order to the termination of the treaty.[18]

11 After the notification or instrument has taken effect, the instrument may nonetheless be revoked if the receiving State expresses its consent explicitly or by acquiescence.[19]

Selected Bibliography

See the bibliography attached to the commentary on Art 65.

[16] *D Rouget* in *Corten/Klein* Art 68 MN 16.
[17] *Ibid* MN 12.
[18] *Villiger* Art 68 MN 4.
[19] *Ibid* MN 6.

Section 5
Consequences of the Invalidity, Termination or Suspension of the Operation of a Treaty

Article 69

Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Contents

A. Purpose and Function

Art 69 sets out the **legal consequences of the invalidity** of a treaty. In essence, treaty law knows two reasons how a treaty and the legal force of its provisions may come to an end, that is, invalidity and termination (→ Art 42). While invalidity always affects the conclusion or entry into force of a treaty, termination invariably concerns reasons that have occurred after the treaty has been validly concluded. This distinction also bears on the consequences of invalidity and termination, respectively. Thus invalidity generally raises the question whether the effects of the invalid treaty, especially acts that have been carried out in applying, implementing and executing the treaty, also become invalid. In case of termination, this question does not arise as these acts have been performed under a valid treaty (→ Art 70). **1**

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2 With regard to invalidity or nullity, domestic legal systems have elaborated various distinctions, such as invalidity and inexistence, absolute and relative invalidity, invalidity and nullity (or voidness), or nullity *ex tunc* and *ex nunc*. The use of such fine domestic concepts by analogy is unhelpful in international law as they derive from different legal traditions and are often based on different conceptual understandings, at times even within domestic legal orders.[1] Furthermore, international practice is not supportive of such distinctions. In principle, therefore, the terms invalidity/invalid and nullity/void are used interchangeably in the VCLT.[2]

3 As regards its structure, Art 69 distinguishes between the **legal effect of the treaty** and its provisions on the one hand, and that of **acts** taken in application of the treaty. Accordingly, it provides that an invalid treaty has no legal force (para 1), but that this invalidity does not automatically and necessarily affect the acts taken in applying and executing the treaty, which are valid and effective unless the parties insist on unwinding the invalid treaty if and to the extent this is possible (para 2). Thus the **general rule** of Art 69 is **threefold**. First, it establishes that an invalid treaty is void and that the provisions of a void treaty have no legal force (para 1). Second, it mitigates the strict rule of para 1 by providing that each party may nevertheless require any other party to establish as far as possible the position that would have existed if the acts under the treaty had not been performed (para 2 lit a). Finally, if this is either not requested by the parties or factually not possible, acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty (para 2 lit b). Art 69 para 3 moreover provides for an exception to the rule of para 2 at the expense of the party that has caused the invalidity of the treaty in aggravating circumstances by showing reprehensible conduct (like coercion, corruption, or fraud). Art 69 para 4 finally extends the rule *mutatis mutandis* to multilateral treaties where only one particular State's consent to be bound by the treaty is affected by the ground of invalidity.

4 As to its scope, Art 69 does not apply to invalidity arising out of a conflict of the treaty with a peremptory norm of general international law under Art 53. The consequences of this type of invalidity are exclusively governed by Art 71. Furthermore, since the VCLT establishes an 'open regime', Art 69 is without prejudice to questions of responsibility arising out of the invalidity of a treaty.[3] The invalidity based on fraud, corruption or coercion (para 3; → MN 30–38) may raise questions of responsibility and reparation under the general rules of the international law of State responsibility. These questions are deliberately excluded from the scope of the

[1]Thus, the concept of nullity will for instance vary depending on whether the act is governed by municipal private law or public law. For a discussion see *eg RY Jennings* Nullity and Effectiveness in International Law in Essays in Honour of Lord McNair (1965) 64, 65–68.

[2]Final Draft, Commentary to Art 65, 264 paras 1–3. See also *Waldock* [1966-I/2] YbILC 9; UNCLOT I 447.

[3]Final Draft, Commentary to Art 65, 264 para 1.

Convention (Art 73) and are, in the absence of specific rules on the matter, governed by the ILC articles on State responsibility.[4]

Finally, reference must be made here also to Art 43 VCLT, which contains the obvious provision that the invalidity of a treaty "shall not in any way impair the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty". This is also in line with Art 38, which similarly provides that a treaty rule may become binding upon a third State not party to that treaty "as a customary rule of international law, recognized as such". Thus, where a treaty becomes invalid, the former State Party may nevertheless be bound by individual provisions of the invalid treaty, either under another (still valid) treaty or under the relevant rules of customary law. **5**

B. Historical Background and Negotiating History

Traditionally, a treaty that was concluded in circumstances that vitiated consent lacked either "**formal**" or "**essential validity**".[5] While the former related to the manner in which the treaty was concluded ("regularity of conclusion", such as capacity and competence), the latter concerned material rather than merely formal reasons causing the treaty's invalidity (such as lack of voluntary consent or illegality of the treaty's object). This was also the point of departure of SR *Fitzmaurice*, who in his second report listed a number of possible consequences of a lack of essential validity. These were that the treaty was simply inexistent, that it was void *ab initio*, voidable and void from the date of voidance, totally inoperative, or unenforceable.[6] The distinction between these terms and their intended scope of application remained however to a large extent obscure. **6**

SR *Waldock* in his second report introduced the distinction between, on the one hand, invalidity *ab initio* with effect *ex tunc*, and the "case of a treaty avoided as from a date subsequent to its entry into force", on the other hand, such nullity having effect *ex nunc*.[7] This distinction was however not approved of by the ILC, which instead decided to treat all causes of invalidity as operating to nullify the treaty *ab initio*.[8] The Commission obviously took the view that any distinction in the effects of the invalidity should be based on the different nature of the various **7**

[4]See Articles on Responsibility of States for Internationally Wrongful Acts, GA Res 56/83, 12 December 2001, UN Doc A/RES/56/83. The text of the Articles and the commentaries thereto are included in ILC Report 53rd Session (2001), UN Doc A/56/10, paras 76–77, and are also reproduced in *J Crawford* The International Law Commission's Articles on State Responsibility (2002).

[5]See *AD McNair* The Law of Treaties (1961) 206–236.

[6]*Fitzmaurice* II 28 (Draft Art 21). In his commentary, *Fitzmaurice* stated that this provision did not call for special comments, "although the system propounded [was] probably capable of improvement or refinement" (*ibid* 45).

[7]*Waldock* II 98 (Draft Art 27 paras 1 and 2).

[8]See the discussion in [1963-I] YbILC 229–234.

grounds of invalidity. It adopted on first reading Draft Art 52,[9] which introduced the criterion of good faith but otherwise already contained the essential elements now to be found in Art 69 and remained substantially unchanged in the further course of the negotiations and of drafting. In the final draft, the ILC inserted a new paragraph 1 to the effect that the provisions of a void treaty have no legal force.[10]

8 At the Vienna Conference, Art 69 para 1 was transferred by decision of the Committee of the Whole to its present location on the proposal of an oral amendment by France.[11] Originally, this provision formed part of former Draft Art 39, which eventually became what is now Art 42 VCLT. Art 69 was adopted at the Vienna Conference by 95 votes to one, with one abstention.[12]

C. Elements of Article 69

9 Art 69 contains an implicit reference to the grounds of invalidity in Part V Section 2, as it does not itself mention or repeat the grounds of invalidity to which it applies. Rather, the phrase "established under the present Convention" indicates that Art 69 is based on **two conditions**, one **substantive** and the other more **formal or procedural**. These conditions are, first, that such a ground of invalidity is indeed present and applies and, second, that the procedure in Art 65 has been followed. If these two conditions are met, the legal consequences set out in paras 2–4 apply. From a contextual point of view, this is also dictated by Art 42, which provides *inter alia* that "[t]he validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention". This clear provision is a further caveat for invoking invalidity in the sense that both a substantive ground for invalidity is present and the procedure has been properly carried out.

10 Unlike Art 70, which allows for party autonomy (→ Art 70 MN 10), Art 69 does not entitle the parties to agree on other, additional grounds of invalidity, or to exclude those mentioned in the VCLT. Again, this would also appear to follow already from Art 42.[13] This means that, in principle, the **grounds of invalidity** listed in the Convention are both **exhaustive and mandatory** (→ Art 42 MN 3, 10, 17). The only possibility not to resort to a ground of invalidity and thus to 'exclude' a specific ground lies within the confines of Art 45 (→ MN 37). There is however some leeway for party autonomy implicit in Art 69 paras 1 and 2 on the legal consequences of invalidity (→ MN 13, 16).

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[9] [1963-II] YbILC 216.

[10] [1966-II] YbILC 172, 264 (Draft Art 65). For comments of governments see *ibid* 53–54.

[11] UNCLOT III 159; for the amendment see *ibid* 195 (UN Doc A/CONF.39/C.1/L.363). Similar amendments were made by Australia and the United States, see *ibid* (UN Doc A/CONF.39/C.1/L.297, A/CONF.39/C.1/L.360).

[12] UNCLOT II 126.

[13] Art 42 refers in para 2 to termination of a treaty "as a result of the application of the provisions of the treaty".

Furthermore, while the grounds of invalidity distinguish between **relative and absolute nullity** (void and invalid or voidable treaties, → Art 42 MN 16), this distinction is **generally immaterial** in the context of Art 69 and only concerns the question as to the entitlement to invoke invalidity. In case of relative nullity, the party concerned may invoke the invalidity (Arts 46–50), whereas in case of absolute nullity, the treaty is "void" or "without any legal effect" (Arts 51–53). This conforms to the general approach in the VCLT to refrain from referring to legal concepts that have developed in different ways in the various domestic legal orders (→ MN 2). **11**

D. Legal Consequences

I. Invalidity of the Treaty (para 1)

The first sentence of para 1 is coined in tautological terms, and its meaning and purpose do not necessarily follow from the wording. This provision was relocated from what is now Art 42[14] with the intention to clearly exclude the possibility that the invalidity of a treaty is based on a ground not listed in the VCLT and to ensure that the procedure concerning invalidity and termination in Art 65 is respected.[15] This intention also follows from the wording proposed by the Drafting Committee.[16] However, as already stated (→ MN 10), it would seem that this is at any rate a consequence of the application of Art 42, which is unambiguous in that it provides that the list of grounds of invalidity is exhaustive and that the procedure is mandatory. **12**

Art 69 para 1 does not expressly provide that an invalid treaty is void *ab initio*, or that it is affected with 'absolute nullity', or that the invalidity operates retroactively. This conforms to an inherent logic of invalidity.[17] Since invalidity is the consequence of a legal act that does not meet the requirements for its coming into existence, it necessarily applies **retroactively** from the time the legal act was concluded, that is, *ab initio*. But this invalidity only "applies" if it was "established" as a result of the procedure according to Art 65. The reason for this proceduralization is to prevent the grounds of invalidity (and termination) to be arbitrarily asserted in face of objections from the other party or parties which would involve a real danger for legal certainty in general, and the legal security and stability of **13**

[14]See text accompanied by n 11.

[15]*S Verosta* Die Vertragsrechtskonferenz der Vereinten Nationen 1968/69 und die Wiener Konvention über das Recht der Verträge (1969) 29 ZaöRV 654, 690; *RD Kearney/RE Dalton* The Treaty on Treaties (1970) 64 AJIL 495, 555; *TO Elias* Problems Concerning the Validity of Treaties (1971) 134 RdC 333, 405; *C-A Fleischhauer* Die Wiener Vertragsrechtskonferenz (1971) 15 JIR 202, 229–231; *JA Frowein* Zum Begriff und zu den Folgen der Nichtigkeit von Verträgen im Völkerrecht in *H Ehmke et al* (eds) Festschrift Ulrich Scheuner (1973) 107, 117; *J Verhoeven* in *Corten/Klein* Art 69 MN 6.

[16]UNCLOT I 490–492. See generally UNCLOT III 195–196.

[17]To the same effect *J Verhoeven* in *Corten/Klein* Art 69 MN 8.

treaty relations in particular,[18] especially against the background of the lack of compulsory dispute settlement (→ MN 16, 41–42). In fact, this regulation amounts to some kind of "consensual invalidity".[19]

14 Since invalidity may be invoked some time after the conclusion of the treaty and since the conduct of the procedure in Art 65 must be awaited, a considerable period of time may have elapsed until the establishment of invalidity. Even in such case, invalidity operates *ab initio*, subject however to the rules in paras 2 and 3 and those of Art 45.

II. Further Consequences (para 2)

1. Establishment of the Position that Would Have Existed (para 2 lit a)

15 Art 69 para 2 lit a provides that "each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed". Art 69 para 2 lit a raises a number difficult questions. To begin with, para 2 lit a does not provide for a right but obliges the parties to find an agreement with regard to the unwinding of the treaty relations and the consequences of invalidity.[20] It follows that where a party requires to re-establish the situation prior to concluding the treaty, the other party is not necessarily obliged to comply with such request to full extent.[21] Accordingly, invalidity *ab initio* does not mean that its effects automatically extend to the acts carried out in applying and executing the invalid treaty. Thus, para 2 lit a deviates from the generally recognized principle that a void treaty does not produce any legal effects without leaving it up to the parties to insist on annulling these effects as well. It thereby **assimilates the consequences of invalidity to those of termination**. The provision in para 2 lit a also stands in marked contrast to the strictly coined rule in para 1.

16 The reason for this relatively lenient consequence of invalidity is not clear, but it may be an expression of **party autonomy** being the fundament of international law in general and treaty law in particular. The need for a consensual agreement between the parties on the consequences of invalidity is especially called for in cases where these consequences are far from clear. This situation of legal uncertainty is furthermore exacerbated in international law due to its decentralized structure where the validity and legal effect of norms are not usually reviewed by central adjudicatory bodies (→ MN 41–42). What is even more, many international

[18] [1963-II] YbILC 214.

[19] *CL Rozakis* The Law on Invalidity of Treaties (1974) 150, 160, who adds that "[i]t is obvious that the invalidation of a consent or treaty remains a private matter to be settled by the parties alone".

[20] In the French doctrine, this is described as a "faculty" (*faculté*) which may be resorted to by the parties, see *P Cahier* Les caractéristiques de la nullité en droit international et tout particulièrement dans la Convention de Vienne de 1969 sur le droit des traités (1972) 76 RGDIP 645, 686; *J Verhoeven* in *Corten/Klein* Art 69 MN 10.

[21] *Cahier* (n 20) 686; *contra Villiger* Art 69 MN 13.

treaties are not of a strictly contractual kind in which the parties agree on a mutual, reciprocal exchange of consideration (→ MN 39–40 with regard to para 4). Quite a number of multilateral treaties rather establish **objective rights** where restitution having retroactive effect would simply be unreasonable and most likely even contrary to the object and purpose of the treaty concerned.

17 Thus, the parties may agree on invalidity with effect either *ex tunc* or *ex nunc*, or even agree to confirm the treaty and thus to ignore its invalid conclusion,[22] subject however to the exception in para 3. In essence this consequence would already follow from Art 45, which provides *inter alia* that a party whose consent to conclude the treaty was deficient may expressly or tacitly renounce its right to invoke the invalidity. However, the problem is that Art 45 and Art 69 para 2 lit a and para 3 are not easily reconcilable in this respect. For Art 45 excludes the possibility of waiver in case of invalidity pursuant to Arts 51–53, whereas Art 69 para 3 does so additionally in case of invalidity under Arts 49 and 50 (→ MN 37).

18 The legal basis for the rule in para 2 lit a is not clear. On the one hand, the rule cannot be based on treaty law itself since the treaty is void and has no legal force (para 1). On the other hand, it cannot arise from State responsibility as this is expressly excluded by para 2 lit b. A third possibility would be a form of liability for injurious consequences of acts lawful under international law. However, liability in international law is a rare exception, which must be expressly agreed upon.[23] But there is nothing to justify the assumption of such an exception in the context of Art 69. Rather para 2 lit a may be considered to be a **rule of equity** within the law, as implicitly enshrined in Art 69.[24] A final possibility would be to consider the rule of restitution in para 2 lit b as an expression of **unjust enrichment** that aims to counterbalance any shift of assets or benefits that has taken place under an invalid treaty.[25]

19 As to the point in time when the acts must have been performed, Art 69 refers to the date when the invalidity was invoked only in the context of para 2 lit b. It is not clear whether this also applies to para 2 lit a but it may well be assumed that this is the case. The protective ambit of the provision in para 2 generally seems to cover those acts that have been performed until the invalidity was validly invoked by a party.[26]

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[22] *Rozakis* (n 19) 161; *Cahier* (n 20) 686.

[23] See *eg* the ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, ILC Report 58th Session, UN Doc A/61/10 (2006) 110, 111. See also *A Boyle* Liability for Injurious Consequences of Acts Not Prohibited by International Law in *J Crawford*/*A Pellet*/*S Olleson* The Law of International Responsibility (2010) 95, 104.

[24] *Cf* Restatement of the Law Third, Foreign Relations Law of the United States para 338 comment d; *J Verhoeven* in *Corten*/*Klein* Art 69 MN 14. See also → MN 23 and 27 (with regard to considerations of good faith) and MN 34.

[25] *C Schreuer* Unjustified Enrichment in International Law (1974) 22 AJCL 281, 299; *C Binder*/*C Schreuer* Unjust Enrichment in MPEPIL (2009) MN 7.

[26] *J Verhoeven* in *Corten*/*Klein* Art 69 MN 16.

20 The rule in para 2 lit a contains **two conditions**. First, re-establishment is only required "**as far as possible**"; and second, it is confined to the "**mutual relations**" of the parties concerned. Concerning the first condition, the wording of para 2 lit a does not say whether it covers only **factual** impossibility or whether it extends also to cases of **legal impossibility**. The latter means that the party concerned would act contrary to a legal rule if it were to re-establish the previous situation. If this legal rule has its basis in domestic law, it will be subject to the requirement of restitution under para 2 lit a. Such situation will be similar to that of restitution as a form of **reparation** in the law of State responsibility, which excludes restitution in case of material impossibility only and thus may oblige the wrongdoing State to provide also for juridical restitution.[27] If the legal norm standing in the way of restitution is one of international law, difficult questions of conflict may arise that will hardly be resolved by applying the general rules of derogation (*lex specialis* and *lex posterior*) and prevalence but often will lead to international responsibility.

21 It is not clear whether, similar to Art 35 lit b Articles on State Responsibility, para 2 lit a implies a rule based on **considerations of equity and reasonableness** according to which restitution, even if materially possible, is not required in cases where the benefit to be gained from restitution is wholly disproportionate to its cost to the wrongdoing party. While the VCLT is without prejudice to the rules of State responsibility (→ MN 4, 28), it does not *a priori* exclude them, and given its inherent soundness, the rule in Art 35 lit b Articles on State Responsibility may well apply by analogy also to Art 69 para 2 lit a VCLT.

22 The second condition in para 2 lit a confines the re-establishment to **mutual relations** of the parties. This condition has two aspects to it. First, in case of a multilateral treaty (para 4), the restoration of the previous situation only applies between the party requiring it and the addressee(s) of that request, depending on the actual performance of treaty actions.[28] Secondly, the requirement of restitution does not affect the **legal position of third parties**. Where an international treaty conferred upon third parties specific rights or a particular legal status or position, the invalidity of that treaty cannot impinge upon these rights.[29] Third parties in this sense may be other States but also individuals.

> Examples are invalid treaties under which individuals have acquired a new nationality or other private rights in the relations between individuals.[30] For instance, the so-called (First) Vienna Award of 2 November 1938 assigned parts of Slovakian territory to Hungary. The arbitration had been imposed upon Czechoslovakia by the Axis countries. In the 1947 Peace Treaty with Hungary the decisions of the Vienna Award were "declared null and void"[31] and this annulment also entailed the annulment of the legal consequences ensuing

[27] See Articles on State Responsibility (n 4), commentary to Art 35, para 5.

[28] *Villiger* Art 69 MN 14.

[29] *Cf Rozakis* (n 19) 163; *Frowein* (n 15) 118.

[30] See the examples mentioned by *Frowein* (n 15) 109–115.

[31] See Art 1 para 4 lit a of the 1947 Peace Treaty with Hungary 41 UNTS 135.

therefrom with the exception that "[t]his annulment shall not apply in any way to relations between physical persons".[32]

A similar example would be the 1973 treaty between Germany and Czechoslovakia declaring the Munich Agreement of 1938 null and void (Art I).[33] But the treaty continues by providing that it "shall not affect the legal effects on natural or legal persons of the law as applied in the period between 30 September 1938 and 9 May 1945" (*ie* during the operation of the Munich Agreement, Art II para 1) and that it "shall not affect the nationality of [. . .] persons ensuing from the legal system of either of the two Contracting Parties" (Art II para 2).

Reference may also be made here to the *Namibia* opinion where the ICJ stated that the invalidity of South Africa's mandate over Namibia could not "be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory".[34]

23 In contrast to para 2 lit b, which explicitly contains the condition of **good faith** (→ MN 27), no such reference is made in para 2 lit a. This absence is unwarranted and even puzzling given the fact that the ILC commentary indeed states that where neither party is to be regarded as a wrongdoer in relation to the cause of nullity, "the legal position should be determined on the basis of taking account both of the invalidity of the treaty *ab initio* and of the good faith of the parties".[35] This clearly indicates that the good faith criterion is also contained in para 2 lit a, albeit only implicitly.

24 Thus, it is well possible that, after having obtained knowledge of a ground of invalidity, a party deliberately carries out acts that render the application of para 2 lit a impossible,[36] *eg* by destroying the object of the treaty. Furthermore, it may be the case that one party has complied with the request of the other party and carried out the acts to re-establish the situation prior to the conclusion of the treaty, assuming that the other party would also perform the necessary acts, which however are declined by that party in bad faith.

25 Finally, para 2 lit a provides for the possibility of establishing the **position that would have existed** if the acts had not been performed. While it is generally said that this amounts to establishing the *status quo ante*[37] this is, strictly speaking, not accurate because the *status quo ante* would require only the establishment of the situation that had existed prior to the conclusion of the invalid treaty, and not also the establishment of the situation that would have existed. With regard to the latter, one would also have to take into account any development since the conclusion of the treaty. In the case of restitution in the context of **State responsibility**, the duty to re-establish the *status quo ante* is indeed confined to the situation that existed

[32] Art 25 Peace Treaty with Hungary.

[33] 1973 Treaty on Mutual Relations 951 UNTS 365.

[34] ICJ *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 Rep 16, para 125.

[35] Final Draft, Commentary to Art 65, 265 para 3.

[36] *J Verhoeven* in *Corten/Klein* Art 69 MN 11.

[37] Final Draft, Commentary to Art 65, 264 para 3; *Villiger* Art 69 MN 13.

prior to the occurrence of the wrongful act.[38] The wording of Art 69 alludes to the broader concept of re-establishment that was expressed by the PCIJ in the *Chorzów Factory* case, where it used this phrase in reference to reparation in general – and not necessarily also restitution – in the law of international responsibility.[39] This seems to suggest that the provision of restitution in para 2 lit a also covers other forms of redress that would lead to the unwinding of the void treaty, especially compensation (as a form of restitution by equivalent).[40]

26 These considerations also apply to the **case of impossibility of restitution**, which is not regulated by Art 69 para 2. In particular, the question is whether there is any requirement of 'undoing' any shift of benefit between the parties. Thus, where restitution is not possible, compensation will take its place.[41] However, losses and benefits will not necessarily be co-extensive. The enrichment of one party may be smaller than the damage suffered by the other party and *vice versa*,[42] and difficult questions of calculation and valuation might ensue.

> For instance, States A and B conclude a treaty for the construction and operation of an industrial facility. The facility is to be built in State A and operated jointly by both States, while State B is obliged to provide the necessary financial funding and technology. If the treaty turns out to be void before the completion of the construction, the damage of State B may outweigh the enrichment of State A.

2. Acts Performed in Good Faith (para 2 lit b)

27 Art 69 para 2(b) provides that "acts performed in **good faith** before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty". This provision has two aspects to it. First, para 2 lit b is intended to protect "the parties from having acts performed in good faith in reliance on the treaty converted into wrongful acts simply by reason of the fact that the treaty has turned out to be invalid".[43] This is a logical *sequitur* of the fact that the **acts carried out** in applying and executing the invalid treaty are – if detached from the treaty as their legal basis – **not *per se* unlawful**. Hence, their legal significance, especially their legal basis and effect, must be examined independently of the treaty.

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[38] Articles on State Responsibility (n 4), commentary to Art 35, para 2.

[39] PCIJ *The Factory at Chorzów (Claim for Indemnity)* (Merits) PCIJ Ser A No 17, 47 (1928).

[40] *Rozakis* (n 19) 161. Furthermore, the inclusion of the broad concept of restitution could also mean to include any form of loss of profits that would not have occurred absence the invalidity, at least to the extent this is necessary to counterbalance any form of inequitable benefit.

[41] *Contra*, however, *Villiger* Art 69 MN 15, and *Frowein* (n 15) 119, who argue that para 2 lit b excludes any form of compensation where restitution is not possible under para 2 lit a.

[42] *Schreuer* (n 25) 299; *Binder/Schreuer* (n 25) MN 7. See also the observations of the ICJ in *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, paras 152–153 (which however were made in the context of State responsibility).

[43] Final Draft, Commentary to Art 65, 264 para 3.

Secondly, para 2 lit b makes it clear that the rules on invalidity in the Convention are **without prejudice to** questions of **responsibility** for wrongful acts that may arise in consequence of the ground of invalidity. Thus, as the ILC commentary states, "if the act in question were unlawful for any other reason independent of the nullity of the treaty, this paragraph would not suffice to render it lawful".[44] This is particularly important for those grounds of invalidity, which will most likely be based on conduct that is in breach of international law, such as corruption or coercion, and are attributable to another State (but see MN 35). Questions of State responsibility are not covered by Art 69, which already follows from the general rule of Art 73 (→ MN 4).[45] **28**

Art 69 para 2 lit b does not say what fact it is to which good faith must relate. It could either be absence of knowledge solely of the invalidity as such or, more specifically, of knowledge of the ground of invalidity as well. The ILC commentary speaks of "acts performed in good faith in reliance on the treaty",[46] which would seem to indicate that good faith only refers to the validity of the treaty itself. Thus, even a State knowing of the facts eventually leading to invalidity may invoke to have performed acts in good faith if it may have assumed, for whatever reason, the validity of the treaty in the given circumstances.[47] **29**

III. The Exception (para 3)

Art 69 para 3 provides for an exception to the general rules in paras 1 and 2. In case of fraud (Art 49), corruption (Art 50), and coercion (Arts 51 and 52), the rules of para 2 do not apply with respect to the party to which the reprehensible act is imputable. The purpose of this provision is to deny the wrongdoing party any benefit it might accrue on account of the invalidity for which it is responsible. However, para 3 raises a number of unresolved questions. For one, while it discards the applicability of para 2, it does not provide for a distinct rule on the legal situation for the non-protected party in case of invalidity on the grounds of Arts 49–52. There are several possibilities how this provision could be read in view of the lack of a clear stipulation of the consequences in such case. **30**

First, para 3 could be interpreted as meaning that there is no requirement at all of re-establishing the previous situation. While this interpretation is no doubt feasible pursuant to the ordinary meaning of the terms used, it would be very unreasonable as the wrongdoing State would be even better off than in case of application of para 2. Such an interpretation is certainly not the purpose of para 3 as it would allow the wrongdoing party to invoke para 3 to ignore the consequences of invalidity, **31**

[44] *Ibid.*

[45] *Cahier* (n 20) 687.

[46] Final Draft, Commentary to Art 65, 264 para 3.

[47] *Frowein* (n 15) 119.

which his own conduct has triggered.[48] There is no reason that would justify the wrongdoing party to benefit from para 2 that is destined to attenuate the effects of nullity.[49] Furthermore, this would also be contrary to the general principle of law that no one may benefit from his own wrongful conduct.[50]

32 Secondly, it might be argued that in case of para 3, there is an unconditioned obligation of the wrongdoing party to re-establish the previous situation without a corresponding obligation of the other party. Hence, it lies within the full discretion of the party 'victim' of invalidity whether or not the situation at the time of the conclusion of the treaty is to be re-established. However, this does not answer the question whether the wrongdoing party may for its part request that the victim party also has to restitute once the latter has requested the former to do so.

33 Given the fact that para 3 is of a **penal character**,[51] it may be considered that the wrongdoing party generally is without remedy even at the cost that the other party is enriched. In such case, it could in principle be argued that this party is not unjustly enriched, the "just cause" being the sanctioning of reprehensible conduct inherent in Art 69 para 3.

> For instance a treaty provides for a mutual cession of a part of the territory of each State Party. If the conclusion of the treaty by State A was effectuated by fraudulent conduct of State B (Art 49), State A could retain the territory ceded by State B while the latter would be obliged to return the territory ceded by State A.

34 On the other hand, it is questionable whether such a consequence is indeed compatible with the principle of **reciprocity** underlying international law in general and treaty law in particular. Neither would such an enrichment be in line with the general tenet of Art 69, including considerations of **equity**.[52] In view of the protective ambit of para 3, it is probably sufficient if the victim State has discretion to choose between the *status quo* and restitution.[53] In this case, the wrongdoing party would be obliged to return the benefit as well if the victim State requires restitution, and such a claim could be based on the principle of **unjust enrichment** as a general principle of law.[54]

35 Furthermore, the relation between para 3 and para 2 lit b is highly unclear. The negative wording of para 2 lit b may be interpreted as rendering the acts performed under the treaty unlawful.[55] But this is doubtful. The lawful or unlawful character of an act can only be derived from the primary norm allowing or prohibiting this act,

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[48] See *Frowein* (n 15) 119–120; *J Verhoeven* in *Corten/Klein* Art 69 MN 21.

[49] *Cahier* (n 20) 687.

[50] PCIJ *The Factory at Chorzów (Claim for Indemnity)* (Jurisdiction) PCIJ Ser A No 9, 31 (1927); see also ICJ *Gabčíkovo-Nagymaros Project* (n 42) para 110.

[51] *Ibid*; see also the comment by the representative of Switzerland UNCLOT I 446.

[52] *Cf Schreuer* (n 25) 299.

[53] *Frowein* (n 15) 120.

[54] See generally *Binder/Schreuer* (n 25) *passim*, especially MN 6–7, 10–11.

[55] *Frowein* (n 15) 120.

but cannot merely be the consequence of the invalidity of the treaty.[56] In other words, the VCLT does not propound rules which determine the legality or illegality of acts. Whether an act leading to the invalidity of a treaty is also an internationally wrongful act must be determined by the applicable primary norms in conjunction with the rules on State responsibility. It is for instance highly unclear whether "fraudulent conduct" within the meaning of Art 49 is of itself an internationally wrongful act. In particular, the elements of this norm are far from being established, and the nature of such rule as customary law is likewise uncertain.

Other considerations also call for a **restrictive interpretation** of para 3. In particular, it is doubtful whether the exception in para 3 should apply in relation to **third parties**, especially individuals. The terms of para 3 ("with respect to the party") indicate that its application should not affect such third parties who have acquired rights under the treaty brought about by the reprehensible conduct of the author State. Accordingly, with regard to third parties, the situation is similar to that governed by para 2 (→ MN 22). **36**

A further question concerns the relation between Art 69 para 3 and Art 45 (→ MN 17). According to Art 45, a State may validly renounce its right to invoke a ground for invalidating a treaty unless this ground does not fall under Arts 51–53. In contrast, Art 69 para 3 extends the duty of the wrongdoing party to unwind the treaty also to Arts 49 and 50. This means that where a ground of invalidity arises either under Art 49 or Art 50, the 'victim' State may validly waive its right to invoke the invalidity of the treaty, in which case Art 69 including its para 3 does not apply. Thus, while being mandatory on the 'wrongdoing' State in case of its application, Art 69 para 3 may well be derogated from by the 'victim' State if the ground for invalidity is one under Arts 49 or 50. **37**

Finally, it may also be the case that the fraud, corruption or coercion is imputable to a State not party to the relevant treaty, or even to a non-State entity or person. This situation is not at all envisaged in Art 69, and the text is silent on this question. The plain wording of para 3 means that this provision does not apply to such a case, which would accordingly be covered by para 2, even if such result may be unreasonable. **38**

IV. Extension to Multilateral Treaties (para 4)

Art 69 para 4 concerns the case where invalidity only affects a **particular State's consent to be bound by a multilateral treaty**. It extends the scope of the rules in paras 2 and 3 to the relations between that State and the parties to the treaty. In principle, this is a rule dictated by logic, and with regard to reciprocal, contractual treaties, *ie* treaties whose individual obligations are to be performed in the bilateral relations between two States Parties only[57] – even if the treaty itself is a multilateral **39**

[56] This is what Art 69 para 2 lit b stipulates in general terms.

[57] See *C Tams* Enforcing Obligations erga omnes in International Law (2005) 42–46.

one – will not pose problems of unwinding the treaty that go beyond those identified in the context of paras 2 and 3 above. As a rule, the invalidity of the consent of the party concerned does not affect the validity of the treaty relations among the other parties. In this respect, the phrase "the foregoing rules" in para 4 must be read so as to exclude the application of para 1; otherwise, the multilateral treaty would be invalid *in toto*, which would be in clear contradiction to what para 4 postulates.[58]

40 The situation is much more complex where the treaty establishes '**objective obligations**' whose structure of performance is not reciprocal but requires a performance towards each and every other treaty partner. In such case, an unwinding of the treaty in relation to the party whose consent to be bound by the treaty was deficient may produce difficulties. For example, multilateral treaties for the protection of human rights fall under this category of "objective treaties". In such case, any application of para 4 must take due account of the rights of the individuals concerned. Special problems arise in case of integral treaties, *ie* treaties where each party's performance is effectively conditioned upon, and requires the performance, of each of the other parties. If the consent of one party to such a treaty is invalid, the other parties may no longer have an interest in continued performance of the treaty because the lack of valid consent of one party radically changes the position of all the other States to which the obligation is owed. While an unwinding of the treaty is in theory feasible in such case, it would probably not make much sense. It is doubtful whether other parties can individually terminate the treaty similar to Art 60 para 2 lit c VCLT.[59]

E. Procedure

41 According to Art 69 para 1, invalidity of a treaty must be established under the VCLT. This is an implicit reference *inter alia* to the procedure pursuant to Art 65 (→ MN 9, 13). The question arises what the situation with regard to invalidity is if another party objects to the invocation of invalidity. If there is no agreement between the parties on the consequences of invocation of invalidity and objection thereto, and further if the methods of peaceful dispute settlement referred to in Art 65 para 3 do not produce a result either, this will lead to a deadlock situation, in which case it would be for each government to appreciate the situation and to act as good faith demands.[60] Unsatisfactory as this result may be, it is but a consequence of the general lack of a compulsory dispute settlement mechanism in the VCLT.

42 If however a request for conciliation was made by a party under Art 66 lit b, and if the conciliation commission in its findings recommends in favour of the party

[58]For this reason, *D Greig* Invalidity and the Law of Treaties (2006) 90 argues that for the reference to "rules" in para 4 to make sense, "presumably paragraphs (2) and (3) comprise rules, but paragraph (1) cannot be so described".

[59]See also Art 42 lit b (ii) Articles on State Responsibility (n 4) and *J Verhoeven* in *Corten/Klein* Art 69 MN 23–25.

[60]Final Draft, Commentary to Art 62, 263 para 5.

invoking invalidity, that party will be justified, at least *prima facie*, in considering the treaty as void.[61] Conversely, an unfavourable report would justify the objecting party in claiming validity and continued performance of the treaty. To be sure, given the non-binding character of the recommendations of the conciliation commission, this legal situation is only tentative as long as the dispute is not authoritatively settled by a binding decision of a third party.

F. Customary Status

43 In view of the virtual inexistence of relevant practice with regard to the consequences of invalidity of treaties, it is difficult to say whether Art 69 has codified customary law existing in 1969 or reflects customary law today. Any definite answer to this question would be pure conjecture.[62] On the one hand, the absence of practice might indicate that there has been, and still is, no customary rule to this effect.[63] On the other hand, however, the absence of practice most likely is due to the lack of factual opportunities to apply this provision in practice, rather than to general disagreement on its content. Also, Art 69 met with generally strong support at the Convention so that one could argue that this provision is "crystallizing into customary international law".[64] Furthermore, assuming that there occurs a case of an invalid treaty to be decided by an international court or tribunal, and assuming moreover that the VCLT is not applicable to that case, it will be difficult, and probably unreasonable, to establish an applicable rule that would be different to that of Art 69.[65]

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[61] *Kearney/Dalton* (n 15) 555; *Sinclair* 233.

[62] For a similarly cautious approach see *J Verhoeven* in *Corten/Klein* Art 69 MN 3.

[63] *M Schröder* Treaties, Validity in MPEPIL (2008) MN 24.

[64] *Villiger* Art 69 MN 24. See also Judge *Abraham* in his separate opinion in ICJ *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Preliminary Objections) [2007] ICJ Rep 903, para 31 referring to Art 69 para 1 "which indisputably expresses customary law".

[65] Similarly *J Verhoeven* in *Corten/Klein* Art 69 MN 3.

Article 70

Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties from any obligation further to perform the treaty;
(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Contents

A. Purpose and Function

Art 70 governs the legal consequences of a treaty that ceases to exist because the conditions for a ground of termination are met. Contrary to invalidity, termination presupposes the valid conclusion and entry into force of the treaty but, for reasons unrelated thereto, the treaty comes to an end due to circumstances that have occurred after its entry into force. Like in case of invalidity, the question arises as to the consequences on the legal position of the parties of the treaty's coming to an end. **1**

Termination of a treaty produces an **inherent tension** between the total disappearance of the treaty and its effects on the one hand and the continuance of the legal situation established in the course of the execution of the treaty on the other hand. The main purpose of Art 70 is to strike a balance between these two conflicting positions. Any application of Art 70 will therefore be guided by the **2**

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
DOI 10.1007/978-3-642-19291-3_74,

"well-established principles of acquired rights, legal certainty, non-retroactivity of the law, and the doctrine of inter-temporal law".[1]

3 As regards its structure, Art 70 contains several rules. First, it provides that the rules on the consequences of termination are dispositive and subject to **party autonomy**. Thus, the rules set forth in Art 70 operate by default unless the parties have agreed otherwise. From this it follows secondly that the application of Art 70 is premised on the condition that termination is carried out according to the provisions of the treaty concerned or, in the absence of such provisions, pursuant to the provisions of the VCLT. Third, Art 70 provides that termination releases the parties from any obligation further to perform the treaty but does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. Finally, para 2 extends the rules of para 1 to denunciation of and withdrawal from multilateral treaties but limits the application of para 1 to the relations between the denouncing or withdrawing State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

4 Concerning its scope, Art 70 does not apply to termination of a treaty as a consequence of the emergence of a **new peremptory norm** of general international law with which this treaty is in conflict (Art 64). Art 64 is a hybrid provision that combines aspects of both invalidity and termination (→ Art 64 MN 16),[2] and the consequences of this ground of termination are exclusively governed by Art 71 (→ Art 71 MN 22–27).

5 Furthermore, since the Convention establishes an 'open regime', Art 70 does not apply to cases of State succession, State responsibility and outbreak of hostilities (→ Art 73). The effect of **State succession** on existing treaties is partly governed by treaty law[3] and partly covered by the rules of customary law.[4] Questions of **State responsibility** may in the present context arise *eg* as a consequence of a material breach of treaty according to Art 60 VCLT.[5] Neither Art 60 nor Art 70 stipulates any consequences of material breach as an internationally wrongful act[6]; both provisions are strictly confined to determining the consequences of the breach on

[1] *A Nollkaemper* Some Observations on the Consequences of the Termination of Treaties and the Reach of Article 70 of the Vienna Convention on the Law of Treaties in *IF Dekker*/*HHG Post* (eds) On the Foundations and Sources of International Law (2003) 187.

[2] This follows *inter alia* from the wording according to which an existing treaty, which is in conflict with a new peremptory norm of general international law, becomes "void and terminates". For a discussion see *H Ascensio* in *Corten*/*Klein* Art 70 MN 2.

[3] See in particular the 1978 Vienna Convention on Succession of States in Respect of Treaties 1946 UNTS 3.

[4] See in general *A Zimmermann* Staatennachfolge in völkerrechtliche Verträge (2000).

[5] Another example would be the destruction by one party of the treaty's object that would render performance impossible.

[6] Final Draft, Commentary to Art 66, 265 para 1.

the treaty concerned. This, to be sure, does not exclude the possibility of parallel action of the injured party under both treaty law and the law of State responsibility.

> The possibility of parallel causes of action has generally been acknowledged in international case law and was for example applied by the tribunal in the *'Rainbow Warrior'* arbitration[7] and by the ICJ in *Gabčíkovo-Nagymaros Project*.[8] The concept was codified by Art 12 ILC Articles on State Responsibility which provides that "[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character".[9]

The reason why the **effect of war or armed conflict** on existing treaties was expressly excluded from the scope of the VCLT probably is that the law in this field is highly uncertain. As *Jennings* and *Watts* stated: "The effect of the outbreak of hostilities between the parties to a treaty upon the validity of that treaty is far from settled."[10] This topic is currently under consideration in the ILC.[11] **6**

Finally, with regard to the scope of Art 70, reference must also be made to Art 43 VCLT, which provides for the obvious rule that **7**

> "termination or denunciation of a treaty, the withdrawal of a party from it [. . .], as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty."

This is also in line with Art 38 VCLT according to which a treaty rule may become binding upon a third State as a customary rule of international law (→ Art 38 MN 10–13).

B. Historical Background and Negotiating History

The idea that a terminated treaty need not be applied and executed any longer and, moreover, does not prejudge the validity of rights established in consequence of the implementation and performance of the treaty is dictated by legal logic. In essence, **8**

[7] *Difference between New Zealand and France Concerning the Interpretation or Application of Two Agreements Concluded on 9 July 1986 between the Two States and Which Related to the Problems Arising from the 'Rainbow Warrior' Affair (New Zealand v France)* (1990) 20 RIAA 217, 251–252 para 75.

[8] ICJ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, 38–39 para 47.

[9] Articles on Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83. The text of the Articles and commentaries thereto are included in ILC Report 53rd Session, UN Doc A/56/10 (2001). They are also reproduced in *J Crawford* The International Law Commission's Articles on State Responsibility (2002).

[10] *R Jennings/A Watts* (eds) Oppenheim's International Law Vol I (9th edn 1992) 1310.

[11] See ILC Report 52nd Session, UN Doc A/55/10, 140 (2000).

the contents of Art 70 were already to be found in the Harvard Draft on the Law of Treaties.[12]

9 SR *Fitzmaurice* proposed a complicated and detailed set of articles that covered a number of problems caused by termination (general legal effects, varying effects depending on the type of treaty, and the effects of termination on the rights of third States).[13] SR *Waldock*'s Draft Art 28 essentially conformed to what is now Art 70. It met with general acceptance in the ILC and was subject to minor drafting changes[14] until the Vienna Conference, where it was only marginally discussed and adopted by unanimous vote.[15]

C. Elements of Article 70

10 An essential element of Art 70 is the reference to **party autonomy**. The VCLT leaves it generally to the parties of the relevant treaty not only to agree on termination, for instance by including in the treaty itself a specific provision, or otherwise by consent (Art 54); it also leaves it to the parties to agree on the consequences of termination, in principle irrespective of the ground of termination. Thus, party autonomy may be exercised either in advance, by including a specific provision on the consequences of termination or *ad hoc*, by special agreement between the parties once the treaty is terminated.

11 A number of treaties include specific clauses concerning the legal consequences of their termination, which operate as *leges speciales* in relation to Art 70. Conceptually, different solutions are possible. First, the treaty may provide for a **continuing applicability of** at least some of its **substantive provisions** even after it has terminated, provided that certain acts have already been carried out before the termination of the treaty became effective. This is a logical consequence of the general concept of non-retroactivity according to which a legal act does not produce retroactive effect unless this can be expressly established.[16]

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[12]See Art 33 lit d Harvard Draft: "The termination of a treaty puts an end to all executory obligations stipulated in the treaty; it does not affect the validity of rights acquired in consequence of the performance of obligations stipulated in the treaty."

[13]*Fitzmaurice* II 35–36.

[14]The main amendment was the rephrasing of para 1 lit a submitted by Sweden, see [1966-II] YbILC 56.

[15]UNCLOT II 126.

[16]See *eg TO Elias* The Doctrine of Intertemporal Law (1980) 74 AJIL 285; *R Higgins* Some Observations on the Inter-Temporal Rule in International Law in *J Makarczyk* (ed) Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzystof Skubiszewski (1996) 173.

Examples mentioned in the ILC commentary[17] are Art XIX Brussels Convention on the Liability of Operators of Nuclear Ships[18] and Art 58 para 2 ECHR.[19] Other examples are Art 317 para 2 UN Convention on the Law of the Sea[20] and Art 127 para 2 Rome Statute.[21]

Such regulations are also important in the specific context of **financial obligations** of Member States of **international organizations**. Therefore, many constituent treaties of organizations provide that the financial obligations accrued prior to effective termination remain unaffected by denunciation or withdrawal. **12**

Thus Art XVIII para E Statute of the International Atomic Energy Agency provides: "Withdrawal by a member from the Agency shall not affect its contractual obligations entered into pursuant to article XI or its budgetary obligations for the year in which it withdraws."[22] Similar provisions are Art 6 para 3 Constitution of the United Nations Industrial Development Organization[23] and Art 127 para 2 Rome Statute.[24]

More specifically, **investment treaties** – either multilateral treaties such as the Energy Charter Treaty or bilateral investment treaties between States – usually provide that they will continue to apply to investments for a named period of time after effective termination.[25] This extension of the continuing effect of investment **13**

[17]Final Draft, Commentary to Art 66, 265 para 2.

[18](1963) 57 AJIL 268. Art XIX provides that even after the termination of the Convention, liability for a nuclear incident is to continue for a certain period with respect to ships the operation of which was licensed during the currency of the Convention.

[19]Art 58 para 2 reads: "Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective."

[20]1833 UNTS 3. Art 317 para 2 reads: "A State shall not be discharged by reason of the denunciation from the financial and contractual obligations which accrued while it was a Party to this Convention, nor shall the denunciation affect any right, obligation or legal situation of that State created through the execution of this Convention prior to its termination for that State."

[21]2187 UNTS 90. Art 127 para 2 reads: "A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective."

[22]276 UNTS 3988.

[23]1401 UNTS 3. Art 6 para 3 reads: "The contributions to be paid by the withdrawing Member for the fiscal year following that during which such instrument was deposited shall be the same as the assessed contributions for the fiscal year during which such deposit was effected. The withdrawing Member shall in addition fulfil any unconditional pledges it made prior to such deposit."

[24]See n 21.

[25]Art 47 para 3 of the 1994 Energy Charter Treaty 2080 UNTS 100 *eg* provides that the Treaty will continue to apply to investments for a period of twenty years from the effective date of withdrawal. Similar provisions may be found in bilateral investment treaties, see *United Nations Centre on Transnational Corporations* (ed) Bilateral Investment Treaties (1988) 36–40.

treaties is designed to protect investors who have made investments in reliance on the expectation of treaty protection.[26] Such provision will also be covered by Art 70 para 1 lit b as it will usually form part of the concept of acquired or vested rights the beneficiaries of which are the investors as third parties (→ MN 29–32).

14 Some treaties – again particularly those establishing international organizations – provide for a period after the expiry of which termination shall take effect. This shall allow the organization to make the necessary internal modifications to adapt to the reduced membership.

Such an example is Art 18 para 2 Convention Establishing the World Intellectual Property Organization[27] or Art XV WTO Agreement.[28]

15 Another possibility is that a general **framework convention** (or umbrella agreement) provides that if a party withdraws from the framework convention, it will *ipso facto* be considered as having withdrawn from all other treaties concluded under the convention.

This is for instance the case with Art 19 para 4 Vienna Convention for the Protection of the Ozone Layer[29] or Art 25 para 3 UN Framework Convention on Climate Change.[30] Similarly, Art XV para 1 WTO Agreement provides that withdrawal from the Agreement "shall apply both to this Agreement and the Multilateral Trade Agreements" concluded under the auspices of the WTO.[31]

16 In other cases, treaties that are substantively interconnected with other treaty regimes provide that termination of one such treaty entails automatic termination of the other treaties linked to the former.

An example of this kind is Art VI § 3 Articles of Agreement of the International Bank for Reconstruction and Development according to which "[a]ny member which ceases to be a member of the International Monetary Fund shall automatically cease after three months to be a member of the Bank unless the Bank by three-fourths of the total voting power has agreed to allow it to remain a member".

In 2003, North Korea declared its withdrawal from the Nuclear Non-Proliferation Treaty (NPT)[32] pursuant to Art X NPT. This withdrawal *ipso facto* terminated the Safeguards Agreement it had concluded with the IAEA in 1992 because Art 26 of that

[26] *JW Salacuse* The Law of Investment Treaties (2010) 129, 173, 351–352.

[27] 828 UNTS 3. Art 18 para 2 reads: "Denunciation shall take effect six months after the day on which the Director General has received the notification."

[28] 1994 Agreement Establishing the World Trade Organization 1867 UNTS 154. Art XV para 1 reads: "Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO."

[29] 1513 UNTS 323. Art 19 para 4 reads: "Any Party which withdraws from this Convention shall be considered as also having withdrawn from any protocol to which it is party."

[30] 1771 UNTS 107. Art 25 para 3 reads: "Any Party that withdraws from the Convention shall be considered as also having withdrawn from any protocol to which it is a Party."

[31] See n 28.

[32] 729 UNTS 161.

Agreement provided: "This Agreement shall remain in force as long as the Democratic People's Republic of Korea is party to the [NPT]."[33]

Treaties frequently provide that their **dispute settlement provisions** continue to remain in force and to apply even after the treaty's termination. But even in the absence of such an explicit stipulation, dispute settlement provisions will remain in effect.[34] For it is the gist of these provisions that they apply precisely when the continued validity of the treaty, or more generally, when the application or interpretation of the treaty prior to its termination is disputed. Dispute settlement clauses will generally be clauses of such a nature that the parties may be supposed to have intended them to remain in force whatever reasons of termination (or suspension) may be advanced, particularly in order that such reasons may be judicially tested.[35] While in theory there is a difference between disputes concerning the substantive application of the treaty and those relating to its effective termination,[36] the consequences are the same for either case. **17**

Examples of this kind are Art 40 para 2 European Convention for the Peaceful Settlement of Disputes[37] or Art 72 ICSID Convention.[38]

In *Jurisdiction of the ICAO Council*, the ICJ rejected the argument of Pakistan that it did not have jurisdiction because the relevant treaty (and with it the jurisdictional clause) were no longer applicable: "If a mere allegation, as yet unestablished, that a treaty was no longer operative could be used to defeat its jurisdictional clauses, all such clauses would become potentially a dead letter, even in cases like the present, where one of the very questions at issue on the merits, and as yet undecided, is whether or not the treaty is operative – *ie* whether it has been validly terminated or suspended. The result would be that means of defeating jurisdictional clauses would never be wanting."[39]

Similarly, in *United States Diplomatic and Consular Staff in Tehran* the ICJ emphasized this aspect when it stated that, without prejudice to the valid termination of the bilateral

[33]See *FL Kirgis* North Korea's Withdrawal from the Nuclear Nonproliferation Treaty, ASIL Insight 96, January 2003.

[34]*Aust* 302.

[35]*F Capotorti* L'extinction et la suspension des traités (1971) 124 RdC 417, 459–460.

[36]See *H Ascensio* in *Corten/Klein* Art 70 MN 36–43. On the 'survival' of compromissory clauses see generally *H Thirlway* The Law and Procedure of the International Court of Justice 1960–1989 (1992) 63 BYIL 1, 90–94. See also → MN 26–27.

[37]320 UNTS 243. Art 40 para 2 cl 1 reads: "Denunciation shall not release the High Contracting Party concerned from its obligations under this Convention in respect of disputes relating to facts or situations prior to the date of the notice referred to in the preceding paragraph."

[38]1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 UNTS 159. Art 72 reads: "Notice [of denunciation] by a Contracting State [. . .] shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary." For an analysis of recent practice, see *C Schreuer* Denunciation of the ICSID Convention and Consent to Arbitration, in *M Waibel et al* (eds) The Backlash against Investment Arbitration: Perceptions and Reality (2010) 353.

[39]ICJ *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* [1972] ICJ Rep 46, 54 para 16.

> Treaty of Amity, Economic Relations, and Consular Rights, the dispute settlement provisions remain applicable: "It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Article XXI, paragraph 2, of the 1955 Treaty [*ie* the jurisdictional clause] was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by other peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Article XXI, paragraph 2, were now to be found not to be open to the parties precisely at the moment when such recourse was most needed."[40]

18 Finally, treaties may contain the obligation of States Parties to find an **agreed settlement** on the particulars of termination.[41] Thus Art XXIV § 2 lit c World Bank Agreement provides that a "settlement shall be made with reasonable dispatch by agreement between the terminating participant and the Fund with respect to any obligation of the terminating participant or the Fund after the setoff [specified in the previous subparagraph]".[42]

19 Other examples mentioned in the doctrine[43] appear to concern a general reference to non-treaty obligations rather than a continuing application of treaty obligations after termination. Such a situation is however already covered by Art 43 VCLT, according to which the termination or denunciation of a treaty or the withdrawal of a party from it "shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty". Also, Art 38 might be relevant in such a case. Thus, where a treaty is terminated in relation to a party, that State may nevertheless be bound by individual provisions of the terminated treaty, either under another (still effective) treaty or under the relevant rules of customary law.

20 Similar to Art 69, Art 70 does not mention the grounds of termination to which it applies, but implicitly refers to Part V Section 3 of the Convention on "termination and suspension of the operation of treaties". The words "under its provisions or in accordance with the present Convention" signify not only that the procedures in Arts 65–68 must have been followed prior to determining the consequences of termination (→ MN 35–37), but also that any other procedural or substantive requirements of termination, either included in the respective treaty itself or in the VCLT, must have been met.

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[40] ICJ *United States Diplomatic and Consular Staff in Tehran (United States v Iran)* [1980] ICJ Rep 3, 28 para 54.

[41] See also *H Ascensio* in *Corten/Klein* Art 70 MN 17.

[42] See Art XXIV §§ 1–5, International Bank of Reconstruction and Development, 1945 Articles of Agreement, 2 UNTS 13. Typically for technical or financial institutions, the World Bank Agreement contains a number of highly complex provisions on termination of membership by one party, of which the rule mentioned above is but one aspect.

[43] See *eg H Ascensio* in *Corten/Klein* Art 70 MN 6 who refers to the Geneva Conventions.

D. Legal Consequences

I. Release from Obligation of Further Performance (para 1 lit a)

Art 70 para 1 lit a provides that termination puts an end to the parties' obligation to apply and perform the treaty. This provision only applies to continuing obligations, which do not expire by mere performance. In such case, the duty of performance does not cease as long as the treaty is in force and occasion of performance arises. In contrast, para 1 lit b applies also to provisions that have been performed and no longer continue to exist. In his commentary on Draft Art 28, SR *Fitzmaurice* stated that this rule was "based on the accepted and inherent distinction between **'executory'** and **'executed' clauses**", a distinction he considered "common form in private law".[44] In practice, a treaty will usually contain both types of clauses but it is also feasible that the entire treaty consists of only executory or executed provisions.[45] **21**

Art 70 para 1 lit a thus restricts the legal consequences of termination to **non-retroactive effects *ex nunc***.[46] It follows that, contrary to the case of invalidity, there is no obligation to unwind or undo the treaty and the (legal and factual) acts carried out in the application and implementation of the treaty remain in force and valid. **22**

> A bilateral extradition treaty, for instance, usually contains the continuing obligation to extradite in the mutual relationship between the parties and on specific conditions persons requested for extradition. If the treaty terminates that obligation will cease to exist, and the parties are released from their duty of continued performance, without prejudice to the legal situation created in performing the effective treaty prior to its termination.

In doctrine,[47] the phrase "further to perform" was criticized as conveying the impression as if only those treaties that have already been performed were covered by Art 70 para 1 lit a. Furthermore, it is argued that certain types of treaties do not only contain obligations that may be performed or not, but also other binding provisions that confer powers, competences or faculties, or provide for permissive rules. These remarks are certainly correct, and para 1 lit a probably is too narrow in confining the terminating effects to obligations; but it is suggested that either of these objections is reconcilable with the wording of para 1. Thus, even an obligation that has not yet been performed, *eg* because there has not been any (factual) occasion of application, will be covered by para 1 lit a and cease to exist. Secondly, the fact that treaties are not confined to stipulating obligations but may provide for a wide variety of different types of legal rules does not render Art 70 para 1 lit a inapplicable to such provisions. Performing a treaty means to comply not only with **23**

[44] *Fitzmaurice* II 67 (emphases added). In that respect, *Fitzmaurice* heavily drew on the 1935 Harvard Draft.

[45] ICJ *Fisheries Jurisdiction (United Kingdom v Iceland)* (Jurisdiction of the Court) [1973] ICJ Rep 3, 17–18 para 33; *Capotorti* (n 35) 451–452.

[46] *Waldock* II 94.

[47] See particularly *Capotorti* (n 35) 453.

its obligations but with any kind of legal stipulation. And given the overall duty of the *pacta sunt servanda* rule (Art 26), which implies the duty to comply with any binding provision of the treaty, Art 70 para 1 lit a no doubt extends also to stipulations that do not lay down specific obligations of performance.

II. Legal Situation Created by the Treaty (para 1 lit b)

24 Art 70 para 1 lit b again makes clear that any form of termination has **no retroactive effect**. Unlike in case of invalidity (→ Art 69), a terminated treaty was validly concluded and ceases to exist *ex nunc*. This means that any right, obligation or legal situation that was created in applying the treaty is not affected by termination.

> SR *Fitzmaurice* gave the following examples: "Familiar examples would be transfers of territory effected under a treaty, boundary agreements or delimitations, and territorial settlements of all kinds; payments of any kind effected under a treaty; renunciations of sovereignty or of any other rights (these would not revive); recognitions of any kind (no position of non-recognition or contestation would revive). As stated in paragraph 1, a continuing disability will cease, but not a permanent disability created by the treaty. Thus an obligation to refrain from doing certain things will not persist when the treaty terminates; but a renunciation of certain claims or pretensions will, and so also will an acceptance of any legal situation or state of fact."[48] With regard to obligations to refrain he added: "For instance, in the case of an obligation not to levy certain dues and charges, the party concerned may resume doing so when the treaty terminates, but could not purport to collect dues *etc* retroactively for the period of the treaty."[49]
>
> In the *Northern Cameroons* case, the ICJ set out the consequences of termination of the Trusteeship Agreement as follows: "Looking at the situation brought about by the termination of the Trusteeship Agreement from the point of view of a Member of the United Nations, other than the Administering Authority itself, it is clear that any rights which may have been granted by the Articles of the Trusteeship Agreement to other Members of the United Nations or their nationals came to an end. This is not to say that, for example, property rights which might have been obtained in accordance with certain Articles of the Trusteeship Agreement and which might have vested before the termination of the Agreement, would have been divested by the termination."[50]

25 Art 70 para 1 lit b speaks of "right, obligation or legal situation" without however defining or explaining the meaning of this phrase. It would seem that what is meant is any kind of **change in the legal situation** of the parties, including rights and obligations in the first place.[51] This broad understanding of the phrase "right, obligation or legal situation" is premised on the condition that this newly created legal situation is based on a legal ground, which is independent of the treaty itself.[52] Otherwise this new legal situation could not survive in case of the treaty's termination.

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[48] *Fitzmaurice* II 67.

[49] *Ibid.*

[50] ICJ *Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15, 34.

[51] This was emphasized by the Greek delegation to the Vienna Conference, see UNCLOT I 447.

[52] *McNair* 531.

These considerations also confirm the general rule that disputes concerning the application of the treaty will usually affect rights, obligations and legal situations created by the treaty. If the dispute concerns claims that have arisen under the treaty, these continue to exist even if the treaty is terminated because "such claims acquire an existence independent of the treaty whose breach gave rise to them".[53] **26**

This was confirmed in the *'Rainbow Warrior'* arbitration. The tribunal held that while France was not in breach of its international obligations at the time of the arbitration, it was responsible for breaching its obligations under the 1986 agreement with New Zealand prior to the lapse of this obligation. Invoking Art 70 para 1 lit b VCLT it concluded that "the claims advanced by New Zealand have an existence independent of the expiration of the First Agreement and entitle New Zealand to obtain adequate relief for these breaches".[54]

This holds even more true where the dispute concerns the termination of the treaty itself. If a party terminates the treaty and if this is objected by another treaty party, termination does not take full effect, and any **dispute** arising out of this attempt to terminate the treaty is **not affected by termination**.[55] The legal consequences of such a situation will frequently coincide with the continuing effect of dispute settlement provisions in a treaty that was validly and effectively terminated (→ MN 17). **27**

Art 70 does not govern the question of a treaty that has been **partially executed** by one party only and then ceases to exist, for instance on account of supervening impossibility of performance according to Art 61.[56] The ILC left that question to the application of the principle of **good faith** that would require "equitable adjustments" in the circumstances of each particular case and referred to the rule of ***pacta sunt servanda*** (Art 26).[57] Given the fact that the party that has not performed the treaty is absolved by Art 70 para 1 lit a from fulfilling its obligation and further that any unwinding of acts carried out in performing the treaty is excluded by para 1 lit b, treaty law indeed does not provide an answer to this question. This gap would however produce an inequitable result, especially if the reason for termination is a material breach and it is the party not having provided performance of the treaty that is responsible for the breach.[58] An equitable solution could however be based on the principle of **unjust enrichment**. Thus, the return of any advantage, *eg* the surrender of the actual increase of wealth obtained through the frustrated transaction in accordance with principles of unjust enrichment appears to be the appropriate solution.[59] This would require the non-performing party either to return the **28**

[53]ICJ *Ambatielos Case (Greece v United Kingdom)* (Jurisdiction) [1952] ICJ 58, 63 (dissenting opinion *McNair*).

[54]*'Rainbow Warrior'* case (n 7) para 106.

[55]*H Ascensio* in *Corten/Klein* Art 70 MN 41–43.

[56]*Aust* 303.

[57]Final Draft, Commentary to Art 66, 266 para 4. See also *TO Elias* The Modern Law of Treaties (1974) 133–134, 205–206.

[58]*B Simma* Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law (1970) 20 ZÖR 5, 64.

[59]*C Schreuer* Unjust Enrichment in International Law (1974) 22 AJCL 300; *C Binder/C Schreuer* Unjust Enrichment in MPEPIL (2009) MN 8. See also the proposal by the United States in its

benefit received from the other party in performing the treaty (for instance by compensation), or to perform its own treaty obligations accordingly, so as to offset any unbalance caused by termination and prior partial execution. In effect, this would yield mainly the same results as demanding equitable adjustments.

> This approach was obviously also taken by the ICJ in the *Fisheries Jurisdiction* cases. In these cases the Court made the following comments as to the consequences of the application of the *clausula rebus sic stantibus*: "Iceland has derived benefits from the executed provisions of the agreement [. . .]. Clearly it then becomes incumbent on Iceland to comply with its side of the bargain [. . .]. Moreover, in the case of a treaty which is in part executed and in part executory, in which one of the parties has already benefited from the executed provisions of the treaty, it would be particularly inadmissible to allow that party to put an end to obligations which were accepted under the treaty by way of *quid pro quo* for the provisions which the other party has already executed."[60]

III. The Position of Third Parties (Individuals)

29 Art 70 para 1 lit b confines the protection of acquired rights to those "of the parties" and thus is without prejudice to the rights of third parties, particularly those of (private) individuals. This is also made clear by the ILC commentary[61] and conforms to the general approach by the ILC according to which the question of the application of treaties to, and the scope of general treaty law on, individuals was not covered by the VCLT.[62] However, in some cases, the rights of individuals acquired in the execution and application of the treaty may also continue to exist. This is but a consequence of the doctrine of **acquired rights,** which is considered to be a general principle of law[63] and a reflection of the principles of legal certainty and non-retroactivity.[64]

> For example, Indonesia denounced the Sino-Indonesian Treaty on Double Nationality according to which double nationals had to opt for one and thereby renounce the other

comments to the draft articles to include the following para 4 into what became later Art 61 VCLT: "The State invoking the impossibility of performance as a ground for terminating the treaty or suspending the operation of a treaty may be required to compensate the other State or States concerned for benefits received under executed provisions." [1966-II] YbILC 355.

[60] ICJ *Fisheries Jurisdiction* (n 45) 18 para 34; ICJ *Fisheries Jurisdiction (Germany v Iceland)* (Jurisdiction) [1973] ICJ Rep 49, 62 para 34.

[61] Final Draft, Commentary to Art 66, 265 para 3.

[62] *Rosenne* 42.

[63] *A McNair* The General Principles of Law Recognized by Civilized Nations (1957) 33 BYIL 1, 16–18. This was already pronounced by the PCIJ in *Questions Relating to Settlers of German Origin in Poland* (Advisory Opinion) PCIJ Ser B No 6, 36 (1923) and in PCIJ *Certain German Interests in Polish Upper Silesia* (Merits) PCIJ Ser A No 7, 42 (1926), and has been repeatedly confirmed by subsequent arbitral practice, see *eg Saudi Arabia v Arabian American Oil Co (Aramco)* 27 ILR 117, 205 (1958); ICSID *Amco Asia Corp et al v Indonesia* 1 Rep 413, 493 (1984).

[64] *Nollkaemper* (n 1) 187.

nationality. After termination of that treaty, the nationality status resulting from the option made in applying the treaty remained unchanged by the termination of the treaty.[65]

Similarly, Indonesia denounced the treaty establishing the Netherlands-Indonesian Union in 1956. The treaty provided for the exemption of Indonesian citizens from the requirement of a labour permit for aliens in the Netherlands. The Netherlands subsequently ceased granting this privileged status to Indonesian citizens, while maintaining the status of those Indonesians who had already established their principal residence in the Netherlands prior to the effective termination of the treaty.[66]

30 It is, however, far from clear under what conditions and requirements the doctrine of acquired rights indeed applies. Practice is too scarce and disparate as to allow to draw concrete and definite conclusions. Essentially, the doctrine of acquired rights is confined in practice to private rights of individuals accrued under municipal law and almost invariably occurred in the context of State succession,[67] investment law apart. Its extension to other rights of individuals is highly doubtful. For example, it cannot generally be said that rights arising under treaties concerning the protection of human rights confer acquired rights to individuals that continue to exist even if the treaty is denounced.[68]

The situation is quite clear in cases where the treaty itself provides for legal consequences of termination. Art 58 para 2 ECHR, for instance, extends the substantive protection of the Convention for a period of six months' notice of the denunciation. In such case of clear regulation, there is no place for the doctrine of acquired rights. More difficult is the question in cases where the relevant treaty is silent on the legal consequences and, more generally, the possibility of denunciation. Thus the ICCPR is silent on the possibility of denunciation (→ Art 56). However, upon the denunciation of the Covenant by North Korea, the Human Rights Committee adopted General Comment No 26, according to which "international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it".[69] Accordingly, the question of acquired rights does not arise in such case.

31 In some areas of international law, the rule on the continuing effect and validity of rights of individuals established under a treaty may also follow from the continuing effect of substantive provisions of the treaty itself, and a clear distinction to Art 70 para 1 lit b is at times difficult to make in such case. For example, and as already mentioned above (→ MN 1), many bilateral or multilateral investment treaties provide that their substantive provisions on the protection of foreign investments will continue to apply for a specified period of time. This shall ensure the continuing protection of investments made in reliance on the existence of the treaty.

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[65] *KS Sik* The Concept of Acquired Rights in International Law (1977) 24 NILR 120, 137–138.

[66] *Ibid.*

[67] See the references in n 63 above. See also *Jennings/Watts* (n 10) 215–216; *MN Shaw* International Law (6th edn 2008) 1001–1004 (both with further references).

[68] See the discussion by *H Ascensio* in *Corten/Klein* Art 70 MN 23–24.

[69] General Comment 26, Continuity of Obligations (61st Session 1997), UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 (2003), 173. See *M Nowak* UN Covenant on Civil and Political Rights: CCPR Commentary (2nd edn 2005) Introduction MN 32–37.

> In the *Amco* case, for example, the arbitral tribunal considered the concept of acquired rights independent from, and "a logical and morally necessary extension" of, the principle of *pacta sunt servanda*. Furthermore, it actually linked the principle of acquired rights to the very aim of the ICSID Convention.[70]
>
> Another example would be agreements between an international organization and the host State which may provide that the termination of the agreement shall not impair the rights which the officials concerned or former officials have acquired thereunder for themselves or for their dependants.[71]

32 Art 70 para 1 lit b is furthermore silent on the question as to the duration of these acquired rights and whether they continue to exist for an indefinite period of time. In essence, it would seem that they may be terminated only by unilateral denouncement by the beneficiary or, to be sure, by way of agreement between the individual and the State. An unwarranted unilateral termination by the party obliged to respect and observe the acquired rights seems impermissible. However, this general rule is again subject to party autonomy as envisaged in the chapeau of the introductory phrase in para 1.

> Thus where an investment treaty provides for the continued protection of foreign investments for a specified period of time after the effective denunciation, any protection of investments after the lapse of this period cannot be based on Art 70 para 1 lit b which was validly derogated from by agreement of the parties.[72]

IV. Multilateral Treaties (para 2)

33 Art 70 para 2 extends the rules in para 1 to multilateral treaties. This means in the first place that the specific rules of the treaty on the matter, if any, operate within the ambit of party autonomy. For instance, the treaty might stipulate specific consequences in case of termination or provide that the treaty terminates for all parties,[73] as will be the case with integral treaties (→ MN 34). If the treaty however is silent on the consequences of termination and the parties do not agree on such, the rules in paras 1 and 2 operate by default. Accordingly, a State denouncing or withdrawing from a multilateral treaty is no longer bound to further performance of the treaty in relation to each of the other States Parties, and the latter are no longer required to do so in their relations to the withdrawing party. A legal situation created in the

[70] *Amco* (n 63) 493.

[71] See *eg* the 2010 Agreement between the Republic of Austria and the United Nations Industrial Development Organization on Social Security [2010-III] Austrian öBGBl 111.

[72] However, this does not necessarily lead to a complete loss of protection. As noted earlier (→ MN 29), the doctrine of acquired rights is a general principle of law which States are bound to respect and comply with even in the absence of a corresponding treaty obligation. Thus even after termination of the treaty and the end of the continuing effects, acquired rights may remain protected according to general international law and Art 43 VCLT. The content and scope of the general rule will, to be sure, not necessarily be identical to the treaty rule.

[73] *Villiger* Art 70 MN 11.

application and execution of the treaty remains however valid and in effect. Likewise, if third parties including individuals have obtained any rights under the treaty these will be protected under Art 70 para 1 lit b.

While this rule will usually pose few problems with ordinary multilateral treaties, the situation is different in cases where **integral treaties** or other agreements containing **interdependent obligations** are at issue.[74] Such treaties consist of obligations whose performance by each party is an essential condition for the performance by each and every other party. If one party withdraws from such a treaty the remaining parties will usually have no significant interest in upholding the treaty since the withdrawal disturbs the 'integrity' of the obligations and the treaty as a whole. In other words, similar to the situation envisaged in Art 60 para 2 lit c, withdrawal from such a treaty will radically change the position of every party with respect to the further performance of its obligations under the treaty. The treaty will therefore come to an end with regard to all parties. In essence, such termination will operate by way of agreement of the parties but it might well be that, due to the specific constellation of the treaty – and hence on basis of the primary treaty norm –, in such case unilateral withdrawal is permissible as well. **34**

E. Procedure

According to Art 70 para 1, termination of a treaty is based on the condition that it is carried out under the treaty's provisions "or in accordance with the present Convention". Like in case of invalidity (→ Art 69 MN 41), this provision has both a substantive and a procedural aspect to it. In addition to the existence of a ground for termination, which may either be one stipulated in the treaty itself or in the VCLT, the parties – especially the one intending to terminate the treaty – must adhere to the procedure to be followed under Art 65 VCLT. **35**

The question arises what the situation with regard to termination is if another party objects to the invocation of termination (→ Art 69 MN 41–42). If there is no agreement between the parties on the consequences of invocation of termination and objection thereto and if the methods of peaceful dispute settlement referred to in Art 65 para 3 do not produce a result either, this will lead to a deadlock situation, in which case it would be for each government to appreciate the situation and to act as good faith demands. While this no doubt is an unsatisfactory result, it is a consequence of the decentralized structure of international law lacking compulsory dispute settlement mechanisms in general, and the VCLT in particular. **36**

If a request for conciliation was made by a party under Art 66 lit b, and if the conciliation commission in its findings recommends in favour of the party invoking termination, that party will be justified, at least *prima facie*, in considering the treaty as terminated.[75] Conversely, an unfavourable report would justify the objecting **37**

[74] On this see *C Tams* Enforcing Obligations erga omnes in International Law (2005) 53–63.

[75] *RD Kearney/RE Dalton* The Treaty on Treaties (1970) 64 AJIL 495, 555; *Sinclair* 233.

party in objecting termination and maintaining continued performance of the treaty. In view of the non-binding character of the recommendations of the conciliation commission, this legal situation is only tentative as long as the dispute is not authoritatively settled by a binding decision of a third party.

F. Customary Status

38 Although practice with regard to Art 70 is scarce, good arguments militate in favour of its customary status. The entire legislative history reveals that the provision was only subject to minor amendments during the drafting process (→ MN 9), which signifies the broad acceptance of its content. At the Vienna Conference, the provision was unanimously adopted,[76] indicating a strong presumption of *opinio iuris*.[77] Furthermore, the few instances in practice generally proceed on the assumption of its customary character.

> Thus in the '*Rainbow Warrior*' arbitration, the tribunal assumed the customary status of Art 70 when it stated that "certain specific provisions of customary law in the Vienna Convention are relevant in this case, such as Article 60, which gives a precise definition of the concept of a material breach of a treaty, and Article 70, which deals with the legal consequences of the expiry of a treaty".[78]

39 Finally, those authors who have expressed opinion on the matter also appear to affirm the customary status of Art 70,[79] and given the logic inherent in Art 70, there seems no reason to suggest that customary law would provide otherwise.[80]

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F Capotorti L'extinction et la suspension des traités (1971) 134 RdC 417–587.

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B Vierdag Some Remarks on the Effect of the Termination of a Treaty under Article 70 of the 1969 Vienna Convention on the Law of Treaties, in *IF Dekker*/*HHG Post* (eds) On the Foundations and Sources of International Law (2003) 179–185.

[76] UNCLOT II 126.

[77] *H Ascensio* in *Corten*/*Klein* Art 70 MN 8.

[78] '*Rainbow Warrior*' (n 7) para 75. The tribunal also referred and seemingly applied Art 70 para 1 lit b in the context of the duration of treaty obligations, see *ibid* para 106.

[79] *G Dahm*/*J Delbrück*/*R Wolfrum* Völkerrecht Vol I/3 (2nd edn 2002) 730; *Nollkaemper* (n 1) 187; *H Ascensio* in *Corten*/*Klein* Art 70 MN 8; *Villiger* Art 70 MN 14.

[80] In its commentary to the 1963 Draft, the ILC stated that the provisions on termination "appeared to it to follow logically from the legal act of the termination of the treaty", see [1963-II] YbILC 216. See also *Waldock* II 94 describing the general rule in para 1 as "largely self-evident"; and *Aust* 303 referring to Art 70 para 1 as being somewhat obvious.

Article 71

Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;
(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Contents

A. Purpose and Function

Art 71 concerns the **legal consequences of the invalidity of a treaty** that is in **conflict with a peremptory norm** of general international law. It singles out the conflict of a treaty with *ius cogens* as a special reason of invalidity of that treaty because it has certain peculiarities and differs from the other grounds of invalidity. **1**

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The most important such difference is that, unlike in case of the legal consequences of 'normal' invalidity as governed by Art 69, the main purpose of Art 71 is not to adjust the legal position as between the parties to the treaty, but to bring it into conformity with what is required by *ius cogens*.[1] Moreover, while invalidity usually involves a party that has a legitimate claim to protection because it has not validly consented to be bound by the treaty, none of the parties to a treaty conflicting with *ius cogens* merits any such legal protection. Thus, in contrast to the other forms of invalidity where at least one of the parties did not freely consent to the conclusion of the treaty, Art 71 (in conjunction with Arts 53 and 64) assumes that both or – in case of a multilateral treaty – all parties have deliberately concluded the treaty contrary to the norms of *ius cogens*, or at least that the contradiction of the treaty with peremptory norms does in any case not justify the maintenance of a legal situation incompatible with such norms. The reason behind this strict approach is that the norms of ***ius cogens*** are a **manifestation** of some kind of **international public order** and protect fundamental community interests, which are not subject to the disposition of individual States.

2 Art 71 combines the special legal consequences of the invalidity of a treaty which has been in conflict with a peremptory norm of general international law from its very beginning (→ Art 53), and those of the invalidity of a treaty which has become incompatible with a new peremptory norm of general international law (→ Art 64). Thus, Art 71 deals with two separate aspects of *ius cogens,* which entail different consequences. This is also reflected in the **structure** of Art 71. Accordingly, while para 1 deals with the consequences of invalidity under Art 53, para 2 sets out the consequences of invalidity under Art 64.

3 Despite these different aspects of the consequences of invalidity arising under Arts 53 and 64, the ILC decided to merge these in a single provision because both are **special cases of invalidity** arising out of the application of a rule of *ius cogens*.[2] A further reason for the Commission to place these two cases in the same article was precisely this distinction between the original nullity of a treaty under Art 53 and the subsequent annulment under Art 64. The Commission considered that "their juxtaposition would serve to give added emphasis to [this] distinction".[3]

4 Further as to its structure, Art 71 para 1 deals with the legal consequences arising out of the invalidity of a treaty pursuant to Art 53. It establishes a kind of **invalidity *ab initio*** that requires the parties to eliminate all consequences of any act performed in reliance on the treaty, irrespective of whether these consequences are by themselves compatible with the norm of *ius cogens* at issue. Art 71 para 2 gives due consideration to the hybrid character of Art 64 (→ MN 22), by providing that the treaty is "void and terminates". Accordingly, the parties are no longer obliged to perform the treaty, and any legal situation (including rights and obligations) established through the execution of the treaty prior to its termination remain

[1] Final Draft, Commentary to Art 67, 266 para 1.

[2] Final Draft, Commentary to Art 67, 266 para 2.

[3] *Ibid.*

valid, unless such situation is incompatible with the new peremptory norm of general international law.

Since the VCLT establishes an 'open regime', Art 71 is without prejudice to questions of responsibility arising out of the invalidity of a treaty conflicting with a peremptory norm of general international law.[4] Such questions may concern the lawful character of the relevant act as well as the specific legal consequences and are expressly excluded from the purview of the Convention (→ Art 73). These questions are, absence specific rules on the matter, governed by the ILC Articles on State Responsibility.[5] However, in practice the rules in Art 71 may well be assimilated, at least partly, to those applying in the law of State responsibility, and some of the latter may apply by analogy in the context of Art 71 (→ MN 15, 17). Finally, Art 43 VCLT also applies to cases of invalidity arising under Arts 53 and 64. It may well be the case that a treaty conflicting with a norm of *ius cogens* contains provisions that are not only compatible with general international law, but are themselves part of customary international law. Since in case of Art 53, the invalidity affects the treaty in its entirety (see Art 44 para 5, → MN 28) also treaty provisions compatible with *ius cogens* lose their legal force and their applicability under customary law may become relevant. **5**

B. Historical Background and Negotiating History

At the early stages of the work of the ILC, only little distinction was made in the legal consequences of an invalid treaty depending on the reason for invalidity.[6] Still in SR *Waldock*'s Draft Art 27 on the "legal effects of the nullity or avoidance of a treaty", a general "regime" of legal consequences was envisaged without singling out the case of invalidity of a treaty that is in conflict with norms of *ius cogens*.[7] However, one point that became clear in the Commission at that stage was that it was necessary to treat the consequences of invalidity on account of a new norm of *ius cogens* separately from the other consequences of invalidity.[8] Indeed, in its first set of draft articles on the consequences of invalidity and termination, the ILC made no distinction in the reason of invalidity (Draft Art 52), whereas it included a **6**

[4]See however the comment of the delegate of the United Kingdom (*Sinclair*) at the Vienna Conference UNCLOT I 449, who stated that since para 1 lit a involved "reparations", it "was concerned with a question of State responsibility".

[5]See Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/RES/56/83 (2001). The text of the Articles and the commentaries thereto are included in ILC Report 53rd Session UN Doc A/56/10, paras 76–77 (2001).

[6]See *eg* Draft Art 22 proposed by *Fitzmaurice* III 28, which considered simply unenforceable a treaty invalid for "illegality of the object".

[7]*Waldock* II 93–94.

[8]See the statements by *Tunkin*, *Yasseen*, *Ago* and *Waldock* [1963-I] YbILC 231–234.

separate para 2 in Draft Art 53 concerning the legal consequences of termination that expressly dealt with the case of the emergence of a new norm of *ius cogens*.[9]

7 In 1966, the Drafting Committee of the ILC proposed a new Art 53 *bis*[10] whose purpose was to include in a single provision all "consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law". The Drafting Committee thought that the draft would gain in clarity if the consequences of rules of *ius cogens* under both Draft Art 37 (now Art 53 VCLT) and Draft Art 45 (now Art 64 VCLT) were juxtaposed in a single article.[11] Draft Art 53 *bis* essentially conformed to what became final Draft Art 67 in 1966 and what is now Art 71 VCLT. At the Vienna Conference, Draft Art 67 was opposed by a number of delegations largely for the same reasons they advanced also against what are now Arts 53 and 64.[12] Another point that was hotly debated was the issue of separability of treaty provisions.[13] However, the Drafting Committee approved Draft Art 67 as it stood,[14] and the provision was subject to only insignificant changes in the CoW.[15] Art 71 was adopted by 87 votes to 5, with 12 States abstaining.[16]

C. Elements of Article 71

8 Unlike Art 69 para 1, Art 71 does **not contain a general clause** to the effect that a treaty conflicting with a peremptory norm of general international law is void and that the provisions of such a void treaty have no legal force. The reason for this is not clear but the lack of a corresponding clause in Art 71 is most likely due to a drafting error. Art 69 para 1 was relocated at the Vienna Conference from what is now Art 42 (→ Art 69 MN 8 and 12), and since the latter provision applies to any form of invalidity, no matter on what ground, Art 69 para 1 would also apply to invalidity arising as a consequence of the application of Arts 53 and 64 – had it not been relocated for reasons other than the deliberate restriction of the rule contained in Art 69 para 1 to cases of 'ordinary' invalidity.[17] Furthermore, the legal consequence contained in Art 69 para 1 follows in any event from the relevant substantive provision covering the particular ground of invalidity. Therefore, it seems

[9] [1963-II] YbILC 216.

[10] [1966-I/2] YbILC 160–161.

[11] [1966-I/2] YbILC 161.

[12] See *eg* the statements by the representatives of Turkey and Switzerland UNCLOT I 449.

[13] See in particular the Finnish amendment UN Doc A/CONF.39/C.1/L.295, UNCLOT I 448, UNCLOT III 197.

[14] UNCLOT I 483.

[15] UNCLOT III 198. Notably, the reference to "termination" in the title was deleted.

[16] UNCLOT II 127.

[17] *Contra EP Nicoloudis* La nullité de jus cogens et le développement contemporain du droit international public (1974) 113; *A Orakhelashvili* Peremptory Norms in International Law (2006) 141. See also the discussion in → MN 30–35 below.

unnecessary to repeat it in the context of Art 71, the more so as the provision in Art 69 para 1 is somewhat tautological (→ Art 69 MN 12).

9 However, this unclear situation adds to the inconsistency of the VCLT in this respect given the **incoherent use of terms** in the provisions on the ground of invalidity – most often simply stating that a State may invoke a ground of invalidity (Arts 46–50), stipulating that a treaty "shall be without any legal effect" (Art 51), or providing that a treaty "is void" (Arts 52 and 53) or "becomes void" (Art 64). This inconsistent use of terms is best exemplified by the general provision of Art 69 para 1, according to which a treaty that was not validly concluded is "void", irrespective of the specific ground of invalidity. The ILC took the view that the distinction between the mere possibility of invoking a ground of invalidity and a void treaty referred to the ground of invalidity itself, either being a defect in consent or an infringement of public order.[18]

10 Logic would dictate that a treaty conflicting with a norm of *ius cogens* is **absolutely void** and not just subject to invalidation or nullity upon invocation by the protected party as in the case of what is called relative nullity in municipal law.[19] However, the last SR on the matter, *Sir Humphrey Waldock*, who not only drafted the articles on *ius cogens*, but was also invited as an expert consultant to the Vienna Conference, made it clear that the term "void" as used by the Convention was not a term incorporating the corresponding notions of municipal legal systems but as a special term having a particular connotation for the purpose of the VCLT.[20] Generally, the Convention's inconsistent terminological approach as mentioned above (→ MN 9) does not indicate much distinction between absolute and relative nullity (→ Art 69 MN 2 and 11). Thus, while Arts 52 and 53 (and also Art 64) all provide that the relevant treaty concerned is "void", this seemingly equal treatment of these substantive grounds of invalidity is not necessarily reflected in the legal consequences of invalidity.[21] Furthermore, even in these cases of a 'genuinely' void treaty (Arts 52, 53 and 64), it is generally necessary that a party invokes invalidity according to Arts 65 and 67 (→ MN 30–35). However, there are some differences in the 'substantive' consequences of a void treaty – and this is spelled out by Art 71 – but these differences are confined to Arts 53 and 64 and do not include Art 52, even though the latter provision also speaks of a "void" treaty. Moreover, an essential – albeit implicit – element of Art 71 is Art 66 lit a, which provides for compulsory jurisdiction of the ICJ in a dispute concerning the application or the interpretation of Arts 53 or 64 (→ MN 30–35).

11 Similar to Art 69, Art 71 does not provide for party autonomy, and the legal **consequences** of a void treaty conflicting with a peremptory norm **are** both **exhaustive** and **mandatory**. This means that the parties to the treaty concerned may not agree on additional or different consequences, nor may they exclude the

[18] UNCLOT I 227 paras 66–67.

[19] See *Orakhelashvili* (n 17) 140–143 extending the argument on absolute versus relative nullity.

[20] Expert Consultant *Waldock* UNCLOT I 227.

[21] See *D Greig* Invalidity and the Law of Treaties (2006) 89.

consequences set out in Art 71.[22] Similarly, pursuant to Art 45, the parties to such a treaty may not expressly or tacitly waive their right to invoke the invalidity of the treaty, which therefore cannot be remedied. The reason behind this strict rule is that a treaty conflicting with a norm of *ius cogens* is a ground of invalidity based not on the interest of individual parties to the treaty, but on the public interest of the international community at large, and this public interest is not subject to the disposition of individual States.

D. Legal Consequences

I. Conflict with Existing *Ius Cogens* (para 1)

1. Duty to Eliminate the Consequences (para 1 lit a)

12 Art 71 para 1 concerns a treaty that has been in conflict with a peremptory norm of general international law from the date of its conclusion. As stated earlier (→ MN 8), the lack of a provision similar to that of Art 69 para 1 is without prejudice to the fact that a treaty invalid pursuant to Art 53 is, like any other invalid treaty, void *ab initio* and its provisions have no legal force. However, the further legal consequences differ from those contained in Art 69. Art 71 para 1 lit a provides that the parties shall **eliminate as far as possible the consequences** of any act performed in reliance on any provision, which conflicts with the peremptory norm of general international law.

13 Contrary to what was advanced by some delegations during the negotiations at the Vienna Conference[23] and what is sometimes argued in the literature,[24] **para 1 does not set forth a rule of international responsibility**. This follows generally from Art 73 that makes it clear that the VCLT does not prejudge any question that may arise in regard to a treaty from the international responsibility of a State (→ MN 5). Moreover, while the commentary to Art 71 is, unlike in case of Art 69 (→ Art 69 MN 4),[25] silent on the question of responsibility, the rule is essentially the same as that contained in Art 69 para 2 lit a, and there seems no

[22] See however *TO Elias* Problems Concerning the Validity of Treaties (1971) 134 RdC 333, 408, who seems to imply that the parties may agree to maintain rights, obligations or situations created by a treaty before it became void by a new peremptory norm of general international law.

[23] See *eg* the statement by the representative of Italy UNCLOT I 450, stating that Art 71 para 1 lit a "seemed to trespass beyond the present convention into the realm of State responsibility, which was explicitly excluded by [Art 73]" and that "it should therefore be removed". Similarly the representative of the United Kingdom UNCLOT I 449 argued that Art 71 para 1 lit a, "since it involved reparations, was concerned with a question of State responsibility which did not fall within the purview of a convention on the law of treaties".

[24] *CL Rozakis* The Concept of jus cogens in the Law of Treaties (1976) 135–136 n 66; *F Crépeau/R Côté* in *Corten/Klein* Art 71 MN 25. See also *Villiger* Art 71 MN 4.

[25] Final Draft, Commentary to Art 65, 264 para 1.

reason to treat these provisions differently in this respect. To be sure, in many, if not most, instances, the application of Art 71 para 1 will yield the same result as that of the rules of State responsibility, and the **consequences** of Art 71 para 1 will be **assimilated to** those of **State responsibility** even more closely than in case of 'ordinary' invalidity under Art 69. Furthermore, while a ground of invalidity leading to the application of Art 69 does not necessarily also constitute a breach of international law (→ Art 69 MN 35), the situation is different with regard to a treaty conflicting with a norm of *ius cogens*. Here, the relevant norm of *ius cogens* itself prohibits the conclusion of the treaty in which case such a conclusion invariably amounts to a breach of international law. However, dogmatically, the bases of the relevant rules are different, and cases may be envisaged where their application leads to different consequences.

14 What para 1 lit a stipulates is that the **nullity** of a treaty conflicting with a norm of *ius cogens* operates ***ab initio*** and thus has **retroactive effect**. Its purpose is to extinguish the *a priori* unlawful legal situation. While this rule is **mandatory**, the effects of nullity are limited in two ways. First, the parties are obliged to eliminate the consequences of the operation of the treaty only "**as far as possible**", and second, the effects of nullity are limited to **those provisions** of the void treaty, **which in fact conflict with the relevant peremptory norm**. Both aspects raise a number of questions, which will be dealt with in turn.

15 The proviso "**as far as possible**" is **unclear** as Art 71 para 1 lit a does not say whether it covers only factual impossibility or whether it extends also to cases of legal impossibility. The elimination of the consequences of a void treaty may factually be prevented by **material impossibility**. While it is true that – similar to the rules of State responsibility – where the restitution of the *status quo ante* is not possible, restitution by equivalent (especially compensation) may take its place.[26] However, to say that the case of material impossibility itself is not possible or that the extinction of the consequences of a legal act can always be achieved[27] is not correct. Breaches of peremptory norms may in extreme situations produce results that cannot be eliminated at all.

> To give such an extreme example: if two States conclude a treaty in which they agree to eliminate an ethnic group, the treaty no doubt is void under Art 53. If they factually succeed in 'implementing' the treaty, an elimination of the consequences of any act performed in reliance on the treaty is simply impossible and cannot be achieved either by restitution in its strict sense or by equivalent forms, such as compensation.

16 *Rozakis* provides a different interpretation according to which Art 71 para 1 lit a leaves "untouched certain acts or situations, which were produced as a result of the operation of the illegal treaty".[28] He however adds that it is unclear what these acts or situations could be and that any answer to this question must be left to the further development by jurisprudence in the future.

[26] *Rozakis* (n 24) 132; *F Crépeau/R Côté* in *Corten/Klein* Art 71 MN 27.
[27] *Rozakis* (n 24) 131.
[28] *Ibid* 132.

17 **Legal impossibility** means that the party is prevented by legal norms to wipe out the consequences of the operation of the treaty. If this legal norm is one of domestic law, the case will be one of material impossibility, similar to the situation of restitution in the law of State responsibility, which requires the wrongdoing State to provide for juridical restitution as well.[29] The situation is more complex in case of an international norm that prevents the effective elimination of the consequences that have been effected in applying the void treaty. However, that juridical restitution may generally be called for also in relation to a conflicting norm of international law is generally recognized in the law of State responsibility.[30]

This idea was in principle affirmed by the ICSID tribunal in *Micula et al v Romania*,[31] albeit not in the context of invalidity but ordinary responsibility. In that case, Romania argued that juridical restitution was "essentially impossible" because to require Romania to reinstate an old regulatory regime on investments would likely breach its obligations under the TEC.

18 As in case of Art 69, the **general rules of derogation** (*lex specialis* and *lex generalis*) may serve as a starting point to decide on the prevalence of the obligation under Art 71. Yet, in many cases of this kind, the only possibility of solving such a conflict would be to consider the obligation in Art 71 para 1 as possessing **higher derogatory force** than the (other) international obligation that is the cause for this legal impossibility. This would also be in line with the general idea of *ius cogens* and the corresponding rules on serious breaches of obligations under peremptory norms of general international law in the law of State responsibility.[32]

19 The **second aspect** of Art 71 para 1 lit a is that the duty to eliminate the consequences of the application of a treaty void under Art 53 is confined to those that were taken pursuant to "any provision which conflicts with the peremptory norm of general international law". Art 53 establishes an overarching regime, according to which the entire treaty is void even if only a single provision conflicts with a norm of *ius cogens* (→ Art 53 MN 57). Art 71 para 1 lit a alleviates the otherwise strict consequences of Art 53 by providing that the parties are not required to eliminate the consequences of any act carried out in implementing those provisions of the treaty that are compatible with *ius cogens*. This aspect of leniency is also important given the inseparability of treaty provisions in case of Art 53 (see Art 44 para 5).[33]

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[29]The exception to the obligation of restitution in Art 35 ILC Articles on State Responsibility is confined to material impossibility only, see Art 35 lit a and commentary to Art 35 of the ILC Articles on State Responsibility (n 5) para 5.

[30]*Ibid.*

[31]ICSID *Micula et al v Romania* (Jurisdiction and Admissibility) Case No ARB 05/20, 24 September 2008, paras 166–168.

[32]See in particular Art 41 ILC Articles on State Responsibility (n 5).

[33]See the discussion in *J Sztucki* Jus cogens and the Vienna Convention on the Law of Treaties [1974] ZÖR Supp 3, 148–149, who argues that the relationship between Arts 44 and 71 reveals three inconsistencies and that, in particular, the proviso "any provision which conflicts with the peremptory norm of general international law" in Art 71 para 1 lit a leads to a limited separability

2. Duty to Bring Mutual Relations in Conformity with *Ius Cogens* (para 1 lit b)

Art 71 para 1 lit b concerns the general duty of the parties to bring the mutual legal relations in conformity with the norms of *ius cogens*. Here, the '**community aspect**' of Art 53 is evident. Unlike the consequences in cases of 'ordinary' invalidity, which are concerned with balancing the strictly mutual relations between the parties, Art 71 para 1 lit b aims to ensure that the law in its objective sense is observed. The general thrust of this provision is that the **integrity and uniformity of the community norm is maintained** and that the value protected by this norm is safeguarded. The concept of *ius cogens* as a reflection of **international public order** invariably prohibits non-conformity with peremptory norms, and this also applies to all the consequences of a treaty conflicting with *ius cogens*. This is after all the key element of Art 71 para 1, and para 1 lit b thus contains a more general rule than that set forth in para 1 lit a. This was made clear by the ILC in its commentary when it emphasized that Art 53 entailed a special case of nullity: **20**

> "The question which arises in consequence of the invalidity is not so much one of the adjustment of the position of the parties in relation to each other as of the obligation of each of them to bring its position into conformity with the rule of *jus cogens*."[34]

This 'objective' legal situation as the ultimate yardstick to determine what measures have to be taken in consequence of Art 53 is also the reason why **aspects of good faith play no role** in the context of Art 71 (→ MN 26). A party concluding a treaty that conflicts with a norm of *ius cogens* cannot claim to have acted *bona fide* in applying, executing, and implementing the treaty as, unlike in case of deficient consent, there is no party deserving or requiring protection. Art 71 para 1 lit b thus is a general saving clause bringing all consequences of the void treaty within the ambit of Art 71, which para 1 lit a might leave unaffected.[35] By requiring the parties to bring "their mutual relations" in conformity with *ius cogens*, Art 71 para 1 lit b seems to insinuate that Art 71 is not restricted to the consequences arising from the void treaty, but to broaden its scope beyond treaty law. However, while this would no doubt be in line with the general purpose of the concept of *ius cogens*, it would clearly lie outside the scope not only of Art 71, but of the Convention generally. Thus, Art 71 para 1 lit b only covers those acts, including unilateral acts, which are related to the void treaty, such as reservations, denouncement, withdrawal, or amendment.[36] **21**

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of treaty provisions, albeit "with respect to the consequences of past acts only". On the issue of separability see → MN 28–29 below.

[34]Final Draft, Commentary to Art 67, 266 para 1.

[35]*Rozakis* (n 24) 135. In terms of drafting the current order of paras 1 and 2 is therefore puzzling and the importance of the consequences would indicate the reverse.

[36]*K Ipsen* Völkerrecht (2005) 190.

II. Conflict with *Ius Cogens Superveniens* (para 2)

1. In General

22 Art 64 is located in Part V, Section 3, concerning termination and suspension of the operation of treaties, but the fact that a treaty conflicts with a new peremptory norm of general international law is a hybrid reason by which a treaty comes to an end. On the one hand, the treaty is **void** because it is incompatible with *ius cogens*; on the other hand, the treaty **terminates** because it has existed validly from the time of its conclusion until the emergence of the new peremptory norm. This twin nature of Art 64 is also reflected in Art 71 para 2 concerning the consequences of a treaty conflicting with a new norm of *ius cogens*. While para 2 lit a provides that the termination brings to an end the obligation to perform the treaty, para 2 lit b governs the consequences of any legal situation established in application of the treaty. Despite this formally hybrid character, "[t]he wording of Article 71, paragraph 2, confirms that, in the case of treaties conflicting with a new rule of *jus cogens*, we are confronted with a ground of *termination* and not of nullity".[37] This is the reason why Art 64 is located in Part V, Section 3, of the VCLT that deals with termination and suspension.

23 Thus, since the ground of conflict with a new peremptory norm is a case of termination, the effects of para 2 generally operate ***ex nunc*** and **not retroactively**. However, the termination of the treaty must be established by applying the procedures of the VCLT (→ MN 30–35), and since this may take a considerable period of time, there will in practice be some kind of retroactive effect of the consequences of Art 71 para 2 between the time of the treaty's termination by operation of the law (*ie* the emergence of the new peremptory norm) and the establishment of such termination by application of the procedure of the Convention.[38]

24 Practice on Art 71 para 2 is virtually not existing. While reference is occasionally made to Art 64, there has to date not been a single case where Art 71 para 2 was applied by an international court or tribunal.

> In *Aloeboetoe et al v Suriname*, the Inter-American Court of Human Rights in an *obiter dictum* addressed a treaty of 1762 to which the Inter-American Commission had referred to and which concerned *inter alia* the taking of and trading in slaves. The Court refused to assess the treaty which "would today be null and void because it contradicts the norms of *jus cogens superveniens*".[39]

[37] *I Sinclair* The Vienna Convention on the Law of Treaties (1984) 225 (emphasis original).

[38] *Rozakis* (n 24) 147.

[39] IACtHR *Aloeboetoe et al v Suriname* (Reparations (Art 63(1) of the American Convention on Human Rights)) Ser C No 15, para 57 (1993).

2. Release from Obligation of Further Performance (para 2 lit a)

Art 71 para 2 lit a provides that termination on account of a new peremptory norm puts an end to the parties' obligation to apply and perform the treaty. This aspect of Art 71 para 2 is a logical corollary of a new peremptory norm as a ground for terminating a treaty and is identical to Art 70 para 1 lit a,[40] since technically, this situation pertains to the termination of the treaty rather than its nullity.[41] On the face of it, Art 71 para 2 lit a does not produce results differing from those of Art 70 para 1 lit a, and the legal consequences of 'regular' termination and those of termination under Art 64 are therefore essentially the same, hence the considerations and comments made in the context of termination also apply here (→ Art 70 MN 21–23). **25**

3. Legal Situation Created by the Treaty (para 2 lit b)

Art 71 para 2 lit b provides that the conflict with a new peremptory norm leaves unaffected any legal situation, including any right or obligation, of the parties established through the execution of the treaty prior to its termination. However, if and to the extent that the maintenance of these legal situations is in itself in conflict with the new peremptory norm, then they become void by the emergence of this new peremptory norm. Again, like in case of Art 53 and Art 71 para 1, considerations of **good faith** are **not important** (→ MN 21),[42] as none of the parties deserves protection. **26**

Art 71 para 2 lit b limits the continuing validity of legal situations created under the treaty to those acts that have already been completed and generally does not cover those that have been performed while the treaty is valid but that continue to exist after the treaty has become void.[43] However, this will certainly depend on the particular nature of the act concerned and other circumstances, and a restrictive approach is generally called for. For Art 71 para 2 lit b requires that any legal consequence, *ie* any right, obligation or legal situation, arising under a treaty void pursuant to Art 64 be reconcilable with the new peremptory norm. *Gaja* gives the example that damages for breach of the treaty that later becomes void could still be due, whereas "other forms of reparation are no longer applicable if they involve an action or omission which is contrary to the new peremptory norm".[44] **27**

[40] *G Gaja* Jus cogens Beyond the Vienna Convention (1981) 172 RdC 271, 291.

[41] *P Daillier/M Forteau/A Pellet* Droit international public (2009) 235.

[42] See however *Elias* (n 22) 409, stating that "[i]t will be generally agreed that acts, which have been performed in good faith in reliance on a treaty considered by the parties to be valid at the time, do not become illegal by reason of the fact that the treaty is subsequently shown to be invalid". It is submitted that this consequence applies irrespective of whether the parties acted in good faith, provided of course that it is compatible with the new norm of *ius cogens*.

[43] *Elias* (n 22) 409.

[44] *Gaja* (n 40) 291–292.

III. Severability

28 Art 44 para 5 expressly excludes the severability of treaty provisions in case of invalidity under Art 53. This is the strict sanction of the *ius cogens* regime that punishes in its totality any treaty in conflict with it.[45] This was made clear by the ILC in its commentary to Draft Art 41, where the Commission responded to heavy criticism voiced from within:

> "The Commission [...] took the view that rules of *jus cogens* are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of *jus cogens*, the treaty must be considered totally invalid. In such a case it was open to the parties themselves to revise the treaty so as to bring it into conformity with the law; and if they did not do so, the law must attach the sanction of nullity to the whole transaction."[46]

It is debatable whether the reference to the possibility of the parties to "revise" the void treaty entitles them to delete the tainted provisions, but to maintain the rest of the treaty in force.[47] This result would however be contrary to both the clear wording of Art 44 para 5 and the object of Art 53. The ILC obviously considered the possibility that the parties conclude a revised but new treaty.

29 The case is different with regard to Art 64, and a separation of the provisions compatible with *ius cogens* from those being in conflict with peremptory norms is permissible, on condition that all other criteria of Art 44, notably para 3 lit a and b, are met. This distinct treatment of severability of Art 53 and Art 64 was expressly approved of by the ILC.[48]

> In the *Aloeboetoe* case mentioned above (→ MN 24), however, the Inter-American Court of Human Rights implicitly considered a treaty that had become incompatible with a new norm of *ius cogens* as null and void in its entirety, although only individual provisions were tainted with invalidity and those relevant for deciding the case were not affected and could have been easily separated.[49]

E. Procedure

I. Applicability of Arts 65–68

30 As already stated (→ MN 8), Art 71 does not contain a general clause similar to that in Art 69 para 1 or Art 70 para 1 where the respective introductory phrases

[45] *Rozakis* (n 24) 124 and *id* The Law on Invalidity of Treaties (1974) 16 AVR 150, 172, emphasizing the purpose of "penalization of the parties to an illegal treaty for their wrongdoing". Similarly *F Crépeau*/*R Côté* in *Corten*/*Klein* Art 71 MN 35.

[46] Final Draft, Commentary to Art 41, 239 para 8.

[47] This is argued by *Sztucki* (n 33) 148. See also *Gaja* (n 40) 285.

[48] Final Draft, Commentary to Art 61, 261 para 3.

[49] IACtHR *Aloeboetoe v Suriname* (n 39) paras 55–57.

("invalidity [. . .] which is established under the present Convention", "termination [. . .] in accordance with the present Convention") *inter alia* imply a reference to Art 65 (→ Art 69 MN 41, Art 70 MN 35). In doctrine it is argued that to consider institutional determination as a precondition for voiding a treaty under Art 53 "is to undermine its regime of nullity".[50] It is true that the requirement of establishing nullity under Arts 53 and 64 pursuant to the procedure of the VCLT mitigates the strict consequences of *ius cogens*, and the fact that Art 71 is a "special provision"[51] to Arts 69 and 70 that would possibly constitute a derogating *lex specialis*,[52] might on the face of it rule out the possibility of reading the requirement of applying the procedure of Arts 65 and 66 also into Art 71.

However, Art 71 seems supplemental or complimentary to Art 69, rather than derogating Art 69 entirely.[53] Also, contextually Art 71 no doubt comes within the purview of Art 65,[54] which requires any party intending to invalidate or terminate a treaty to set in motion a procedure by notifying the other parties of its claim. In particular Art 65 para 1 does not distinguish as to its scope between the various grounds of invalidity or termination and refers expressly to a party invoking "either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty", the latter proviso no doubt describing the invocation of Arts 53 and 64. Furthermore, Art 66 lit a expressly refers to invalidity under Arts 53 and 64, and since the procedure of Part V Section 3 of the Convention consists of a coherent body of rules, they are designed to be applied to any case of invalidity, whatever the ground.[55] Similarly, Art 42 clearly confirms this approach. Thus Art 42 para 1 also distinguishes between "validity" and "consent to be bound", both of which "may be impeached only through the application of the present Convention". The phrase "application of the present Convention" does not, as suggested by some authors,[56] merely refer to the substantive grounds of invalidity (and termination, respectively), but relates to the articles as a whole, including the legal consequences of nullity.[57] **31**

[50] *Orakhelashvili* (n 17) 142.

[51] Final Draft, Commentary to Art 65, 265 para 4; Final Draft, Commentary to Art 66, 266 para 6.

[52] *Sztucki* (n 33) 145, who however discards such a reading. But see *Orakhelashvili* (n 17) 141.

[53] See *R Jennings/A Watts* Oppenheim's International Law Vol I (9th edn 1992) 1295 footnote 3, arguing that Art 71 "would seem to apply in addition to the provisions of Art 69".

[54] *Sztucki* (n 33) 145–146; *Rozakis* (n 45) 171; *id* (n 24) 109–115; *W Graf Vitzthum* Völkerrecht (2004) 62.

[55] *Gaja (n* 40) 285; *M Schröder* Treaties, Validity in MPEPIL (2008) MN 23.

[56] *Nicoloudis (n* 17) 113; *Orakhelashvili* (n 17) 141.

[57] This was put beyond any doubt by the Final Draft, Commentary to Art 39, 237 para 4: "The phrase 'application of the present articles' used in both paragraphs refers, it needs to be stressed, to the draft articles as a whole and not merely to the particular article dealing with the particular ground of invalidity or termination in question in any given case. In other words, it refers not merely to the article dealing with the ground of invalidity or termination relevant in the case but also to other articles governing the conditions for putting that article into effect". See also the statement by Expert Consultant *Waldock* UNCLOT I 226–227.

32 This result is also supported by teleological reasons. The purpose of this procedural limitation is to make it more difficult to challenge the validity of treaties in general, to preclude, as far as possible, arbitrary and unfounded assertions of invalidity by individual parties,[58] and to encourage the friendly settlement of disputes on the matter.[59] Furthermore, in the decentralized order of international law considerations of legal certainty and stability require resort to a predetermined procedure,[60] especially in such a sensitive area as that of *ius cogens*, which ought to be applied and interpreted in a uniform and consistent manner.

33 As a consequence, invalidity under Arts 53 and 64 is not automatic, but must be established by the dispute settlement procedures of the VCLT.[61] And under Art 66 lit a, it is the ICJ that eventually decides on the nullity of a treaty on account of a conflict with a norm of *ius cogens*.

In this context, *Gaja* gives an example which illustrates the danger of undermining that monopoly. He refers to General Assembly Resolution 34/65 B of 29 November 1979,[62] which stipulates that the Camp David agreements "have no validity". *Gaja* suggests that "the conflict with *jus cogens* being the most likely cause for the agreements to be declared void".[63]

II. Invocation

34 A further procedural question in the context of implementing invalidity under Arts 53 and 64 and its consequences under Art 71 is who is entitled *ratione personae* to invoke the invalidity of a treaty conflicting with a norm of *ius cogens*. This question is again answered by Art 65, according to which only a "party" may invoke a ground for impeaching the validity of a treaty. The term "party" is defined in Art 2 para 1 lit g as "a State which has consented to be bound by the treaty and for

[58] See the Final Draft, Commentary to Art 62, 262 para 1: "[T]he Commission considered it essential that the present articles should contain procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty may be arbitrarily asserted as a mere pretext for getting rid of an inconvenient obligation."

[59] *Rozakis* (n 24) 110; *Gaja* (n 40) 285. See also *Orakhelashvili* (n 17) 140, who however discards the argument as "sin[ning] against the clear wording of the Vienna Convention" (*ibid* 141), unfortunately without giving any indication as to such "clear wording".

[60] *K Zemanek* The Legal Foundations of the International System, RdC 266 (1997) 9, 97; id The Metamorphosis of *Jus Cogens* From an Institution of Treaty Law to the Bedrock of the International Legal Order? in *E Cannizzaro* (ed) The Law of Treaties Beyond the Vienna Convention (2011) 381, 389.

[61] This is also the majority view in the doctrine, see *eg Sztucki* (n 33) 146; *Rozakis* (n 45) 171; *id* (n 24) 109–115, 144; *E Jiménez de Aréchaga* International Law in the Past Third of a Century (1978) 159 RdC 1, 59; *W Czaplinski/G Danilenko* Conflicts of Norms in International Law (1990) 21 NYIL 3, 10; *JA Frowein* Collective Enforcement of International Obligations (1987) 47 ZaöRV 64, 77; *id* Ius cogens in MPEPIL (2009) MN 9.

[62] UNGA Res 34/65 B, 29 November 1979, UN Doc A/RES/34/65.

[63] *Gaja* (n 40) 282.

which the treaty is in force". Accordingly, only parties to the treaty affected with nullity under Arts 53 or 64 may invoke nullity, and this argument seems again to be the majority view in the doctrine, even though it is difficult to reconcile with the very notion of *ius cogens* that aims to protect elementary values of international society that are of concern to all the members of that society, in particular the States.[64]

Yet, this is not to say that an international court or tribunal other than the ICJ may not refuse to apply a treaty on account of the latter's incompatibility with *ius cogens*. It is hardly conceivable that an international court does not review the voidness of a treaty, either upon party initiative or *ex officio* if there is good reason to assume the incompatibility of a treaty with *ius cogens*. **35**

Thus, as already stated, in the *Aloeboetoe* case (→ MN 24) the Inter-American Court of Human Rights considered a slavery treaty as null and void under a new peremptory norm of general international law. With regard to invocation it said: "No treaty of that nature may be invoked before an international human rights tribunal."[65]

In *Prosecutor v Kallon and Kamara*, the Appeals Chamber of the Special Court for Sierra Leone had to consider a challenge to its jurisdiction caused by an amnesty accord. The issue was that under Art 10 Statute of the Special Court, this amnesty accord was not a bar to prosecution. In considering its jurisdiction and the objections made thereto, the Court stated: "That this court will normally not claim jurisdiction to exercise a power of review of a treaty or treaty provisions on the ground that it is unlawful seems evident, except, perhaps in cases where it can be said that the provisions of Article 53 or Article 64 of the Vienna Convention on the Law of Treaties apply."[66] And further: "This court cannot question the validity of Article 10 of its Statute on the ground that it is unlawful unless it can be shown that, in the terms of Article 53 or Article 64 of the Vienna Convention or of customary international law it is void. That has not been shown in this case."[67]

[64]See the detailed discussions in *Sztucki* (n 33) 125–132 and *Rozakis* (n 24) 115–122. See also *Gaja* (n 40) 283; *C Tomuschat* Obligations Arising for States Without or Against Their Will (1993) 241 RdC 195, 363; *Aust* 322; *MN Shaw* International Law (6th edn 2008) 944–945; *G Dahm/J Delbrück/R Wolfrum* Völkerrecht Vol I/3 (2nd edn 2002) 714. *Contra Orakhelashvili* (n 17) 142–143. *A Cassese* International Law (2005) 177 admits that under the VCLT "only a party to the defective treaty may invoke its consistency with *jus cogens*", but argues "that the *customary* rules corresponding to the Vienna Convention's provisions on invalidity of treaties should be interpreted to the effect that *any State concerned*, whether or not party to the treaty, may invoke *jus cogens*" (emphases original). However, *Cassese* unfortunately does not disclose the foundations for the establishment of such "customary rules". As to the customary nature of Art 71 see below → MN 36–37.

[65]IACtHR *Aloeboetoe v Suriname* (n 39) para 57.

[66]Special Court for Sierra Leone *Prosecutor v Kallon and Kamara* (Appeals Chamber) (Decision on Challenge to Jurisdiction: Lomé Accord Amnesty) SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), 13 March 2004, para 61.

[67]*Ibid* para 62.

F. Customary Status

36 At the time of the conclusion of the Convention, the regime of peremptory norms including the legal consequences no doubt was progressively developed and did not reflect existing customary law.[68] Until to date, Art 71 (like Arts 53 and 64) has been a norm never applied in practice, and therefore it is impossible to say whether it has attained customary status. In essence, the situation will be similar to that prevailing in the context of 'ordinary' invalidity (→ Art 69 MN 43). Thus the absence of practice may indicate that there has been, and still is, no customary rule to the effect of Art 71,[69] even though the concept of *ius cogens* is occasionally invoked or referred to in practice (→ MN 35).

37 On the other hand, it may well be presumed that an international court or tribunal, when faced with a case of a treaty conflicting with a peremptory norm of general international law, will apply Art 71 as a rule of customary law if the case does not come under scope of the Convention, even if this rule cannot properly be confirmed by practice and *opinio iuris*. For reasons of practicability, it will be difficult – and for reasons of legal certainty it might even be unwarranted – for such a court or tribunal to establish an applicable customary rule that would differ from that of Art 71.

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Id The Concept of jus cogens in the Law of Treaties (1976).
J Sztucki Jus cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal [1974] ZÖR Supp 3.

[68] The debates and the vote on Art 71 VCLT testify to this situation (→ MN 7). Thus *Gaja* (n 40) 279 stated still in 1981: "The [. . .] attitude on the part of many States makes it impossible to maintain that the provisions in the Convention relating to peremptory norms correspond to the existing law on the subject." See also *Sinclair* (n 37) 17, *Ipsen* (n 36) 175, and *Schröder* (n 55) MN 24, who describes the rules of Art 71 as being "of a pioneering character".

[69] *F Crépeau/R Côté* in *Corten/Klein* Art 71 MN 9. But see *Villiger* Art 71 MN 11, stating that "it is most likely that Article 71 crystallized into customary law only after is adoption in Vienna in 1969", without however providing any indication for such customary status. See also *Cassese* (n 64).

Article 72

Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

Contents

A. Purpose and Function

Suspension is the **temporary interruption of the treaty relations** and its legal effects. Suspension is a reaction to obstacles to the performance of a treaty. It has less infringing effects on a treaty, and therefore is a less radical measure, than termination[1] and may be resorted to in every case where termination is permissible. Since suspension is only a temporary measure, it does not affect the existence of the treaty and implies that the application, operation and performance of the treaty are resumed once the reason for suspension does no longer exist. **1**

Like Art 70 (→ Art 70 MN 3), Art 72 is guided by the principle of **party autonomy**, which takes on a double nature. First, the parties may either agree *ad hoc* on the consequences of suspension, or they may have done so *a priori* by inserting a special provision on the matter in the treaty itself. Secondly, the treaty may also contain specific provisions on when and how it may be suspended ("under its provisions"); absence such provisions, the grounds for suspension and the **2**

[1] *MM Gomaa* Suspension or Termination of Treaties on Grounds of Breach (1996) 135.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
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procedural rules under the Convention apply ("in accordance with the present Convention"; → MN 22).

3 In regulating the effects of suspension, Art 72 distinguishes between the **existence and validity of the treaty,** which remain **unaffected** by suspension, and the **actual operation** of the treaty, which is **suspended**.[2] Furthermore, suspension also means that given its temporary nature, the parties shall not carry out any acts that would prevent them to resume the operation of the treaty, which implies an obligation of **good faith**.

4 Since the VCLT establishes an 'open regime', Art 72, like Arts 69–71, does not touch the question of **State responsibility**, which is reserved by Art 73, but concerns only the direct consequences of the suspension of the operation of the treaty.[3] Absent specific rules on the matter, issues of responsibility that may arise out of the suspension of a treaty are governed by the ILC Articles on State Responsibility.[4] Art 72 is also without prejudice to the consequences of suspension as a consequence of war or armed conflict, which are excluded by operation of Art 73 as well (→ Art 70 MN 6).[5]

5 Finally, concerning the scope of Art 72, mention must also be made of Art 43, which provides for the evident rule that the suspension of the operation of a treaty "shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty". This also corresponds to Art 38, according to which a treaty rule may become binding upon a third State as a rule of customary international law.

B. Historical Background and Negotiating History

6 Prior to the VCLT, the question of suspension, let alone its legal consequences, was not an issue either in theory or practice. Even during the drafting of the Convention, the question as to the legal effects of suspension was raised at a very late stage, which of course is partly due to the contextual location of the issue of suspension.[6] As is well known, current Art 72 is mainly owed to *Shabtai Rosenne*'s initiative in the ILC in 1963. In a comment on SR *Waldock*'s second report, *Rosenne* said that "he was becoming more and more convinced that it would be a great step forward in the development of the law of treaties if the Commission could deal more thoroughly with suspension" and "that the Commission might finally decide to

[2] *F Capotorti* L'extinction et la suspension des traités (1971) 134 RdC 417, 468.

[3] Final Draft, Commentary to Art 68, 267 para 1.

[4] Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/RES/56/83 (2001). The text of the Articles and commentaries thereto are included in ILC Report 53rd Session, UN Doc A/56/10 (2001).

[5] See *eg* the *ICAO Council* case between India and Pakistan (→ MN 15, n 23), in which the suspension allegedly was a consequence of the outbreak of hostilities.

[6] In his second report, SR *Waldock* was only concerned with the legal consequences of termination without addressing those of suspension, see *Waldock* II 91 (Draft Art 28).

transfer all, or as many as possible, of the provisions on suspension to one or two separate articles on that subject".[7]

As a consequence, the Drafting Committee introduced a new Draft Art 29 on "legal consequences of the suspension of the application of a treaty",[8] whose content essentially conformed to present Art 72. As the Drafting Committee stated, it "had come to the conclusion that as questions of substance were involved the matter should be dealt with in a separate article rather than among the definitions".[9] At the Vienna Conference, Draft Art 68 was only subject to minor changes[10] and was adopted by 108 votes to one, with one abstention.[11] **7**

C. Elements of Article 72

An essential element of Art 72 is its reference to **party autonomy**.[12] The VCLT leaves it generally to the parties of the particular treaty not only to agree on the reason of suspension, *eg* by including in the treaty itself a relevant provision, or otherwise by consent (→ Art 57); it also authorizes the parties to agree on the consequences of suspension, irrespective of the particular ground of such suspension. Thus, party autonomy may be exercised either in advance by including a specific provision on the consequences of suspension, or any time by special agreement between the parties once the treaty is suspended. In general, treaties do not contain specific provisions on the consequences of suspension, but leave their determination to the general rules of Art 72. **8**

A rare example is the 1969 Agreement for Cooperation between the United States of America and the Republic of Austria Concerning Civil Uses of Atomic Energy[13] which provides in Art XII para B that in case of termination or suspension by the United States on account of breach by Austria, the United States may require the return of any materials, equipment and devices explicitly mentioned.

Constituent treaties of international organizations at times include special provisions concerning the suspension of specific rights, in which case the suspension performs punitive functions not envisaged in Art 72.[14] **9**

The best-known example of such a provision is Art 19 UN Charter providing for the suspension of the right of a Member State to vote in the General Assembly if it is in qualified arrears with the payment of its financial contributions. Similar provisions are

[7] [1963-I] YbILC 242.

[8] *Ibid* 282.

[9] *Ibid*.

[10] See *TO Elias* The Modern Law of Treaties (1974) 207–208.

[11] UNCLOT II 127.

[12] Final Draft, Commentary to Art 68, 267 para 1.

[13] 725 UNTS 183.

[14] *Capotorti* (n 2) 487–488; *P Couvreur*/*C Espaliú Berdud* in *Corten*/*Klein* Art 72 MN 5.

those of Art XIX para A IAEA Statute[15] and Art 5 para 2 UNIDO Constitution.[16] Art 5 UN Charter provides that a Member State against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership. This is also provided for by Art 5 para 1 UNIDO Constitution and Art II para 4 UNESCO Constitution.[17]

10 In addition to referring to the concept of party autonomy, Art 72 contains **several rules** on the consequences of suspension. Similar to Art 70 para 1, Art 72 para 1 first provides that the parties, during the time of suspension, are liberated from their obligation to apply and perform the treaty but that suspension does not otherwise affect the legal relations and situations between the parties established by the treaty. In addition, para 2 does justice to the specific nature of suspension as a temporary measure, by obliging the parties to refrain from any acts that are likely to prevent the resumption of the operation of the treaty after suspension has come to an end.

11 Contrary to Art 70 para 2, Art 72 does not expressly distinguish between bilateral and multilateral treaties and does not establish a distinct rule for the latter. However, the consequences of suspension of multilateral treaties are covered by Art 72 para 1 lit a, where reference is made to the mutual relations of those parties between which the operation of the treaty is actually suspended (→ MN 14).

12 Like Art 70, Art 72 does not itself mention the grounds of suspension but implicitly refers to Part V Section 3 of the Convention on "termination and suspension of the operation of treaties". The phrase "under its provisions or in accordance with the present Convention" not only means that a substantive ground for suspension, either included in the relevant treaty or contained in the VCLT, must be present and that any given procedure under the treaty was respected; it also implies that the procedures in Arts 65–68 must have been followed prior to determining the consequences of termination (→ MN 22).

D. Legal Consequences

I. Release from Obligation of Further Performance (para 1 lit a)

13 Art 72 para 1 lit a provides that suspension transitionally puts an end to the parties' obligation to apply and perform the treaty. Accordingly, the legal consequences of suspension have **non-retroactive effects *ex nunc***. The **situation** here is virtually **identical to** that existing in the case of **termination**, and therefore the considerations made in the context of Art 70 will essentially also apply here (→ MN 70 MN 21–23). The assimilation of this aspect of the consequences of suspension with that of Art 70 para 1 lit a holds the more true as suspension may well turn out to be a permanent condition and thus amounting in fact to termination.

[15] 1956 Statute of the International Atomic Energy Agency 267 UNTS 3.

[16] 1979 Constitution of the United Nations Industrial Development Organization 1401 UNTS 3.

[17] 1945 Constitution of the United Nations Educational, Scientific, and Cultural Organization 4 UNTS 275.

For instance, in 1975 Austria suspended a bilateral treaty concluded with Switzerland in 1875 on account of material breach pursuant to Art 60 VCLT.[18] The operation of this treaty still remains suspended to date.[19]

The reference in lit a to "the parties between which the operation of the treaty is suspended" is meant to cover the consequences of suspension of the operation of multilateral treaties, which are not singled out in Art 72.[20] Thus, the release from the obligation of further performance applies only to those parties between which the suspension has become effective and it affects neither the treaty relations among the other parties to the treaty, nor between them and each of the parties having suspended the operation of the treaty in their mutual relations. **14**

A special case is the suspension of treaties containing a **dispute settlement provision**. Usually, the relevant treaty does not provide for the continuing applicability of such a clause in case of suspension, since specific provisions on the consequences of suspension are generally rare (→ MN 8). However even absence such a provision, dispute settlement clauses will remain operative also in case of suspension,[21] as it is the general idea of such clauses that they apply precisely when *eg* the legality of suspension or the continued operation of the treaty is disputed (→ Art 70 MN 17). The reason for this is even more compelling in the context of Art 72 than of Art 70 because, unlike termination, suspension does not affect the normative force of the treaty but only the performance, application, and operation of its provisions.[22] **15**

In *Appeal Relating to the Jurisdiction of the ICAO Council*, the ICJ had to determine whether the Chicago Convention on International Civil Aviation of 1944, that was, according to India's argument, suspended as between India and Pakistan as a consequence of armed hostilities between the two States, fell within the phrase of Art 36 para 1 ICJ Statute concerning its jurisdiction under "treaties or conventions in force" between the parties to the dispute. The Court held: "Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested."[23]

[18] *P Fischer/G Hafner* Aktuelle Praxis zum Völkerrecht (1976) 27 ZÖR 301, 344. See also the decision of the Austrian Constitutional Court No B 196/75 (1976) *ibid* 322 and 77 ILR 439–440. For a discussion, see *B Simma* Termination and Suspension of Treaties: Two Recent Austrian Cases (1979) 21 GYIL 74.

[19] See *Villiger* Art 72 MN 3 n 14.

[20] Final Draft, Commentary to Art 68, 267 para 2. The commentary refers to the cases of *inter se* suspension under Art 58 and suspension in case of material breach under Art 60 para 2.

[21] *P Couvreur/C Espaliú Berdud* in *Corten/Klein* Art 72 MN 29.

[22] *Capotorti* (n 2) 467–468.

[23] ICJ *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* [1972] ICJ Rep 46, 53 para 16. The Court's statement continues with the text to be found at → Art 70 MN 17 n 39. The ICJ further elaborated in more detail on this problem *ibid* para 32. See also the separate opinions of Judge Fitzmaurice in *Fisheries Jurisdiction (United Kingdom v Iceland)* [1973] ICJ Rep 23, para 12, and *Fisheries Jurisdiction (Germany v Iceland)* [1973] ICJ Rep 23, para 12.

16 A particular problem of Art 72 para 1 lit a may arise if suspension is resorted to as a response to a material breach of treaty pursuant to Art 60. By discharging both parties from their obligation to continue the performance of the treaty concerned, para 1 lit a "deprives the actions or omissions of the treaty violator *ex nunc* of their illegal character".[24] One way of solving this problem would be to strictly exclude any question of illegality from the considerations in the context of Art 72, leaving it to the law of State responsibility to solve such problems caused by the breach. This, after all, seems to follow already from Art 73 (→ MN 4).

II. Legal Relations Established by the Treaty (para 1 lit b)

17 Art 72 para 1 lit b spells out once more that suspension has **no retroactive effect**. While this is already the situation in case of termination, the case of suspension is even clearer because here, as already mentioned, the legal nexus between the parties established by the treaty remains intact, and it is only the operation of its provisions that is suspended.[25] Crucially, "[t]he concept of 'suspension' which is clearly keyed to a temporary condition, *pre-supposes the continued existence of the treaty*".[26]

> The French Conseil d'État *eg* applied this rule in a case concerning the suspension of a bilateral agreement between France and Morocco exempting Moroccon nationals from visa requirements for visits to France. The suspension was based on a fundamental change of circumstances. The Conseil d'État suspended the operation of the agreement without revoking any visas issued prior to the notification of suspension.[27]

18 In contrast to Art 70 para 1 lit b, which refers to the terms "right, obligation or legal situation", Art 72 para lit b speaks of "legal relations between the parties", and neither this terminological distinction nor the term "legal relations" are explained. However, it would seem that this difference is due to the fact that Art 70 contains in its para 2 a separate provision on the consequences of termination of a multilateral treaty, whereas Art 72 does not make that distinction. Thus "**legal relations**" is an **inclusive term** covering any right, obligation or legal situation established by the treaty, and the effect of this rule will essentially be the same as that of Art 70 para 1 lit b (→ Art 70 MN 25).

19 If a treaty has been **partially executed** by one party and then is suspended, this will produce a result unfavourable and detrimental to this party, particularly if the reason for suspension is a material breach committed by the other party that has not

[24] *B Simma* Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law (1970) 20 ZÖR 5, 55. See also *S Rosenne* Terminaison des traités: rapport provisoire [1967-I] AnnIDI 137, who expresses doubts to what extent Art 72 covers the suspension of a treaty as a consequence of its breach.

[25] Final Draft, Commentary to Art 68, 267 para 3.

[26] *Jurisdiction of the ICAO Council* (n 23) 102 (separate opinion *Dillard*, emphasis original).

[27] Council of State (France) *Prefect of La Gironde v Mahmedi* 106 ILR 204, 213–215 (1992).

yet executed the treaty.[28] Again the considerations made in the context of termination may also be made here (→ Art 70 MN 28). In particular, the principle of unjust enrichment would require equitable adjustments in such case, at least for any advantage or enrichment accrued during the period of suspension. This is also supported by the principle of good faith that is implied in Art 72, especially in para 2 (→ MN 20).

> In the *Fisheries Jurisdiction* cases the ICJ took a similar view when it stated in respect of Iceland's invocation of the *clausula rebus sic stantibus*: "Iceland has derived benefits from the executed provisions of the agreement [. . .]. Clearly it then becomes incumbent on Iceland to comply with its side of the bargain [. . .]. Moreover, in the case of a treaty which is in part executed and in part executory, in which one of the parties has already benefited from the executed provisions of the treaty, it would be particularly inadmissible to allow that party to put an end to obligations which were accepted under the treaty by way of *quid pro quo* for the provisions which the other party has already executed."[29]

III. Obligation Not to Obstruct Resumption of Operation of Treaty (para 2)

20 Since in principle termination is a provisional and transitory measure that should come to an end when its cause has ceased to exist, the parties shall, during the period of effective suspension, remain in a position to take up again their treaty obligations in the future. Art 72 para 2 demonstrates that suspension produces a more complex legal situation in terms of consequences than termination.[30] For unlike the latter, which brings the treaty definitively to an end, suspension by its very nature as a temporary and limited measure requires the parties to abstain from any acts that would prevent them to resume the regular operation of the treaty once the ground or cause of suspension ceases. This implies a **good faith** obligation arising under the principle of ***pacta sunt servanda*** (→ Art 26).

21 Although the wording of para 2 is coined in negative terms ("refrain from acts"), this does not exclude the possibility that the parties may also be required to take positive action in order to prevent the obstruction of the resumption of the operation of the treaty, given the case.[31] It seems that this would in any event follow from the fact that the required act may itself consist of an action or omission.[32] Broadly

[28] *Simma* (n 24) 31.

[29] ICJ *Fisheries Jurisdiction (United Kingdom v Iceland)* (Jurisdiction of the Court) [1973] ICJ Rep 3, 18 para 34; *Fisheries Jurisdiction (Germany v Iceland)* (Jurisdiction) [1973] ICJ Rep 49, 62 para 34.

[30] *Rosenne* (n 24) 137.

[31] *P Couvreur/C Espaliú Berdud* in *Corten/Klein* Art 72 MN 32.

[32] It is legitimate here to draw an analogy to the law of State responsibility where an internationally wrongful act is defined as an act or omission. See Art 2 ILC Articles on State Responsibility (n 4).

speaking para 2 thus prohibits any conduct that would render the renewed operation and application of the treaty subsequent to the cessation of suspension virtually impossible.[33]

E. Procedure

22 According to Art 72 para 1, suspension of the operation of a treaty is conditioned by the fact that it is carried out under the treaty's provisions or "**in accordance with the present Convention**". This provision has two aspects to it, one more substantive, the other more procedural. As regards the former, Art 72 is premised on the existence of a ground for suspension, which may be either one contained in the treaty itself, or absent such special rule, one mentioned in the VCLT. Furthermore, the party invoking a ground for suspension must apply the procedure under Art 65. In case of an objection to suspension, the observations made in the context of termination (→ Art 70 MN 36–37) apply also to the case of Art 72, albeit *mutatis mutandis*.

F. Customary Status

23 With regard to the question of the customary status the comments made in relation to Art 70 (→ Art 70 MN 38–39) are pertinent also in the present context. In 1969, Art 72 was a new provision certainly not reflecting customary law at the time.[34] There is as yet no arbitral or judicial practice discernible on the consequences of suspension. Literature is split on the question, partly arguing that, given the lack of practice, Art 72 has not entered into the body of customary law even subsequent to the adoption of the VCLT.[35] On the other hand, the rules contained in Art 72 were not only readily accepted within the ILC, but generally approved by those governments commenting on former draft Art 54.[36] Furthermore, the overwhelming approval of Art 72 at the Vienna Conference (→ MN 7) and the absence of reservations to Art 72 warrant the assumption of *opinio iuris* in favour of its customary status.[37] Also, the rules laid down in Art 72 seem quite reasonable, and the mere absence of State practice probably is due to the lack of factual opportunities to apply this provision rather than to any objection to the content of the rules. Thus, if occasions might occur in practice in which the Convention is not

[33] As to the discussion at the Vienna Conference on this aspect of para 2 see *Capotorti* (n 2) 469 n 37.

[34] *Ibid* 431; *A Verdross* Die Quellen des universellen Völkerrechts (1973) 93; *Villiger* Art 72 MN 14.

[35] See the balanced discussion in *P Couvreur*/*C Espaliú Berdud* in *Corten*/*Klein* Art 72 MN 5–13, especially at MN 7–10.

[36] *Waldock* VI 57–58.

[37] *P Couvreur*/*C Espaliú Berdud* in *Corten*/*Klein* Art 72 MN 9.

applicable as treaty law, the foregoing considerations render it very likely that Art 72 will be applied also as a rule of customary law.

> In *Prefect of La Gironde v Mahmedi*, for instance, the representative of the French Government referred to Art 72 and argued that the fact that France was not a party to the VCLT was irrelevant because "it merely codifie[d] pre-existent rules and principles of international law".[38]

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F Capotorti L'extinction et la suspension des traités (1971) 134 RdC 417–588.
MM Gomaa Suspension or Termination of Treaties on Grounds of Breach (1996).

[38]Council of State (France) *Prefect of La Gironde v Mahmedi* (n 27) 207 (*Lamy*, Commissaire du Gouvernement). See also ICJ *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* (separate opinion *Jiménez de Aréchaga*) [1972] ICJ Rep 140, para 17.

Part VI
Miscellaneous Provisions

Article 73

Cases of State succession, State responsibility and outbreak of hostilities

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.

Contents

A. Purpose and Function

Art 73 includes a **precautionary reservation,**[1] which leaves room for the ILC to formulate rules on **State succession**, **State responsibility** as well as the effects of **armed conflict** on the law of treaties outside the framework of the VCLT. Especially, the issues of State succession and State responsibility were already under consideration by the ILC so that it was considered necessary not to obstruct or anticipate the outcome of these studies.[2] This was a well-considered pragmatic approach because of which the codification process was not overloaded with **1**

[1] *S Rosenne* Developments in the Law of Treaties (1989) 34.

[2] *Rosenne* (n 1) 34, 63.

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attempts to codify rules in fields of international law in which it has proved to be particularly difficult to identify the applicable customary law.

B. Historical Background and Negotiating History

2 The issue of **State succession** was dealt with in *Waldock*'s second report in 1963. Here, *Waldock* examined points of contact between State succession and termination of treaties. The ILC had already taken up State succession as a separate topic in 1961.[3] Thus, the ILC arrived at the conclusion that "succession in respect of treaties should be dealt with in the context of succession of States, rather than in that of the law of treaties."[4] Likewise, more specific considerations concerning the extinction of one of the parties to a treaty in context of the dissolution of a treaty[5] were discontinued. The ILC

> "considered that it would be very misleading to formulate a provision concerning the extinction of the international personality of a party without at the same time dealing with, or at least reserving, the question of the succession of States to treaty rights and obligations. [. . .] [I]t was thought to be inadvisable to prejudge in any way the outcome of [the study on State succession] by attempting to formulate in the present article the conditions under which the extinction of the personality of one of the parties would bring about the termination of a treaty. If, on the other hand, the question of State succession were merely to be reserved by some such phrase as 'subject to the rules governing State succession in the matter of treaties', a provision stating that the 'extinction of a party can be invoked as terminating the treaty' would serve little purpose."[6]

3 Again, in 1966, *Waldock* raised the argument that a change in the legal personality of a State Party could be a ground for terminating a treaty. The ILC, however, concluded that neither the succession of States in respect of treaties nor the effect of the extinction of the international personality of a State upon the termination of treaties should be dealt with in the VCLT. Thereby, the latter issue was seen as a problem inseparable from State succession, which was examined under a separate agenda.[7] Thus, *Jiménez de Aréchaga* proposed that the "whole question of the effects of State succession on the termination of treaties should be reserved" arguing in favour of a broad saving clause to prevent any misunderstandings as to what could constitute a ground for terminating a treaty.[8]

4 **State responsibility** had been subject to codification efforts since the times of the League of Nations. The ILC itself has examined the issue since 1955 under a

[3] *Waldock* II 38.

[4] Report of the Sub-Committee on State Succession [1963-II] YbILC 260, 261; see also *Rosenne* [1963-II] YbILC 265, 288; *Tabibi* [1963-II] YbILC 285.

[5] *Waldock* II 77–78 (Draft Art 21).

[6] [1963-II] YbILC 206.

[7] [1966-II] YbILC 177.

[8] [1966-I/2] YbILC 297.

separate agenda topic.[9] Still, in its 1964 report, the Commission discussed the relation between the law of treaties and the international responsibility of a State with respect to a failure to perform a treaty obligation, especially the reparation to be made for a breach of a treaty as well as the grounds that may be invoked in justification for the non-performance of a treaty. However, since these matters were considered to be part of the international responsibility of States they were excluded from the codification of the law of treaties.[10]

As a consequence of its considerations on State succession and State responsibility, the ILC inserted Draft Art 69 only in 1966 at the final reading of the draft articles.[11] With the reservation the Commission aimed to "prevent any misconceptions from arising as to the interrelation" between these and the law of treaties: **5**

> "Both these matters may have an impact on the operation of certain parts of the law of treaties in conditions of entirely normal international relations, and the Commission felt that considerations of logic and of the completeness of the draft articles indicated the desirability of inserting a general reservation covering cases of succession and cases of State responsibility. [. . .] The reservation [. . .] is formulated [. . .] in entirely general terms. The reason is that the Commission considered it essential that the reservation should not appear to prejudge any of the questions of principle arising in connexion with these topics, the codification of both of which the Commission already has in hand."[12]

The 1963 Draft did not yet contain any provisions concerning the effect of the **outbreak of hostilities** upon treaties. The ILC acknowledged that **6**

> "this topic raises problems both of the termination of treaties and of the suspension of their operation. The Commission considered that the study of this topic would inevitably involve a consideration of the effect of the provisions of the Charter concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question; and it did not feel that this question could conveniently be dealt with in the context of its present work upon the law of treaties."[13]

In 1966, the pragmatic approach changed to a more principled policy-oriented position. The ILC stressed in its commentary that **7**

> "the state of facts resulting from an outbreak of hostilities may have the practical effect of preventing the application of the treaty in the circumstances prevailing. It also recognized that questions may arise as to the legal consequences of an outbreak of hostilities with respect to obligations arising from treaties. But it considered that in the international law of today the outbreak of hostilities between States must be considered as an entirely abnormal condition, and that the rules governing its legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations

[9] *Rosenne* (n 1) 35.

[10] [1964-II] YbILC 175–176.

[11] [1966-II] YbILC 186 (Draft Art 69: "Cases of State succession and State responsibility"): "The provisions of the present articles are without prejudice to any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State." See also *Rosenne* (n 1) 34.

[12] Final Draft, Commentary to Art 69, 267 para 1, 268 para 3.

[13] [1963-II] YbILC 189.

> between States. Thus, the Geneva Conventions codifying the law of the sea contain no reservation in regard to the case of an outbreak of hostilities notwithstanding the obvious impact which such an event may have on the application of many provisions of those Conventions; nor do they purport in any way to regulate the consequences of such an event. It is true that one article in the Vienna Convention on Diplomatic Relations (article 44) and a similar article in the Convention on Consular Relations (article 26) contain a reference to cases of 'armed conflict'. Very special considerations, however, dictated the mention of cases of armed conflict in those articles and then only to underline that the rules laid down in the articles hold good even in such cases. The Vienna Conventions do not otherwise purport to regulate the consequences of an outbreak of hostilities; nor do they contain any general reservation with regard to the effect of that event on the application of their provisions. Accordingly, the Commission concluded that it was justified in considering the case of an outbreak of hostilities between parties to a treaty to be wholly outside the scope of the general law of treaties to be codified in the present articles; and that no account should be taken of that case or any mention made of it in the draft articles."[14]

8 During the Vienna Conference, the expression "are without prejudice" was replaced with the term "shall not prejudge" in order to harmonize the different language versions.[15] The provision was adopted by 100 votes to none.[16]

C. Elements of Article 73

I. The Provisions of the Present Convention Shall Not Prejudge Any Question That May Arise in Regard to a Treaty

9 Art 73 makes clear that the VCLT does not address all issues pertinent to treaty law. It includes an express reservation relating to the legal impact that State succession, State responsibility and the outbreak of hostilities may have on treaties between States Parties.[17]

10 The question whether a State continues to be bound by a treaty in cases of State succession or armed conflict is thus determined by the **specific rules of each regime** and – in principle – not by the VCLT,[18] although subject to the specific circumstance **Part V** may still be applicable (→ MN 23, 31–34, 44, 61–64). While the effects of armed conflict on the law of treaties as well as State succession with respect to treaties are special fields of application of treaty law, **State responsibility** constitutes a different branch of international law, not only concerned with treaties but also with other obligations arising from international law. Here, Art 73 is an important indication for determining whether the law of State responsibility and the

[14] Final Draft, Commentary to Art 69, 267–268 para 2.

[15] UNCLOT I 484.

[16] UNCLOT II 127.

[17] *Villiger* Art 73 MN 11.

[18] *R Provost* in *Corten/Klein* Art 73 MN 1.

law of treaties are complementary with a view to material breaches, countermeasures and reparation (→ MN 29–34).

II. Succession of States

1. Concept

Succession of States means "the replacement of one State by another in the responsibility for the international relations of territory".[19] Forms of State succession include **cession**, **dismemberment**, **incorporation**, **merger** of existing States and **decolonization**. State succession and State continuity are mutually exclusive concepts. State continuity describes situations in which a State preserves its legal identity despite significant changes concerning its internal constitutional structure or its territory or population.[20] In cases of State succession concerning treaties the law must address the problem whether and to what extent the successor State is bound by the treaties of its predecessor.[21] The identification of applicable customary international law rules proves to be particularly difficult since the conditions of each case of State succession differ considerably involving sensitive political issues due to circumstances dominated by conflict. Interests of the States involved will likewise differ decisively.[22] **11**

2. Customary International Law and the 1978 Vienna Convention on the Succession of States in Respect of Treaties

Historically, there are numerous cases of State successions, including the independence of the United States in the eighteenth century and of the former Spanish colonies in the nineteenth century. Moreover, several cases of unification took place in the nineteenth century, above all those of Germany and Italy. However, because of new developments in the law, this early practice is of lesser value for the identification of customary international law.[23] **12**

In the years after World War II, the decolonization process revealed diverging understandings of the basic principles of State succession culminating in the failure **13**

[19] Art 2 para 1 lit b of the 1978 Vienna Convention on the Succession of States in Respect of Treaties 1946 UNTS 3; Art 2 para 1 lit a of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts UN Doc A/CONF.117/14.C.N.358; Art 2 lit a ILC Articles on Nationality of Natural Persons in Relation to the Succession of States, UNGA Res 55/153, 12 December 2000, UN Doc A/RES/55/153; see also the decision of the arbitral tribunal in the *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* 83 ILR 1, para 31 (1989).

[20] *A Zimmermann* State Succession in Treaties in MPEPIL (2006) MN 1; see *M Craven* The Problem of State Succession and the Identity of States under International Law (1998) 9 EJIL 142.

[21] *I Brownlie* Principles of International Law (7th edn 2008) 649.

[22] *Aust* 369; *Zimmermann* (n 20) MN 4.

[23] *Aust* 367; *Zimmermann* (n 20) MN 3.

of the 1978 **Vienna Convention on the Succession of States in Respect of Treaties**.[24] A major point of dispute was the question whether the clean slate principle was applicable to former colonies, the so-called '**newly independent States**'. As a consequence of this principle, newly independent States would not be bound by any treaty of their predecessors. This stood in contrast to the hypothetical principle of universal succession according to which treaty relations are principally upheld. Thus, the principle of universal succession protects the interests of third States.[25] The Convention did not enter into force before 1996 with only 22 States Parties in 2010. It probably failed due to the perception of many States that the interests of newly independent States benefitted disproportionately from the Convention.[26] Moreover, by 1978 the period of decolonization had basically ended and it was doubted whether the Convention codified modern customary international law in relation to other aspects of State succession, such as the dismemberment of States.[27] Thus, State succession is mainly regulated by **customary international law**. Here, the increase in State practice after the end of the Cold War due to the dissolution of the USSR, the former Yugoslavia and Czechoslovakia[28] as well as the reunification of Germany[29] and Yemen contributed to the formation of at least some accepted rules and principles.[30]

3. Applicable Customary Law Principles

14 The following legal principles appear to be agreed upon in State practice:

15 In cases of treaties directly related to the **political interests of the predecessor State**, such as treaties of alliance, a successor is not automatically bound. The treaty will only remain in force if the third State agrees to it.[31]

16 In cases of **border treaties** and other **treaties establishing a territorial regime** State practice, international jurisprudence as well as Arts 11 and 12 Vienna

[24] 1946 UNTS 3. See on the Convention *DP O'Connell* Reflections on the State Succession Convention (1979) 39 ZaöRV 725; *M Craven* The Decolonization of International Law: State Succession and the Law of Treaties (2010).

[25] *Zimmermann* (n 20) MN 5, 12; see *P Dumberry*/*D Turp* La succession d'États en matière de traités et le cas de succession (2003) 36 RBDI 377–412.

[26] *Zimmermann* (n 20) MN 3.

[27] *Aust* 368; see also *P Eisemann*/*M Koskenniemi* (eds) State Succession: Codification Tested Against the Facts (2000).

[28] *M Bothe*/*C Schmidt*, Sur quelques questions de succession posées par la dissolution de l'URSS et celle de la Yougoslavie (1992) 96 RGDIP 811–842; *H Hamant* Démembrement de l'URSS et problèmes de succession d' Etats (2007); *R Müllerson* The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia (1993) 42 ICLQ 473–493; *B Stern* La Succession d'Etats (1996) 262 RdC 9–437.

[29] See *K Hailbronner* Legal Aspects of the Unification of the Two German States (1991) 1 EJIL 18; *S Oeter* German Unification and State Succession (1991) 51 ZaöRV 349–383.

[30] *Aust* 367; *Zimmermann* (n 20) MN 3 *et seq*; see *J Crawford* State Practice and International Law in Relation to Secession (1998) 69 BYIL 85; *A Zimmermann* Staatennachfolge in Verträge (2000).

[31] *Aust* 369.

Convention on State Succession in Respect of Treaties confirm that a State succeeds to these treaties *ipso iure*. Automatic succession serves the interests of the international community in legal security since it protects the stability and inviolability of boundaries. In contrast to border treaties, however, the automatic succession to localized treaties is disputed in literature.[32]

> In the *Gabčíkovo-Nagymaros Project* case the ICJ held that Art 12 Vienna Convention on State Succession in Respect of Treaties reflects a rule of customary international law and that "treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties." Thus, the Court concluded that Slovakia succeeded to the disputed 1977 Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks.[33]

17 According to the practice of human rights bodies, successor States remain bound by **human rights obligations** agreed to by their predecessors. Thus, the Human Rights Committee has argued that

> "[t]he rights enshrined in the Covenant belong to the people living in the territory of the State Party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State Party, including dismemberment in more than one State or State succession or any subsequent action of the State Party designed to divest them of the rights guaranteed by the Covenant."[34]

This has been contested as a politically motivated view not based on State practice. Instead it is claimed that successor States are only bound by those human rights, which are customary international law.[35] Indeed, State practice seems to be at least ambiguous.[36] Moreover, the ICJ has circumvented the issue in the *Genocide* case. In its 1996 decision on the preliminary objections, the Court could assume that Yugoslavia was a State Party to the Genocide Convention since it had expressed its will to remain so. Moreover, for the purposes of the case under consideration, it was sufficient for the ICJ to stress "that it has not been contested that Yugoslavia was party to the Genocide Convention."[37]

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[32] *Zimmermann* (n 20) MN 13 *et seq*; see however *Brownlie* (n 21) 663; see also *S Rosenne* Automatic Treaty Succession in J Klabbers (ed) Essays on the Law of Treaties (1998) 97–106.

[33] ICJ *Gabčíkovo–Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, para 123; see *J Klabbers* Cat on a Hot Tin Roof (1998) 11 LYIL 345–355.

[34] Human Rights Committee, General Comment No 26: Continuity of Obligations, 8 December 1997, UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1; see also *M Kamminga* State Succession in Respect of Human Rights Treaties (1996) 7 EJIL 469; *R Müllerson* The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia (1993) 42 ICLQ 473, 490 *et seq*; *Zimmermann* (n 20) MN 15.

[35] *Aust* 371.

[36] *Zimmermann* (n 20) MN 15.

[37] ICJ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595, paras 17–23; see however the separate opinion of Judge *Weeramantry* [1996] ICJ Rep 640 *et seq*.

> In the *Čelebići* case the ICTY Appeals Chamber argued in favour of automatic succession to human rights treaties as a rule of customary international law: "The Appeals Chamber notes that the practice of international organisations (UN, ILO, ICRC) and States shows that there was a customary norm on succession *de jure* of States to general treaties, which applies automatically to human rights treaties."[38] Thus, the Chamber concluded that "irrespective of any findings as to formal succession, Bosnia and Herzegovina would in any event have succeeded to the Geneva Conventions under customary law, as this type of convention entails automatic succession, *ie* without the need for any formal confirmation of adherence by the successor State. It may be now considered in international law that there is automatic State succession to multilateral humanitarian treaties in the broad sense, *ie* treaties of universal character which express fundamental human rights."[39]

18 Human rights treaties guarantee rights to individuals. They aim to protect the individual from the State. Legal uncertainty on the applicability of human rights treaties would undermine this purpose. Moreover, in case of automatic succession to human rights treaties, there are no direct (political) interests of third parties involved that could be infringed since these treaties basically address the relationship between a State and its inhabitants. Considering that State succession often takes place in a conflict-ridden environment, automatic succession is all the more important in cases of human rights treaties as well as **treaties on international humanitarian law**.

19 There is no automatic succession in relation to the **membership in international organizations**. In cases of dismemberment or separation, the successor State has to apply for admission as a new member according to the uniform practice of international organizations, especially after the Cold War. In cases of legal continuity, however, membership is inherited.[40]

> While the Russian Federation as legally identical with the USSR continued the latter's membership in the UN, the former Yugoslavia, whose claim for legal continuity of the Socialist Federal Republic of Yugoslavia was not accepted by the international community, had to apply for membership like the other successor States.[41]

20 In cases of **cession of territory**, such as with regard to Hong Kong, Macau or the Walvis Bay, the '**moving boundary principle**' is applicable.[42] On the basis of this principle, the treaties of the predecessor are no longer in force on the ceded territory. In contrast, treaties of the successor will automatically be expanded to the acquired territory. The same applies when a **State** is **incorporated into another State**. The treaties of the incorporating State will be applied to the territory of the incorporated State. The treaties of the latter, however, will cease to be in force if the

[38] ICTY *Prosecutor v Delalić et al* (Appeals Chamber) IT-96-21-A, 20 February 2001, para 110 n 132.

[39] *Ibid* para 111; see however *A Rasulor*, Revisiting State Succession in Humanitarian Treaties: Is There a Case for Automaticity? (2003) 14 EYIL 141–170.

[40] *K Bühler* State Succession and Membership in International Organization (2001), 115 *et seq*; *Zimmermann* (n 20) MN 15.

[41] *Bühler* (n 40) 151 *et seq*, 180 *et seq*; *Aust* 375, 379.

[42] Art 15 Vienna Convention on the Succession of States in Respect of Treaties (n 19).

parties concerned do not reach a different agreement. A significant exception is **localized treaties,** which will remain in force. A pertinent example is the German reunification of 1990. In contrast, in the case of the 1990 union of the Republic of Yemen and the People's Democratic Republic of Yemen, which constituted a **merger** of two States,[43] treaties remained in force with regard to the territory to which they applied before the union.[44]

21 In view of the lack of clear and uniform customary international law rules, in practice, States concerned conclude **devolution agreements** on the basis of which the treaties of the predecessor will bind the successor State.[45] However, these agreements do not deal with the interest of third states and thus might infringe the *pacta tertiis* principle. In the case of multilateral treaties, there is also the practice to issue a **unilateral declaration** to the depositary. Thereby, the successor State endorses its succession to the multilateral treaty. Still, the validity of such a declaration will be subject to the requirements that a treaty may stipulate for accession. Moreover, only a specific declaration expressly stating the treaties concerned may bring about the consequence of succession. A general declaration without any specification will not suffice.[46]

4. Relation Between the VCLT and the Rules on State Succession

22 State succession may affect several issues of the VCLT, including **reservations** (→ Arts 19–23) or **relations to third States** (→ Arts 34–37). Although the continuing applicability of a treaty depends on the rules of State succession, there might still be room to apply Part V, *eg* in cases where a substantial loss or gain of territory may have an effect on a State's **capability to fulfill its treaty obligations**.[47]

III. International Responsibility of States

1. Concept

23 The rules on State responsibility prescribe the conditions according to which States will be held responsible for attributable violations of their international legal obligations and the consequences that such breaches entail.[48] Apart from questions

[43] Art 31 Vienna Convention on the Succession of States in Respect of Treaties (n 19).

[44] *Aust* 370; *Zimmermann* (n 20) MN 8.

[45] *Brownlie* (n 21) 664.

[46] *Zimmermann* (n 20) MN 6 *et seq*.

[47] *Villiger* Art 73 MN 12.

[48] *M Schröder* Verantwortlichkeit, Völkerstrafrecht, Streitbeilegung und Sanktionen, in *W Graf Vitzthum* (ed) Völkerrecht (5th edn 2010) MN 4.

of reparation, the rules on State responsibility also deal with the prerequisites of permissible reactions to international wrongful acts.

24 The rules on State responsibility are part of customary international law. In principle, they are laid down in the ILC's Articles on Responsibility of States for Internationally Wrongful Acts adopted in 2001. The Articles are not in themselves legally binding but only insofar as they represent customary international law since they are only included in an annex to a Resolution of the UN General Assembly and have not been codified as an international convention.[49]

25 The 2001 Articles are based on the long-standing rule of customary international law that every internationally wrongful act of a State entails the international responsibility of that State.[50] According to Art 2 there is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to the State under international law and constitutes a breach of an international obligation of that State. The prerequisites of attribution are included in Chapter II. In principle, the conduct of State organs or others who have acted under the direction, instigation or control of those organs is attributable but not the acts of private individuals.[51] According to Art 12, there is a breach of an international obligation by a State when an act of that State is not in conformity with the obligation owed, regardless of its origin or character.[52] The 2001 Articles on State Responsibility also provide for rules on complicity[53] and circumstances precluding wrongfulness for breaches of international obligations, such as force majeure (Art 23), distress (Art 24) and necessity (Art 25).

26 Legal consequences of the commission of an internationally wrongful act entail on the one hand an immediate duty of cessation as well as non-repetition[54] and on the other hand a duty to make reparation.[55] According to the Articles, a State responsible for an internationally wrongful act must continue to perform the obligation breached (Art 29), cease the wrongful act and offer guarantees of non-repetition (Art 30) because the primary obligation under international law continues to be in force regardless of its breach and the legal relationship affected by the

[49]UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83. For the history of codification, see *J Crawford* The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect (2002) 96 AJIL 874.

[50]Art 1 Draft Articles; PCIJ *The Factory at Chorzów (Claim for Indemnity)* (Merits) PCIJ Ser A No 17, 47 (1928).

[51]*J Crawford* State Responsibility in MPEPIL (2008) MN 18.

[52]On the question whether fault and damage are necessary prerequisites for incurring responsibility, see *J Crawford*/*S Olleson* The Nature and Forms of International Responsibility in *M Evans* (ed) International Law (3rd edn 2010) 457 *et seq*; see also *O Diggelmann* Fault in the Law of State Responsibility - Pragmatism ad infinitum (2006) 496 YIL 293–305.

[53]See *H Aust*/*G Nolte* Unequivocal Helpers – Complicit States, Mixed Messages and International Law (2009) 58 EJIL 1.

[54]ICJ *LaGrand (Germany v United States)* [2001] ICJ Rep 466, para 124.

[55]*Crawford* (n 51) MN 24.

breach must be restored.[56] If any injury is caused by the act, the States must make full reparation for the damage, whether material or moral (Art 31). There are three different forms of reparation provided for: restitution, compensation and satisfaction (Art 34).

Special consequences result from serious breaches of obligations under preemptory norms of general international law: States are obliged to co-operate to put an end to the breach and there is a duty of third States not to recognize the consequences of such a breach as lawful (Art 41). In addition, according to Art 48 (2) (b) of the 2001 Articles, every State is entitled to invoke responsibility for breaches of *erga omnes* obligations[57] so that States may act in the interest of the international community where collective goods or the common welfare are concerned. With this regime, the ILC aimed to circumvent the disagreement about the concept of international crimes of States as an element of State responsibility.[58] **27**

The 2001 Articles also deal with the question what States are entitled to do when an international wrongful act occurs. Here, the articles distinguish between injured States and other States (Arts 42 and 48) that may invoke responsibility in cases of the violation of an *erga omnes* norm. According to Art 43 of the 2001 Draft Articles, the injured State may choose between the different forms of reparation, while non-injured States may claim cessation, assurances and guarantees of non-repetition and performance of the obligation of reparation in the interest of the injured State or of other beneficiaries (Art 48 para 2). If the responsible State refuses cessation or reparation, the injured State is entitled to take countermeasures (Art 49) subject to certain specific conditions such as the requirement of proportionality. **28**

2. Relation Between the VCLT and the Rules on State Responsibility

The relation between the VCLT and the rules on State responsibility is explicitly regulated in Art 30 para 5, Art 73 and the Preamble of the VCLT. While Art 73 delineates the relation between the VCLT and the rules on State responsibility in a general way Art 30 para 5 contains a more specific rule[59] according to which the rules on successive treaties with diverging States Parties are without prejudice "to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty" (→ Art 30 MN 29–32). Thus, para 4 of Art 30 only clarifies the reciprocal rights and duties of certain States Parties in a **29**

[56] *Crawford/Olleson* (n 52) 463.

[57] See on the concept *C Tams* Enforcing Obligations erga omnes in International Law (2005).

[58] *Crawford* (n 51) MN 32 *et seq*, 46; see on State responsibility and international crimes *eg JHH Weiler* International Crimes of States: A Critical Analysis of the ILC's Draft Article on Art 19 on State Responsibility (1989); *S Rosenne* State Responsibility and International Crimes (1997/1998) 30 New York University JILP 145; *G Gaja* State Responsibility: Should All References to International Crimes Disappear from the ILC Draft Articles on State Responsibility? (1999) 10 EJIL 365.

[59] *PM Dupuy* Droit de traités, codification et responsabilité internationale (1997) 43 AFDI 12, 15.

particular situation as between themselves. A State may still incur international responsibility for the breach of treaty obligations towards another State under another treaty by entering into a treaty that conflicts with the former treaty. The infringed State may terminate the treaty according to the rules of the VCLT or invoke State responsibility.[60] This is also in line with the Preamble. It provides that the rules of customary international law will continue to govern questions not regulated by the provisions of the VCLT leaving room for the application of the law of State responsibility, which is still a matter of customary law.

30 A **clear separation** between the two regimes of international law is also envisaged under the law of State responsibility.[61] According to Art 12 of the ILC Articles, there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.[62] The rule guarantees a uniform application of the law of State responsibility regardless of the origin of the infringed norm.[63] Thus, the commentary to the ILC Articles concludes:

> "There is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, *ie* for responsibility arising *ex contractu* or *ex delicto*. In the *'Rainbow Warrior'* arbitration, the tribunal affirmed that 'in the field of international law there is no distinction between contractual and tortious responsibility'.[64] As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility."[65]

31 Despite the rules delimitating both regimes of international law, there are numerous **overlaps** that have given rise to considerable legal dispute about the relation between the two branches of international law. In particular, the relation between **Part V** of the VCLT and the law of State responsibility is disputed in view of the concepts of **nullity**, ***force majeure*** as well as **termination** or **suspension**.[66] Thus, the grounds for nullity included in Arts 49–53 VCLT will themselves all constitute an internationally wrongful act entailing the international responsibility of a State. To declare a treaty null and void will consequently not only serve to guarantee free consent but might also be part of the required reparation to re-establish the situation that existed before the wrongful act was committed (Arts 31,

[60] *Aust* 228 *et seq*.

[61] *Dupuy* (n 59) 16.

[62] Draft Articles on Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83.

[63] *R Provost* in *Corten/Klein* Art 73 MN 10.

[64] *Difference between New Zealand and France Concerning the Interpretation or Application of Two Agreements Concluded on 9 July 1986 between the Two States and Which Related to the Problems Arising from the 'Rainbow Warrior' Affair (New Zealand v France)* (1990) 20 RIAA 217, para 75.

[65] [2001-II/2] YbILC 55.

[66] *Dupuy* (n 59) 17.

34, 35 ILC Articles on State Responsibility).[67] There has also been the proposition, *eg* by New Zealand in the *'Rainbow Warrior'* case,[68] that the question of **reparation for a violation of a treaty obligation** must be determined by the law of treaties alone. A further field of intersection is the law of **countermeasures**. Here, the relation between Art 60 VCLT and Art 22 as well as Arts 49–54 Articles on State Responsibility needs to be determined.[69] Like the law of State responsibility, Art 60 VCLT regulates the consequences of a breach of an international obligation, namely a treaty. The article takes a restrictive approach by requiring a material breach. Does this article therefore exclude the possibility for a State to justify the non-performance of a treaty obligation as a lawful reaction to a material (or non-material) breach of a treaty obligation under the law of State responsibility?

The circumstance precluding wrongfulness according to the ILC Articles on **32**
State Responsibility would not provide an excuse for non-performance if the relation between the two fields of law could be perceived as one of *lex specialis* with the consequence that the rules of the VCLT would take precedence over the law of State responsibility.[70] This view could be based on Art 42 VCLT according to which the validity of a treaty may be impeached only through the application of the Convention. Moreover, the termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty. Art 42 could be read as a kind of normative monopoly of the VCLT, which would be justified by the aim to guarantee legal security and stability of treaty relations, which is the predominant object of Part V of the Convention.[71] Otherwise, there would seem to be a contradiction between Art 42 and Art 73 VCLT, which could only be resolved by subjecting one provision to the other.[72] Accordingly, the prerequisites of Art 60 (material breach) and Art 61 VCLT are more restrictively framed than their corresponding norms under the law of State responsibility. Thus, the "degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by Art 61 VCLT for termination on grounds of supervening impossibility."[73]

[67] *R Provost* in *Corten/Klein* Art 73 MN 12. A further problematic overlap might be seen in the relationship between Art 23 of the ILC Draft Articles on *force majeure* and the rules on a supervening impossibility of performance according to Art 61 VCLT.

[68] 'Rainbow Warrior' Affair (n 64) para 73.

[69] *R Provost* in *Corten/Klein* Art 73 MN 16–17; *Dupuy* (n 59) 15.

[70] See *D Bowett* Treaties and State Responsibility in Mélanges M. Virally (1991) 137, 138 *et seq*; *Dupuy* (n 59) 17; *LA Sicilianos* The Relationship between Reprisals and Denunciation or Suspension of a Treaty (1993) 4 EJIL 341 *et seq*.

[71] *Dupuy* (n 59) 15.

[72] See *ibid* 22.

[73] Second Report of SR *Crawford*, 16 March 1999, UN Doc A/CN.4/498, para 257; see also *R Lefeber* The Gabčíkovo-Nagymaros Project and the Law of State Responsibility (1998) 11 LJIL 609, 612.

33 International jurisprudence and practice speak in favour of complementarity. Courts have argued on the basis of the understanding that non-performance as a countermeasure may be a lawful reaction to a breach of a treaty. Courts have taken the position that it is the law of State responsibility, which determines whether the termination or suspension of a treaty not in line with the VCLT constitutes an internationally wrongful act.[74] Likewise, the appropriate reparation will be determined by the law of State responsibility. This position is also accepted by the ILC itself.[75]

> In the *'Rainbow Warrior'* case the arbitral tribunal held: "for the decision of the present case, both the [. . .] Law of Treaties and the customary Law of State Responsibility are relevant and applicable. [. . .] [C]ertain specific provisions of customary law in the Vienna Convention are relevant in this case, such as Article 60, which gives a precise definition of the concept of a material breach of a treaty [. . .]. On the other hand, the legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent) and the appropriate remedies for breach, are subjects that belong to the customary Law of State Responsibility. The reason is that the general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation. [. . .] The conclusion to be reached on this issue is that, without prejudice to the terms of the agreement which the Parties signed and the applicability of certain important provisions of the Vienna Convention on the Law of Treaties, the existence in this case of circumstances excluding wrongfulness as well as the questions of appropriate remedies, should be answered in the context and in the light of the customary Law of State Responsibility."
>
> In the *Gabčíkovo-Nagymaros Project* case the ICJ argued in favour of complementarity: "The two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of state responsibility. [. . .] [E]ven if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but – unless the parties by mutual agreement terminate the Treaty – it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives. [. . .] [I]t is only a material breach of the treaty itself, by a State Party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties."[76]

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[74] *Air Services Agreement of 27 March 1946 (United States v France)* 18 RIAA 416 (1979); ICJ *Gabčíkovo-Nagymaros Project* (n 33) paras 84 *et seq*.

[75] *J Crawford/S Olleson* The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility (2001) 21 AYIL 55, 57.

[76] ICJ *Gabčíkovo–Nagymaros Project* (n 33) paras 47, 101, 106.

34 If a State Party violates a treaty, the injured party may on the one hand rely on the **remedies under the VCLT**, in particular termination, withdrawal and suspension, and on the other hand avail itself of the **remedies under the law of State responsibility**, such as cessation of the wrongful act, assurances and guarantees of non-repetition as well as reparation including satisfaction, restitution in kind and compensation.[77] The relation between the two fields of law cannot be understood in terms of speciality. For the concept of *lex specialis* to apply, both rules must have a common sphere of application.[78] Although Art 60 VCLT seems to blur the difference between primary and secondary rules[79] because according to its title, it seems to qualify as a secondary norm under international law just like the law of State responsibility,[80] both concepts serve different purposes. The instruments of the VCLT react to cases in which the breach of a treaty obligation infringes the reciprocal treaty relations in a manner that the other party can no longer be expected to perform the treaty. Thus, it is concerned with the long-term future treaty relationship between the parties of treaty following a material breach of the treaty. In cases of countermeasures, the injured party aims to prompt the other party to comply with its international law obligations. Countermeasures also allow a State to obtain reparation for an internationally wrongful act.[81] While in case of a termination, the whole treaty becomes legally invalid, in case of countermeasures not even the legal validity of the obligation concerned is affected.[82] Moreover, the drafting history of the VCLT speaks in favour of complementarity. SR *Waldock* excluded most aspects of treaty performance from the scope of the VCLT. Consequently, the Convention concentrates on the conclusion, content and termination of treaties. This seems to imply that Art 73 leaves questions of performance to the realm of State responsibility.[83] This interpretation can also be backed by the special characteristics of the international order. Countermeasures are an important alternative to the remedies available under the VCLT because they allow for an effective and swift response to breaches of a treaty obligation. The procedural requirements for termination or suspension of a treaty according to Arts 65 *et seq* VCLT lead to lengthy processes of peaceful settlement. Given the decentralized structure of the international order still lacking comprehensive obligatory forms of jurisdiction, self-help measures are still decisive. Moreover, reparation may not be a sufficient

[77] *Aust* 362.

[78] ILC Report of the Study Group on the Fragmentation of International Law, Finalized by *M Koskenniemi*, 13 April 2006, UN Doc A/CN.4/L.682, paras 68 *et seq*; *H Krieger* A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study (2006) 11 Journal of Conflict and Security Law 265, 270.

[79] *M Fitzmaurice*/*O Elias* Contemporary Issues in the Law of Treaties (2005) 146; see in general *U Linderfalk* State Responsibility and the Primary-Secondary Rules Terminology (2009) 78 NJIL 53–72.

[80] See *Dupuy* (n 59) 22.

[81] *Lefeber* (n 73) 611.

[82] *MN Shaw* International Law (6th edn 2008) 794.

[83] *Crawford*/*Olleson* (n 75) 60.

remedy for not enforcing a treaty obligation.[84] In the words of *Gerald Fitzmaurice*: "treaties are merely a particular form of international obligation, and there is in principle no reason why breaches of them should entail general consequences that breaches of other international obligations [. . .] do not."[85]

IV. Outbreak of Hostilities

35 Despite the somewhat idealistic reasoning of the ILC in its Final Draft (→ MN 7) and irrespective of changing concepts of war, the question how the impact of armed conflicts on treaties shall be dealt with remains. Under the classical notion of war, the question had to be answered whether war as a legal concept entailed the legal consequence that all treaty relations were severed. Although the legal concept of war has no longer been applied after World War II, armed conflicts persist. Thus, the question remains whether treaties are (also) automatically terminated at the outbreak of an armed conflict. Moreover, the specific factual conditions of an armed conflict might affect the application of general treaty law. Thus, a further question arises whether general treaty law, *eg* on the procedural requirements of termination, needs to be modified.

1. Definition

36 Neither the ILC Commentary nor the Vienna Conference provided for a definition of the words "outbreak of hostilities". However, from the ILC commentary to what is now Art 73, it can be inferred that the phrase is used to describe "[a] state of facts [which] may have the practical effect of preventing the application of the treaty in the circumstances prevailing [and] that questions may arise as to the legal consequences of an outbreak of hostilities with respect to obligations arising from treaties."[86]

37 The term "hostilities" "refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy."[87] This encompasses, above all, acts of violence causing injury to human beings or destruction of property through means and methods of warfare.[88] The term is commonly used in treaties regulating situations of international and non-international armed conflict.[89]

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[84] *Aust* 363.

[85] *G Fitzmaurice* The Law and Procedure of the International Court of Justice (1985) 6.

[86] Final Draft, Commentary to Art 69, 267 para 2.

[87] *ICRC* (ed) Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2009) 43.

[88] *Y Dinstein* The Conduct of Hostilities under the Law of International Armed Conflict (2nd edn 2010) 1.

[89] See *eg* Art 1 of the 1907 Hague Convention (III) Relative to the Opening of Hostilities; Section II of the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex; Art 3 para 1 Geneva Conventions I–IV; Art 17 Geneva Convention I, Art 33 Geneva

However, Art 73 only aims to deal with international armed conflicts, since it refers to outbreak of hostilities between States.

The text does not take up the traditional approach, which dealt with the effects of war on treaties. Consequently, the notion "outbreak of hostilities" reflects the **"shift away from the traditional concept of war"**, which took place after World War II. This shift is characterized by a lack of formal declarations of war, a prohibition on the use of force under the UN Charter and the qualification of armed conflicts without authorization by the Security Council as legitimate self-defense or humanitarian intervention.[90] **38**

Modern studies of the topic have chosen the more common concept of **armed conflict** to replace the concept of outbreak of hostilities. This approach appears to be appropriate because the notion of hostilities is more restricted than the understanding of 'armed conflict'. Not all conduct during an armed conflict is part of hostilities. As laid down in Art 2 Geneva Conventions I–IV, there might even be armed conflicts without any hostilities in case of a declaration of war or an occupation of territory without armed resistance.[91] Still, such an occupation of territory may affect the application of treaties.[92] Consequently, the first report of ILC Special Rapporteur *Lucius Caflisch* proposed a definition of armed conflict in line with a well-accepted definition of armed conflict under international humanitarian law. Also, for the purposes of treaty law, armed conflict may be defined as "a situation in which there has been a resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups."[93] **39**

While the VCLT does explicitly not deal with **non-international armed conflict**, the new draft articles start from the idea that the rules on the effect of armed conflicts on treaties must also cover non-international armed conflict. The approach has been criticized by China, which argues that the mandate of the ILC is restricted by the wording of Art 73, which only refers to inter-State conflicts.[94] However, as SR *Caflisch* stated correctly, the article does not rule out to deal with issues that have so far not been taken into account under a different agenda topic.[95] To the contrary, given the growing number of civil wars around the world, it seems appropriate to include the effect of domestic hostilities on treaties because non- **40**

Convention II; Section II and Art 21 para 3, Art 67, 118–119 Geneva Convention III; Art 49 para 2, Arts 130, 133–135 Geneva Convention IV; Arts 33–34, 40, 43 para 2, Arts 45, 47, 51 para 3, Arts 59–60 Additional Protocol I and Part IV Section I Additional Protocol I; Arts 4 and 13 para 3 Additional Protocol II; Art 3 paras 1–3 and Art 4 Protocol on Explosive Remnants of War.

[90] *J Delbrück* War, Effects on Treaties (2000) 4 EPIL 1371.

[91] *ICRC* (n 87) 41.

[92] See also ILC Report 60th Session, UN Doc A/63/10 (2008), 91.

[93] First Report of SR *Caflisch*, 22 March 2010, UN Doc A/CN.4/627, para 21 with reference to ICTY *Prosecutor v Tadić* (Appeals Chamber) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1, 2 October 1995, para 70.

[94] Statement of China, UN Doc A/C.6/63/SR.17, para 53.

[95] First Report of SR *Caflisch* (n 93) para 25.

international armed conflicts might influence the conditions for performance of a treaty as much as international armed conflicts do. At the same time, this approach reflects the increase in the willingness of States to deal with non-international armed conflicts on the international level since the 1960s.

> During the civil war in Suriname the Netherlands suspended all bilateral treaties in 1982.[96] In 1998, the United States suspended its Peace Corps programme during the civil war in Guinea-Bissau because the fighting in the capital between rebels and government troops affected the treaty.[97]

2. The Role of State Practice

41 The rules on the effects of armed conflicts on treaties are **highly controversial** under international law.[98] It seems safe to say that no general rule of customary international law exists regulating treaties in times of armed conflict.[99] The evaluation of today's State practice appears to be difficult. The factual conditions of armed conflicts vary considerably so that it appears to be difficult to create rules covering all conceivable situations. As a consequence, there is a **lack of uniform State practice**. Moreover, it is apparently difficult to assess current State practice because judicial procedures only commence after a significant lapse of time in the aftermath of an armed conflict.[100] Thus, the assessment of State practice after World War II is particularly problematic.

> In 1983, the government of the United Kingdom pronounced that the Nootka Sound Convention of 1790 had been terminated in 1795 because of the hostilities between the United Kingdom and Spain during the Napoleonic Wars.[101] In 1977, a UK court ruled on the effects of World War II on the 1927 Convention on the Execution of Foreign Arbitral Awards.[102]

42 The ILC itself illustrated the difficulty that

> "apparent examples of State practice concern legal principles which bear no relation to the effect of armed conflict on treaties as a precise legal issue. For example, some of the modern State practice refers, for the most part, to the effect of a fundamental change of circumstances, or to the supervening impossibility of performance, and is accordingly irrelevant."[103]

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[96](1984) 15 NYIL 321; ILC, The Effect of Armed Conflicts on Treaties, Memorandum by the Secretariat, 1 February 2005, UN Doc A/CN.4/550, para 90.

[97]ILC, Effect of Armed Conflicts on Treaties (n 96) para 110.

[98]*B Broms* Preliminary Report to the Fifth Commission: The Effects of Armed Conflicts on Treaties (1981) 59-I AnnIDI 224, 227.

[99]*Aust* 308; *Delbrück* (n 90) 1369.

[100]ILC, Effect of Armed Conflicts on Treaties (n 96) paras 3, 5.

[101](1983) 54 BYIL 370; see ILC, Effect of Armed Conflicts on Treaties (n 96) para 5.

[102](1976–1977) 48 BYIL 333 *et seq*; ILC, Effect of Armed Conflicts on Treaties (n 96) para 5.

[103]ILC Report 60th Session, UN Doc A/63/10 (2008), 98.

Already **several major studies** have been conducted on the effect of armed conflict on treaties. These include a study by the Institut de Droit International in 1912,[104] the Harvard Research on the Law of Treaties of 1935[105] as well as a further study by the Institut de Droit International with a resolution dating from 1985.[106] In 2004, the UN General Assembly endorsed the decision of the ILC to include in its agenda the topic "effects of armed conflicts on treaties".[107] *Ian Brownlie*, the first Special Rapporteur, framed a first set of draft articles[108] and delivered four reports.[109] In 2008, the ILC adopted draft articles on first reading.[110] By 2010, there is a first report of the second Special Rapporteur *Lucius Caflisch* responding to the comments of States and preparing the second reading.[111] **43**

3. The Effects of Armed Conflicts on Treaties

In current international law, the basic rule on the effect of armed conflicts on treaties stipulates that the outbreak of an armed conflict **does not automatically terminate** a treaty **or suspend** its operation. Accordingly, the basic rule laid down in Art 3 of the 2010 ILC Draft Articles ("Absence of *ipso facto* termination or suspension") runs: **44**

> "The outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties as:
> (a) Between States Parties to the treaty that are also parties to the conflict;
> (b) Between a State Party to the treaty that is also a party to the conflict and a State that is a third State in relation to the conflict."[112]

State practice and scientific studies on the subject reflect that throughout the history of international law, the predominant view on the effect of armed conflict on treaties has changed. The rigid **traditional approach,** which held that war disrupts all legal relations between States including treaty relations, has been superseded by more flexible attitudes. The traditional approach can be explained from two perspectives. On the one hand, it reflects the ideas of natural law philosophers. According to their view, during war time, States return to a natural status of conflict – the *bellum omnium contra omnes* – breaking up the social contract, which does not only exist between individuals but also between States. As a consequence, all legal relations **45**

[104]Effects of War Upon Treaties and International Conventions (1912) 7 AJIL 149.

[105]Harvard Draft 1183–1204.

[106](1985) 61-I AnnIDI 1–27; (1985) 61-II AnnIDI 199–255.

[107]UNGA Res 59/41, 16 December 2004, UN Doc A/RES/59/41, para 5.

[108]First Report of SR *Brownlie*, 21 April 2005, UN Doc A/CN.4/552.

[109]Second Report of SR *Brownlie*, 16 June 2006, UN Doc A/CN.4/570; Third Report of SR *Brownlie*, 1 March 2007, UN Doc A/CN.4/578; Fourth Report of SR *Brownlie*, 14 November 2007, UN Doc A/CN.4/589.

[110]ILC Report 60th Session, UN Doc A/63/10 (2008), 80–135.

[111]See n 93.

[112]First Report of SR *Caflisch* (n 93) para 40.

between States are terminated. This approach is captured in the phrase '*inter armas sileant leges*'.[113] Another explanation is based on medieval practice. The severance of all treaty relations seems to be based on the practice of *diffidatio*.[114] A *diffidatio* was a message of defiance, which dissolves the tie of faith between belligerent parties[115] together with all treaties existing between themselves.[116]

Examples include an announcement of Charles II, King of England and Scotland, to the Scottish Judges that "the treaty of Breda is certainly void by warre" with the Dutch.[117]

46 By the early twentieth century, a **contrasting position** came forward rejecting that war terminated treaties *ipso facto*.[118] This view has been proposed by the Institut de Droit International in 1912[119] and the Harvard Research on the Law of Treaties in 1935.[120] Exceptions are accepted in cases of treaties of alliance and friendship because in such cases, a state of war seems to be incompatible with the essence of a treaty.[121]

The Permanent Court of Arbitration held in the *North Atlantic Coast Fisheries* case of 1910: "International law in its modern development recognizes that a great number of Treaty obligations are not annulled by war, but at most suspended by it."[122]

47 The **modern approach** to the effect of armed conflict on treaties is determined by pragmatic considerations. It aims to protect the stability of treaty relations while acknowledging that in some areas, armed conflict might have such a negative impact on the political and social relations between States that it might also affect the treaties in questions.[123]

4. Criteria for Determining Whether a Treaty Continues to Operate

48 Despite remaining uncertainties, State practice suggests that the susceptibility of a treaty to termination, withdrawal or suspension must be ascertained by way of **interpretation**. If the treaty does not explicitly provide for its applicability in times of armed conflict,[124] the intention of the parties must be derived from an interpretation of the treaty in line with Arts 31 and 32 VCLT thereby taking into account the

[113] *Delbrück* (n 90) 1368; *G Schwarzenberger* Jus pacis ac belli (1943) 37 AJIL 460 *et seq*.

[114] *McNair* 698–702.

[115] *Schwarzenberger* (n 113) 471; *J Westlake* International Law Part II (1913) 8.

[116] *McNair* 698 n 2.

[117] *Ibid* 698: for further UK and US State practice see *ibid* 698–702.

[118] *Delbrück* (n 90) 1369; ILC, Effect of Armed Conflicts on Treaties (n 96) para 15.

[119] (1912) 25 AnnIDI 611; see also (1911) 24 AnnIDI 200.

[120] Harvard Draft 1183–1204.

[121] *Delbrück* (n 90) 1369.

[122] *North Atlantic Coast Fisheries (United Kingdom v United States)* 11 RIAA 167, 181 (1910).

[123] *Delbrück* (n 90) 1369.

[124] See for pertinent State practice on explicit regulations *G Dahm/J Delbrück/R Wolfrum* Völkerrecht Vol I/3 (2nd edn 2002) 759.

nature and extent of an armed conflict as well as the number of parties to the treaty.[125] These criteria are also decisive for deciding on the resumption of the operation of a treaty.[126]

Even more important is the **subject matter** of the treaty. State practice suggests that it is the subject matter of a treaty that determines whether a treaty will remain in force despite of the outbreak of an armed conflict.[127] Consequently, the ILC Draft Articles as suggested by SR *Caflisch* in 2010 include an indicative list of categories of treaties, which continue to operate during an armed conflict. **49**

The list as it was proposed in 2010 is composed of the following categories: **50**

"(a) Treaties relating to the law of armed conflict, including treaties relating to international humanitarian law;
(b) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;
(c) Treaties relating to international criminal justice;
(d) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;
(e) Treaties for the protection of human rights;
(f) Treaties relating to the protection of the environment;
(g) Treaties relating to international watercourses and related installations and facilities;
(h) Treaties relating to aquifers and related installations and facilities;
(i) Multilateral law-making treaties;
(j) Treaties establishing an international organization;
(k) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;
(l) Treaties relating to commercial arbitration;
(m) Treaties relating to diplomatic and consular relations."[128]

However, this list, which shall only be included in an annex, is only indicative. Consequently, other aspects may also be evaluated so that treaties do not remain operable just because they belong to one of these groups. Thus, the list is not exclusive[129] but represents a rebuttable presumption.[130]

Especially Art 5 ILC Draft and the list of treaties have provoked a lot of **criticism**.[131] The broad categorization into different types of treaties is considered as problematic because treaties do not automatically match a certain category. Instead, the United States *eg* has argued in favour of an interpretative approach **51**

[125]Art 4, 7 of the 2008 ILC Draft Articles; see First Report of SR *Caflisch* (n 93) paras 51, 81.

[126]Art 12 as suggested by the First Report of SR *Caflisch* (n 93) para 114.

[127]*Delbrück* (n 90) 1370; ILC, Effect of Armed Conflicts on Treaties (n 96) para 17.

[128]First Report of SR *Caflisch* (n 93) para 70; see also ILC Report 60th Session, UN Doc A/63/10 (2008), 96–124.

[129]First Report of SR *Caflisch* (n 93) paras 53, 65.

[130]Third Report of SR *Brownlie* (n 109) para 34.

[131]See *inter alia* statements by India UN Doc A/C.6/60/SR.18, para 64; Poland UN Doc A/C.6/60/SR.19, para 19; the United Kingdom, UN Doc A/C.6/60/SR.20, para 1 and the United States *ibid* para 34 and UN Doc A/C.6/61/SR.19, para 41.

exclusively based on the will of the parties. For this purpose, criteria should be identified.[132] The criticism does not seem to be justified. Keeping in mind that the list that shall be included in an annex is only indicative, Draft Arts 4 and 5 provide criteria for an assessment of the parties' intention. Here, it is in particular Draft Art 5 that reflects State practice.[133] Thus, major studies of the effect of armed conflict on treaties reflect this approach although the individual categories of treaties may differ.[134]

52 It is a matter of logic that treaties, which aim to regulate the **law of armed conflict,** remain applicable in war time. Given the *ius cogens* nature of most of the rules included in treaties such as the Geneva Conventions, it is doubtful whether these rules may at all be terminated or suspended. This rationale is also applicable in case of treaties concerning **international criminal justice**.

53 Treaties relating to a **permanent regime** will in principle continue to operate because they are concluded in the interest of legal security and thus in the interest of the international community. However, it appears that State practice has accepted an exception in cases where the legal regime concerned is located under the territorial jurisdiction of a belligerent party.[135] The basic reasoning is also applicable in cases of treaties relating to **international watercourses** and related installations and facilities; treaties relating to **aquifers** and related installations and facilities, treaties establishing an **international organization** and treaties relating to the **settlement of disputes** between States by peaceful means, including resort to conciliation, mediation, arbitration and the ICJ. Thus, some studies consider these categories as subcategories of international regimes.[136]

54 The inclusion of **treaties of friendship, commerce and navigation** and analogous agreements concerning private rights reflects uncertainties with identifying categories. Thus, in 1982, *Delbrück* concluded that treaties of friendship and commerce, which require for their operation a political consensus and normal inter-State relations, would be automatically be suspended.[137] Moreover, it appears to be that practice of national courts is not consistent either.[138] However, since this category of treaties often includes regulations concerning private international law as well as private rights and interests, an assumption of their operability in respect

[132]See for the statement of the United States UN Doc A/C.6/60/SR.20, para 34; see also India, UN Doc A/C.6/63/SR.17, para 47; Israel, UN Doc A/C.6/63/SR.18, para 33; Nordic Countries, UN Doc A/C.6/63/SR.16, para 32.

[133]First Report of SR *Caflisch* (n 93) para 56.

[134]*Aust* 309; *Delbrück* (n 90) 1370; *G Fitzmaurice* The Juridical Clauses of the Peace Treaties (1948) 73 RdC 255, 312–317; *WE Hall* International Law (8th edn 1924) 453–459; *McNair* 693–728; *D O'Connell* International Law (2nd edn 1970) 269 *et seq*; Arts 3 and 6 of the IDI Resolution (1985) 61-I AnnIDI 1–27; (1985) 61-II AnnIDI 199–255.

[135]*Delbrück* (n 90) 1370.

[136]First Report of SR *Brownlie* (n 108) para 107; *Delbrück* (n 90) 1370.

[137]*Delbrück* (n 90) 1371; see however *Dahm/Delbrück/Wolfrum* (n 124) 756; *McNair* 713–715, 718 *et seq*.

[138]First Report of SR *Brownlie* (n 108) para 80.

of rights granted to individuals seems appropriate in the interest of their legal security. The rationale should also be extended to **bilateral investment treaties**.[139] The same consideration might also apply to **multilateral law-making treaties** whose continuity during armed conflict will serve consideration of legal security either in the interest of the international community or in the interest of individuals. Law-making treaties are defined by *McNair* as "treaties which create rules of international law for regulating the future conduct of the parties without creating an international regime, status, or system."[140] This might either concern treaties with an international private law content or treaties regulating specific areas of international law, such as public health, narcotics or labor rights.[141] The rationale justifying the inclusion of law-making treaties in the ILC's list does also apply to treaties relating to **commercial arbitration**.[142] The examples given also demonstrate that some treaties might match several of the categories offered. However, since the list only possesses an indicative character, such overlaps are insignificant for the functioning of the list.

Treaties for the **protection of human rights** continue to be operable in times of armed conflict. The examples of the ICCPR (Art 4 para 1) and the ECHR (Art 15 para 2) illustrate that these treaties are not only designed for times of peace but also for times of war. Thus, the ICJ's advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* suggests that "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights".[143] However, a **derogation** does not necessarily entail the consequence that the respective human rights guarantees would no longer be applicable at all. Derogation often only entails the consequence that the application of a human rights obligation will be modified giving a greater leeway for the executive while preserving a core of the human right in question. Thus, *eg* the European Court of Human Rights remains competent to control that the derogation measures taken, *ie* the restriction of a human rights guarantee, are strictly required by the exigencies of the situation.[144] Moreover, the question of termination or suspension of human rights treaties must be differentiated on the one hand from the question whether international humanitarian law takes precedence as applicable *lex specialis* in times of war[145] and on the

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[139] *Aust* 310; First Report of SR *Brownlie* (n 108) para 83.

[140] *McNair* 723.

[141] ILC, Effect of Armed Conflicts on Treaties (n 96) paras 48 *et seq*.

[142] First Report of SR *Brownlie* (n 108) paras 108 *et seq*.

[143] ICJ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 106.

[144] *H Krieger* Notstand in *R Grote/T Marauhn* (eds) Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz (2006) MN 20.

[145] Third Report of SR *Brownlie* (n 109) paras 49, 54; for criticism on this point, see the views of the delegations of South Korea UN Doc A/C.6/60/SR.18, para 36, the United Kingdom UN Doc A/C.6/60/SR.20, para 1, and the United States UN Doc A/C.6/60/SR.20, para 33; see on the

other hand from the issue of extraterritorial application of human rights treaties, which often becomes virulent in times of armed conflict.[146]

56 The general reference to treaties relating to the **protection of the environment** in the list to Draft Art 5 might be seen as problematic. First, it may be concluded from the written submissions in the proceedings to the ICJ's advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* that there is a dissent among States as to the applicability of environmental treaties during armed conflict.[147] The applicability will very much depend on the intention of the parties and the concrete subject matter of the treaty.[148] Thus, different presumptions might exist for environmental treaties establishing an objective regime as for treaties concerning the requirement of a public environmental impact assessment whose operation might depend on the maintenance of normal social and political relations.

57 In case of treaties relating to **diplomatic and consular relations,** the applicability in times of armed conflict can already be inferred from some of the treaty provisions, such as Arts 24, 44 and 45 of the 1961 Vienna Convention on Diplomatic Relations[149] and Arts 26 and 27 of the 1963 Vienna Convention on Consular Relations.[150] In the *United States Diplomatic and Consular Staff in Tehran* case, the ICJ held that "[e]ven in the case of armed conflict [. . .] those provisions require that both inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State."[151]

5. Other Specific Rules

58 The ILC Draft Articles also aim to provide for the **conclusion of treaties during an armed conflict**. Draft Art 6 as suggested by the Special Rapporteur in 2010 first states that a State Party to an armed conflict retains the capacity to conclude treaties. This is in line with the presumption of legal continuity of a State even if it temporarily does not fulfill the criteria for statehood. Moreover, Draft Art 6 allows States during armed conflict to conclude lawful agreements involving termination or suspension of a treaty or part of a treaty that is operative between them during situations of armed conflict.[152] However, this rule must not be understood as allowing States to derogate from applicable customary international law so that

differentiation between continuing operation/applicability and the *lex specialis* rule *Krieger* (n 78) 268 *et seq*.

[146]*H Krieger* Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz (2002) 62 ZaöRV 669.

[147]*D Akande* Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court (1997) 68 BYIL 183.

[148]See ILC, Effect of Armed Conflicts on Treaties (n 96) paras 58–63.

[149]500 UNTS 95.

[150]596 UNTS 261.

[151]ICJ *United States Diplomatic and Consular Staff in Tehran (United States v Iran)* [1980] ICJ Rep 3, para 86.

[152]First Report of SR *Caflisch* (n 93) para 76.

eg States would not be allowed to terminate international humanitarian law treaties.[153]

While there are specific rules for the **notification** of a termination, withdrawal or suspension of a treaty (→ Art 65), the **separability of treaty provisions** is modeled along the lines of Art 44 VCLT (→ Art 44). Here, no specific considerations owed to the circumstance of armed conflict apply. The same holds true for the loss of the right to terminate, withdraw or suspend the operation of a treaty. The rules reflect Art 45 VCLT (→ Art 45). **59**

The 2008 Draft Articles include several **reservations** concerning the right to self-defense,[154] decisions of the UN Security Council,[155] the law of neutrality,[156] other cases of termination, withdrawal or suspension in line with the VCLT[157] and the revival of treaty relations subsequent to an armed conflict.[158] Moreover, the Draft Articles prohibit that a State committing an act of aggression terminates, withdraws from or suspends the operation of a treaty as a consequence of an armed conflict if the effect would be to the benefit of that State.[159] **60**

6. Relation Between the VCLT and the Rules in the ILC Draft

A pertinent example for diverging policy considerations in the specific case of the effect of armed conflicts on treaties can be found in the rules on **termination and suspension of treaties** (→ Art 65 MN 27). SR *Brownlie* stressed that in the standard cases of termination or suspension, the decisive element is the breach of the treaty or the disclosure of invalidity itself, which leads to the termination of the treaty. In contrast, in cases of armed conflict, the reason for termination lies outside the treaty itself and is often based on security considerations imposed by the **61**

[153] *Ibid* paras 74 *et seq*; see also Art 9 Draft Articles.

[154] Draft Art 13 ("Effect of the exercise of the right to individual or collective self-defence on a treaty"): "A State exercising its right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right."

[155] Draft Art 14 ("Decisions of the Security Council"): "The present draft articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations."

[156] Draft Art 16 ("Rights and duties arising from the laws of neutrality"): "The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality."

[157] Draft Art 17 ("Other cases of termination, withdrawal or suspension"): "The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*: (a) The agreement of the parties; or (b) A material breach; or (c) Supervening impossibility of performance; or (d) A fundamental change of circumstances."

[158] Draft Art 18 ("Revival of treaty relations subsequent to an armed conflict"): "The present draft articles are without prejudice to the right of States Parties to an armed conflict to regulate, subsequent to the conflict, on the basis of agreement, the revival of treaties, terminated or suspended as a result of the armed conflict."

[159] Art 15 Draft Articles.

conditions of the armed conflict. There are elements of necessity involved. Thus, while in the standard cases, peaceful settlement of dispute lies at the heart of the termination or suspension procedure, in the case of armed conflict, these rules seem less significant. Accordingly, the **duty to notify** may not be an appropriate instrument in cases of armed conflict if normal diplomatic relations are not maintained and the armed conflict hinders a timely notice. The application of such procedural requirements will to a large extent depend on the factual circumstances of the specific armed conflict.[160]

62 Despite these considerations, the draft articles as suggested by the Special Rapporteur in 2010 come close to the provisions of the VCLT. They include a duty to notify if a State intends to terminate, suspend or withdraw from a treaty as well as a provision on peaceful settlement of disputes in Draft Art 8.[161]

63 The **duty to notify** is considered to be essential for the operation of the rules on the effects of armed conflicts on treaties. The specific conditions of armed conflict are at least reflected in the time limit for objections, which is longer than the time limit of three months provided for in Art 65 para 2 (→ Art 65 MN 36–40).[162]

64 Likewise, the relevance of the specific conditions of armed conflict for the **rules on peaceful settlement of disputes** is controversial. The ILC did not include in its 2008 draft a provision parallel to Art 65 para 4 (→ Art 65 MN 49) assuming that a treaty would remain suspended until the end of armed conflict following an exchange of notification and objection. The Commission considered it unrealistic to expect from parties to an armed conflict to undergo procedure of peaceful settlement of disputes concerning the treaty. Thus, the ILC stated that "the States in question will consider that they have more urgent things to do."[163] Switzerland, however, criticized this approach, emphasizing States' obligations to seek peaceful settlement of disputes.[164] Since corresponding treaty obligations may continue to operate during armed conflicts, the Special Rapporteur aimed to provide for the

[160]Fourth Report of SR *Brownlie* (n 109) paras 29 *et seq*.

[161]First Report of SR *Caflisch* (n 93) para 82; Art 8 of the 2010 Draft Articles ("Notification of intention to terminate, withdraw from or suspend the operation of a treaty"): "1. A State engaged in armed conflict intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty, shall notify the other State Party or States Parties to the treaty, or its depositary, of that intention. 2. The notification takes effect upon receipt by the other State Party or States Parties, unless it provides for a subsequent date. 3. Nothing in the preceding paragraphs shall affect the right of a party to object, in accordance with the terms of the treaty or applicable rules of international law, to termination, withdrawal from or suspension of the operation of the treaty. Unless the treaty provides otherwise, the time limit for raising an objection shall be [. . .] after receipt of the notification. 4. If an objection has been raised within the prescribed time limit, the States Parties concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations. 5. Nothing in the preceding paragraphs shall affect the rights or obligations of States with regard to the settlement of disputes insofar as, despite the incidence of an armed conflict, they have remained applicable, pursuant to draft articles 4 to 7."

[162]First Report of SR *Caflisch* (n 93) paras 89, 91.

[163]*Ibid* para 85.

[164]Statement of Switzerland, UN Doc A/CN.4/622.

peaceful settlement procedures while the other members of the Commission remained critical.[165]

7. Evaluation

The need for the codification of specific rules concerning the effect of armed conflict on treaties might not be as clear as the abundant literature on the subject suggests. Once the basic rule that the outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties is identified as a rule of customary international law, other issues might be solved by application of general treaty law, including Arts 31 and 32 VCLT, the operation of the *ius cogens* rule, supervening impossibility of performance or the *clausula rebus sic stantibus*. Thus, the ILC itself stresses that a delineation between the *clausula rebus sic stantibus* and supervening impossibility of performance on the one hand and specific issues of the effect of armed conflicts on treaties on the other hand is often difficult to draw.[166] There might remain a need to regulate the termination or suspension of the operation of a treaty for cases that are not covered by Arts 60–62 VCLT but where a State still wants to terminate a treaty because of an ongoing armed conflict. Probably, the main value of the Draft Articles as they stand in 2010 lies in their function as an **interpretative guidance**. **65**

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Article 74

Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Contents

A. Purpose and Function

Art 74 addresses the situation that even after the rupture or in the absence of diplomatic relations, certain inter-State relations will remain. Economic interdependences, cultural, scientific or political interests may require to keep some relations between the States despite the severance of diplomatic relations.[1] Interests sections in the embassies of third States, liaisons bureaus, trade missions or cultural institutes may be established. Informal contacts may be kept at the United Nations. The ongoing interchange explains the need for States to be able to conclude treaties in the absence of diplomatic relations. Moreover, in such a situation, the conclusion of treaties may play an important part in the amelioration of inter-State relations and may thus contribute to easing the conflict.[2] **1**

Art 74 consists of two corresponding rules concerning the link between diplomatic relations and the conclusion of treaties. Art 74 complements Art 63 (→ Art 63 MN 1), which provides that the severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except insofar as the existence of diplomatic or consular relations is indispensable for the application of the treaty. Accordingly, the **conclusion of a** **2**

[1]Thus, the representative of Malaysia acknowledged that "[h]is delegation recognized that cases might arise in which severance of diplomatic relations would not preclude the conclusion of treaties and the establishment of legal relations which were essential for the economic survival of States" (UNCLOT I 384).

[2]The representative of Poland *eg* stated that "he would emphasize that, in the case of the severance of diplomatic or consular relations, the conclusion of a treaty might effectively contribute to lessening the tension between the States concerned" (UNCLOT I 385).

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
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new treaty is compatible with a lack of diplomatic or consular relations too.[3] By introducing the article into the VCLT, the assumption was rebutted that States could not conclude treaties among themselves if diplomatic relations had been severed.[4] The second sentence of the provision takes the inverse view: the conclusion of a treaty does not imply that diplomatic relations are entertained.

3 Both sentences of Art 74 codify norms of **customary international law**.[5] It might be assumed that the abstentions at the Vienna Conference reflect doubts about the exact scope of application in view of non-recognition but not about the customary international law character.[6]

B. Historical Background and Negotiating History

4 It is often asserted that until 1918, State practice suggested that the conclusion of a treaty brought about recognition.[7] Accordingly, literature regularly treated the **conclusion of a treaty with an unrecognized entity** as a form of **implicit recognition**.[8] However, there is sporadic State practice demonstrating that without establishing diplomatic relations, States concluded treaties with entities, which strived to become States well before 1918.[9]

> Already in 1596 France and England concluded an agreement with the Netherlands without the Netherlands being recognized as a sovereign State. In 1641 and 1642 both countries concluded treaties with Portugal which had not been granted sovereign statehood in the Westphalian Peace.[10] After the United States had declared their independence but had not been recognized by Spain, Spain entertained relations to the US representative in Madrid through an exchange of notes. Likewise, before recognition of Mexico Prussia exchanged declarations regulating Prussian commerce with Mexico.[11]

5 The number of treaties with entities not being recognized as States increased after World War I. The growing number of international organizations and multilateral treaties, the constant increase in economic inter-State relations or mere humanitarian necessities urged States to entertain relations with unrecognized entities.

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[3] *Villiger* Art 74 MN 8, 10.

[4] Statement by the representative of Chile UNCLOT I 383.

[5] *N Angelet/C Clavé* in *Corten/Klein* Art 74 MN 5–6; *Villiger* Art 74 MN 9; statement by the representative of Chile UNCLOT I 383.

[6] *N Angelet/C Clavé* in *Corten/Klein* Art 74 MN 5; *Villiger* Art 74 MN 9.

[7] *M Lachs* Recognition and Modern Methods of International Co-operation (1959) 35 BYIL 252, 253; *Villiger* Art 74 MN 1.

[8] See *eg Bin Cheng* The International Law of Recognition (1951) 192 *et seq*; *H Lauterpacht* Recognition in International Law (1948) 375 *et seq*.

[9] *J Frowein* Das De-facto-Regime im Völkerrecht (1968) 96.

[10] *Ibid* 2.

[11] *Ibid* 96 *et seq*.

In 1920 numerous European States concluded agreements on the repatriation of prisoners of war with the new Soviet Republics. After the conclusion of such an agreement in February 1920[12] the UK Foreign Office declared in the case of *Luther v Sagor* that the Soviet government had not been recognized by the United Kingdom.[13] The same position was maintained by France, Belgium and Denmark.[14] Germany concluded an economic agreement with Manchukuo before its recognition in 1938.[15]

By the late 1960s, international practice demonstrated that "multilateral and bilateral treaties were concluded between States which had severed diplomatic relations [. . .] [as a] self-evident fact, [which should be codified in the Convention as] existing international law and practice."[16] **6**

Art 74 had only been introduced at the Vienna Conference upon a proposal by the Chilean delegation in the context of discussion on today's Art 63 VCLT (→ Art 63 MN 18).[17] Most delegations were in favour of the amendment but the place of the amendment in the draft was left to the drafting committee. The provision was then shifted to Part VI of the Convention dealing with miscellaneous provisions since "the second idea expressed in that amendment seemed to belong rather to the law of diplomatic relations."[18] **7**

Before adoption, the provision met some **objections** from States, which followed a strongly motivated policy of non-recognition, such as the Arab States and Israel or the Federal Republic of Germany and the German Democratic Republic. Thus, the representative of the United Arab Republic said that the article "should not prejudice in any way the question of non-recognition."[19] It was considered as too far-reaching.[20] Similar statements were issued by Iraq, Algeria and Syria.[21] Likewise, the Federal Republic of Germany considered that there was no need to include such a provision.[22] In contrast, the representative of the Ivory Coast explicitly supported the provision "which was in conformity with the practice of his country to conclude treaties with countries with which it had no diplomatic relations."[23] **8**

[12] 1 LNTS 264.

[13] High Court of Justice (United Kingdom) *Luther v Sagor* 1 KB 456, 477 (1921), reversed by Court of Appeal (United Kingdom) *Luther v Sagor* 3 KB 532 (1921) after the United Kingdom recognized the USSR.

[14] *Frowein* (n 9) 98 *et seq*.

[15] *Ibid* 100.

[16] Statement by the representative of Chile UNCLOT I 383.

[17] UN Doc A/CONF.39/C.1/L.341, UNCLOT III 185.

[18] Statement by the representative of Switzerland UNCLOT I 384.

[19] Statement by the representative of the United Arab Republic UNCLOT I 480.

[20] Statement by the representative of Syria UNCLOT I 480.

[21] Statements by the representatives of Iraq, Algeria and Syria UNCLOT I 480.

[22] Statement by the representative of Germany UNCLOT I 480.

[23] Statement by the representative of Ivory Coast UNCLOT I 480.

9 In view of the concerns of many States about the implications that Art 74 might entail for recognition, it was adopted only with 88 to 2 votes and 10 abstentions.[24]

C. Elements of Article 74

I. Severance or Absence of Diplomatic and Consular Relations

10 The term "diplomatic relations" refers to the customary form of **permanent diplomatic intercourse** between States.[25] This includes "any means by which States establish or maintain mutual relations, communicate with each other, or carry out political or legal transactions, through their authorized agents."[26] An active and a passive right of legation can be distinguished, *ie* the right to send and to receive diplomatic agents. Every independent and recognized State enjoys this right but is not obliged to do so.[27] Thus, the establishment of diplomatic relations does not necessarily imply recognition. Diplomatic relations are established by **mutual consent**, usually through an agreement (→ MN 21). Normally, this leads to the exchange of permanent diplomatic missions.[28] However, other forms are available, such as special missions or double accreditation.

11 Usually, diplomatic relations encompass **consular relations**. However, a consulate may be maintained before diplomatic relations are established or after they have been terminated.[29] Consular relations are functionally different from diplomatic relations. Thus, consular agents have a different legal status. Consular functions comprise the "protection of the interests of the sending state and its nationals, the development of economic and cultural relations, the issuing of passports and visas, the administration of the property of nationals, the registration of births, deaths, and marriages, and supervision of vessels and aircrafts attributed to the sending state."[30]

12 The severance of diplomatic and consular relations leads to the political **breakup** between two States. A State may sever diplomatic and consular relations through a unilateral act. The severance of diplomatic relations lies in the **discretion of every State** without entailing international responsibility. Thus, there is no

[24] UNCLOT II 127.

[25] See the Preamble of the 1961 Vienna Convention on Diplomatic Relations 500 UNTS 95.

[26] *I Brownlie* Principles of International Law (7th edn 2008) 349. The law governing diplomatic relations is codified in the Vienna Convention on Diplomatic Relations (n 25) and represents customary international law.

[27] *H Blomeyer-Bartenstein* Diplomatic Relations, Establishment and Severance (1992) 1 EPIL 1070.

[28] Art 2 Vienna Convention on Diplomatic Relations (n 25).

[29] *Blomeyer-Bartenstein* (n 27) 1070.

[30] *Brownlie* (n 26) 364. The law governing consular relations is codified in the 1963 Vienna Convention on Consular Relations 595 UNTS 261 and represents customary international law.

obligation under the UN Charter to entertain diplomatic relations.[31] However, according to the specific circumstances of the case, the arbitrary severance of diplomatic relations may contravene obligations resulting from the principle of sovereign equality. On the other hand, there might also be a **duty to sever diplomatic relations** in case of Security Council sanctions on the basis of Arts 41 and 25 UN Charter.[32]

> Thus, Security Council Resolution 217 (1965) calls upon all States not to recognize the illegal authorities of Southern Rhodesia and not to entertain any diplomatic or other relations with it. In the binding Resolution 277 (1970) the Security Council "[d]ecides [. . .] that Member States shall immediately sever all diplomatic, consular, trade, military and other relations that they may have with the illegal Régime in Southern Rhodesia, and terminate any representation that they may maintain in the Territory".[33] Likewise, the Security Council "calls upon all governments to deny any form of recognition to the so-called independent Transkei and to refrain from having any dealings with the so-called independent Transkei or other bantustans".[34]

After World War II, the severance of diplomatic relations became a **common political instrument**. It allows a State to protest against or criticize a State while maintaining substantial political and economical relations. Thus, the severance of diplomatic relations has a **high symbolic value**.[35] Diplomatic relations may also be severed because of the extinction of a State, the recognition of a new State, the decision to recognize a de facto government or because of revolutionary changes within a country.[36] 13

> In 1954 India terminated its diplomatic relations with Portugal because of their dispute about the legal status of Goa.[37] During the Cold War Germany severed all diplomatic relations with States that recognized the German Democratic Republic according to the so-called Hallstein Doctrine. A pertinent example are the relations to Cuba which were severed in 1963.[38] More recent examples include the relations between Russia and Georgia. On 26 August 2008, Russia recognized Abkhazia and South Ossetia as independent states.[39] As a response Georgia severed diplomatic relations with Russia. In 2009 Morocco severed its diplomatic relations with Iran because the Iranian embassy had allegedly interfered in the internal religious affairs of Morocco. In 2010 Venezuela broke up

[31] *G Dahm/J Delbrück/R Wolfrum* Völkerrecht Vol I/1 (2nd edn 1989) 293.

[32] *Dahm/Delbrück/Wolfrum* (n 31) 294; see *J Frowein/N Krisch* in *Simma* Art 41 MN 14–16.

[33] See *H Krieger* Das Effektivitätsprinzip im Völkerrecht (2000) 214 *et seq*.

[34] See *ibid* 219 *et seq*; see also *Y Ronen* Transition from Illegal Regimes under International Law (2010), 71 *et seq*.

[35] *N Angelet/C Clavé* in *Corten/Klein* Art 74 MN 2.

[36] *Blomeyer-Bartenstein* (n 27) 1071.

[37] See *S Bègue* La réaction international face à la chute de Goa (2008) 133 Relations internationales 53–70.

[38] See *W Kilian* Die Hallstein-Doktrin: der diplomatische Krieg zwischen der BRD und der DDR 1955–1973: aus den Akten der beiden deutschen Außenministerien (2001).

[39] On the conflict, see *A Nussberger* The War between Russia and Georgia – Consequences and Unresolved Questions (2009) 1 Göttingen JIL 341.

diplomatic relations with Colombia over a dispute concerning allegations that Venezuela would tolerate FARC bases.

14 According to the classical concept of **war**, its outbreak will also lead to an automatic severance of diplomatic relations. However, in cases of **armed conflicts without a formal declaration of war**, diplomatic relations may continue.

Japan and China exchanged ambassadors until 1939 although already in 1932 an armed conflict had erupted between both States.[40] Likewise, Pakistan and India maintained diplomatic relations despite their armed conflict in 1965.[41]

15 The severance of diplomatic relations entails several **legal consequences** under the law of diplomatic relations, such as the closure of the State's mission. The diplomatic personnel must leave the country without delay. The premises of the mission will be closed. The rights and the status of citizens of one State in the territory of the other State remain unaffected except for the loss of diplomatic protection. However, a third State may act as a protecting power.[42]

16 While in the case of the severance of diplomatic relations a State breaks up the diplomatic relations it had entertained with a State, which it had recognized before, the **absence of diplomatic relations** refers to situations where relations have never been taken up, probably as a consequence of non-recognition.[43] It is disputed in how far the notion 'absence of diplomatic relations' relates to recognition and therefore prejudges the question whether non-recognition hinders the conclusion of treaties or whether the conclusion of treaties implies recognition. Thus, at the Vienna Conference the representative of Syria "had some misgivings about the words 'or absence', which might, in one case at least, inject the highly political question of recognition into the legal question of concluding treaties" (→ MN 22–28).[44]

II. 'Does Not Prevent the Conclusion of Treaties Between Those States'

17 Under the law of treaties according to customary international law, States may still conclude treaties despite the absence of diplomatic or consular relations in times of peace. This supplements the rule that existing treaty obligations are not influenced by the severance of diplomatic or consular relations (→ Art 63 MN 28–29). In the case of armed conflict, the continuance of treaties is subject to the rules concerning the effect of armed conflict on treaties (→ Art 73 MN 44–47).

Despite the severance of diplomatic relations between the United States and Cuba in 1961 both States concluded an agreement on the migration of Cuban refugees in 1965 in which

[40] *Dahm/Delbrück/Wolfrum* (n 31) 293.
[41] *Blomeyer-Bartenstein* (n 27) 1071.
[42] *Ibid* 1072.
[43] *Villiger* Art 74 MN 4.
[44] UNCLOT II 127.

Switzerland acted as a protecting power.[45] In the course of time further agreements have been concluded. The agreements concern maritime boundaries,[46] the establishment of interests sections,[47] migration matters[48] and tax reimbursement.[49] Likewise, the severance of diplomatic relations with Iran in 1980 did not preclude the conclusion of the Algiers Accords in 1981.[50] Further agreements were concluded in respect of the Iran-US Claims Tribunal[51] and the aerial incident of 3 July 1988.[52]

Other pertinent examples concern the United Kingdom. Thus, despite the severance of diplomatic relations the United Kingdom and Albania concluded a compromis in order to submit their dispute concerning the Corfu Channel to the ICJ.[53] In 1984 the United Kingdom severed diplomatic relations with Libya. Nonetheless, in 1998 an agreement was concluded between the United Kingdom, the United States and Libya concerning the Lockerbie case in which Libya agreed to pay compensation to families of Pan Am Flight 103.[54]

18 The term "conclusion of treaties" refers to the acts described in Part II Section 1 of the Convention (→ Arts 6–18). Despite the State practice described above (→ MN 4, 17) States will often be unwilling to conclude treaties when there are no diplomatic and consular relations.[55] Inasmuch as such treaties might contribute to ameliorate the relation between the States concerned, there might be cases where

[45] 1965 Memorandum of Understanding between the Embassy of Switzerland in Habana Representing the Interests of the United States in Cuba and the Foreign Ministry of the Government of Cuba Concerning the Movement to the United States of Cubans Wishing to Live in the United States 601 UNTS 81.

[46] 1977 Maritime Boundary Agreement 17 ILM 110 and 2008 Agreement Extending the Provisional Application of the Maritime Boundary Agreement of December 16, 1977, see US Department of State, Treaties in Force (2010) 64.

[47] 1977 Agreement Relating to the Establishment of Interests Sections of the United States and Cuba in the Embassy of Switzerland in Havana and the Embassy of Czechoslovakia in Washington Respectively 30 UST 2101, TIAS 9313.

[48] 1984 Joint Communiqué on Immigration Matters, with Minute on Implementation 2034 UNTS 193; 1994 Joint Communiqué Concerning Normalizing Migration Procedures and 1995 Joint Statement Further Normalizing Migration Procedures, see US Department of State, Treaties in Force (2010) 65.

[49] 1990 Tax Reimbursement Agreement, with Annex 2208 UNTS 3.

[50] 1981 Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning Commitments and Settlement of Claims by the United States and Iran with Respect to Resolution of the Crisis Arising out of the Detention of 52 United States Nationals in Iran, with Undertakings and Escrow Agreement 20 ILM 230.

[51] 1996 Settlement Agreement on Certain Claims Before the Iran–US Claims Tribunal, with Annex 35 ILM 588.

[52] 1996 General Agreement on the Settlement of Certain ICJ and Tribunal Cases, with Related Statements 35 ILM 566; 1996 Settlement Agreement on the Case Concerning the Aerial Incident of July 3, 1988 Before the International Court of Justice, with Annexes 35 ILM 572.

[53] ICJ *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4, 6.

[54] (2003) 97 AJIL 987.

[55] The representative of Malaysia "considered the wording rather too loose in its presumption that States would wish to enter into treaties while there was diplomatic friction between them. In practice, States would more often than not refrain from concluding treaties when relations between them were strained." (UNCLOT I 384); Villiger Art 74 MN 5.

the normalization of relations is politically unwanted.[56] There may also be cases where the conclusion of a treaty is factually impossible because diplomatic channels lack.[57]

III. 'The Conclusion of a Treaty Does Not in Itself Affect the Situation in Regard to Diplomatic or Consular Relations'

19 The sentence makes clear that the establishment of diplomatic relations cannot be inferred from the conclusion of a treaty. The second and the first sentence are closely related.[58] Some delegations at the Vienna Conference even held that "the second sentence [. . .] was already implicit in the first sentence."[59] However, the representative of Chile introducing the amendment stated that

> "[t]he second sentence was a necessary complement to the first: whereas the conclusion of treaties was a legal act binding two or more States, severance of diplomatic relations had a political significance and affected relations between Governments. It therefore seemed advisable to state that the conclusion of a treaty in those circumstances did not affect the situation between the two States in regard to diplomatic relations."[60]

20 The phrase "in itself" refers to the act of concluding a treaty. Thus, the establishment of diplomatic or consular relations may well be deduced from the **text of the treaty** or other pertinent (political) **circumstances surrounding the conclusion** of the treaty. An indication may be whether the performance of treaty obligations requires the maintenance of such relations.[61]

21 According to State practice and in line with Art 2 Vienna Convention on Diplomatic Relations,[62] the establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent and is thus often explicitly regulated in formal treaties. In such a case, Art 74 does not apply.[63]

> In 1922 Germany and the USSR concluded the Treaty of Rapallo in which these States expressly agreed to re-establish diplomatic relations.[64] In 1979 the People's Republic of China and the United States established diplomatic relations through a Joint

[56]For the debate concerning the normalization of relations between the Federal Republic of Germany and the German Democratic Republic through the conclusion of the *'Grundlagenvertrag'* and the question whether the conclusion of this treaty might imply *de iure* or *de facto* recognition, see Federal Constitutional Court (Germany) 36 BVerfGE 1, 22 *et seq*.

[57]*Villiger* Art 74 MN 5.

[58]Statement by the representative of Chile UNCLOT I 383.

[59]Statement by the representative of Malaysia UNCLOT I 384.

[60]UNCLOT I 383.

[61]*N Angelet*/*C Clavé* in *Corten*/*Klein* Art 74 MN 10.

[62]See n 25.

[63]*N Angelet*/*C Clavé* in *Corten*/*Klein* Art 74 MN 10.

[64][1922-II] German RGBl 677 (Art 3).

Communiqué.[65] In 2010 Azerbaijan and Grenada signed a Joint Communiqué on Establishing Diplomatic Ties during the 65th session of the UN General Assembly.

IV. Non-recognition and the Conclusion of Treaties

Art 74 was not intended to regulate – even implicitly – the conclusion of treaties between States, which do not recognize each other.[66] It was left open whether non-recognition is a hindrance to the conclusion of treaties or whether the conclusion of a treaty might imply recognition.[67] Both aspects are closely related and can be inferred from each other.[68] **22**

Until the 1960s, a widespread view still held that by entering into a treaty a State may recognize another State. It was held that the signature of a bilateral treaty would imply recognition. Whether the conclusion of a multilateral treaty would also imply recognition was more disputed.[69] **23**

The practice of the United States was inconsistent in respect to implied recognition through accession of multilateral treaties. With regard to the 1926 International Sanitary Convention it made a declaration that ratification does not imply recognition to any government not already recognized.[70]

In view of the position that the conclusion of bi- or multilateral treaties might imply recognition,[71] many States at the Vienna Conference explicitly objected to Art 74. Moreover, during the drafting process, the ILC underlined that the issue of non-recognition and treaty relations was not dealt with by the Convention.[72] Thus, **24**

[65] 1979 Joint Communiqué on the Establishment of Diplomatic Relations between the People's Republic of China and the United States of America TIAS 9177.

[66] See, however, the statement by the representative of Syria, which "abstained from the voting on article 69 *bis* because it had some misgivings about the words 'or absence', which might, in one case at least, inject the highly political question of recognition into the legal question of concluding treaties" (UNCLOT II 127).

[67] *N Angelet/C Clavé* in *Corten/Klein* Art 74 MN 7–8.

[68] *Cf* the statement by the representative of Malaysia UNCLOT I 384.

[69] See *M Hudson* Recognition and Multi-Partite Treaties (1929) 23 AJIL 126, 128; *McNair* 746; see, however, *BR Bot* Non-Recognition and Treaty Relations (1968) 145–146; *M Lachs* Recognition and Modern Methods of International Co-operation (1959) 35 BYIL 252, 253 *et seq*.

[70] *Hudson* (n 68) 128.

[71] See the statement by the representative of Chile who held that the second sentence of Art 74 "was connected with [the problem] of recognition, for the conclusion of a treaty might be held to imply tacit recognition" (UNCLOT I 383).

[72] [1966-II] YbILC 260: "Similarly, any problems that may arise in the sphere of treaties from the absence of recognition of a Government do not appear to be such as should be covered in a statement of the general law of treaties. It is thought more appropriate to deal with them in the context of other topics with which they are closely related, either succession of States and Governments, which is excluded from the present discussion for the reasons indicated in paragraph 30 of the Introduction to this chapter, or recognition of States and Governments, which the Commission in 1949 decided to include in its provisional list of topics selected for codification."

the wording of both sentences does not mention recognition. Moreover, the severance of diplomatic and consular relations does not necessarily imply that the States do not recognize each other.[73]

25 Today, State practice speaks in favour of an applicability of Art 74 to situations of **States not recognizing each other**. While non-recognition usually entails the consequence that there are no diplomatic relations,[74] the conclusion of treaties in the absence of recognition does not imply that recognition of statehood is granted. To the contrary, State practice confirms that States may entertain bilateral treaty relations with unrecognized entities, so-called ***de facto* regimes**,[75] albeit often below the level of normal treaty relations.[76] For instance, agreements may only be concluded between the governments. Other forms of agreement may include declarations, communiqués or the exchange of notes.[77] However, even though recognition of statehood cannot be inferred from the conclusion of agreements, the parties are probably estopped from denying that the entity possess the quality of a subject of international law, *ie* that of a *de facto* regime.[78]

The policy of non-recognition was a prominent institute during the Cold War. Still, States entered into treaties. Several States which did not recognize the former German Democratic Republic have nonetheless concluded bilateral agreements.[79] In 1955 the United States had not recognized the People's Republic of China but concluded an agreement on the repatriations of civilians.[80] However, pertinent State practice is not restricted to the period of the Cold War. Although the United States do not recognize North Korea, both States have concluded several agreements in the 1990s. For instance, the 1994 Agreed Framework between the United States of America and the Democratic People's Republic of Korea aimed at stopping North Korea's proliferation policy with regard to nuclear weapons, *inter alia* by promising the step-by-step normalization of relations between the United States and North Korea.[81] Another agreement established Sweden as the protecting power for US citizens in North Korea in 1995. Further pertinent State practice concerns Israeli relations. Although Lebanon and Israel do not recognize each other, they concluded an Armistice Agreement in 1949.[82] Both States agreed on a ceasefire understanding in 1996 and have repeatedly agreed on the exchange of prisoners.[83]

[73] *N Angelet*/*C Clavé* in *Corten*/*Klein* Art 74 MN 7.

[74] *J Frowein* Non-Recognition (1997) 3 EPIL 628.

[75] A *de facto* regime can be defined as an "entity claiming to be a State, which controls a more or less clearly defined territory without being recognized"; see *J Frowein* De facto Regime in MPEPIL (2009) MN 1. For a comprehensive treatment of the subject, see *Frowein* (n 9).

[76] *N Angelet*/*C Clavé* in *Corten*/*Klein* Art 74 MN 8; *Frowein* (n 74) MN 8; *R Jennings*/*A Watts* (eds) Oppenheim's International Law Vol 1 (9th edn 1996) 170 *et seq*; *Bot* (n 68) 30 *et seq*, 67 *et seq*.

[77] *Frowein* (n 74) MN 8.

[78] *N Angelet*/*C Clavé* in *Corten*/*Klein* Art 74 MN 8.

[79] See *Bot* (n 68) 76–91; *Frowein* (n 9) 101–104.

[80] *Frowein* (n 9) 105.

[81] See IAEA, Information Circular INFCIRC/457, 2 November 1994.

[82] 1949 Israeli–Lebanese General Armistice Agreement UN Doc S/1296, 42 UNTS 287.

[83] For the examples see *N Angelet*/*C Clavé* in *Corten*/*Klein* Art 74 MN 8.

There is also State practice demonstrating that *de facto* regimes may join **multilateral treaties** with States Parties with whom they do not entertain (diplomatic) relations. In some of these cases non-recognizing States issue, a declaration not accepting the accession as valid.[84] **26**

> Upon accession of the Provisional Revolutionary Government of the Republic of South Viet-Nam to the 1949 Geneva Conventions the United States issued a declaration that it does not recognize South Viet-Nam to be able to join the Convention but would accept the application of the Convention insofar.[85]
>
> In some cases more complex arrangements have been used to allow accession of a *de facto* regime to a multilateral treaty without establishing direct relations with a non-recognizing State. For instance, the German Democratic Republic and Taiwan could join the 1963 Nuclear Test Ban Treaty[86] because the USSR, the United Kingdom and the United States acted as depositaries allowing the German Democratic Republic to deposit its instrument of ratification with the USSR while Taiwan chose the United States.[87]

In some cases, States issue **declarations** that their accession to a multilateral convention does not imply recognition of an unrecognized entity. **27**

> Upon ratifying the VCLT itself several States have issued declaration with a view to Art 74. For instance, Morocco explicitly stated that "[i]t shall be understood that Morocco's signature of this Convention does not in any way imply that it recognized Israel. Furthermore, no treaty relationships will be established between Morocco and Israel." Similar declarations have been issued by Syria, Algeria and Kuwait. Israel objected.[88] Likewise, upon ratifying the 1948 Geneva Conventions "[t]he Government of the People's Democratic Republic of Yemen declare[d] that the accession of the People's Democratic Republic of Yemen to [the Geneva] Conventions by no means implies recognition of Israel."[89]

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[84] *Frowein* (n 74) MN 8.

[85] Declaration Relating to the Accession of the Provisional Revolutionary Government of the Republic of South Viet-Nam 972 UNTS 403: "The Government of the United States of America recognizes the Government of the Republic of Viet-Nam and does not recognize the 'Provisional Revolutionary Government of the Republic of South Viet-Nam' as a government. The United States Government therefore does not recognize that the 'Provisional Revolutionary Government of the Republic of South Viet-Nam' is qualified to accede to the Geneva Conventions. Bearing in mind, however, that it is the purpose of the Geneva Conventions that their provisions should protect war victims in armed conflicts, the Government of the United States of America notes that the 'Provisional Revolutionary Government of the Republic of South Viet-Nam' has indicated its intention to apply them subject to certain reservations."

[86] 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water 480 UNTS 43.

[87] *Frowein* (n 74) MN 8.

[88] The Government of Israel has noted the political character of paragraph 2 in the declaration made by the Government of Morocco on that occasion. In the view of the Government of Israel, this Convention is not the proper place for making such political pronouncements. Moreover, that declaration cannot in any way affect the obligations of Morocco already existing under general international law or under particular treaties. The Government of Israel will, in so far as concerns the substance of the matter, adopt towards the Government of Morocco an attitude of complete reciprocity.

[89] 1049 UNTS 321.

28 The legal concept of a *de facto* regime has practically made the dispute irrelevant whether the lack of diplomatic relations hinders the conclusion of treaties or whether treaty relations imply recognition. Since a *de facto* regime is at least partially a subject of public international law, treaties can be concluded. Thus, it is clarified that non-recognition does not entail the consequence that an unrecognized entity falls outside the VCLT. Since a *de facto* regime is a legal subject not qualifying as a State, other States can conclude agreements with the entity without the need for recognizing it as a State or establishing diplomatic relations.

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Article 75
Case of an aggressor State

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

Contents

A. Purpose and Function

Art 75 is tailored for a **very specific scenario**. A State concerned must have committed an act of aggression. In response to this act of aggression measures must have been taken in conformity with the UN Charter. In consequence of these measures, States must have concluded a treaty from which certain obligations result. These obligations are exempt from the rules of the VCLT. **1**

The exact **scope** of the article is **not entirely clear**. Already, the wording of the article is difficult to understand.[1] It was highly disputed during the drafting process and is still open to controversial interpretations. **2**

Behind Art 75, there is the problem of **peace treaties** in general[2] and of the Potsdam Agreements in particular.[3] Being concluded after the end of an armed conflict or war, a peace treaty is usually brought about by a certain degree of coercion. In view of Art 52 VCLT, a peace treaty forced on a State against which aggression was directed could be considered as void.[4] Likewise, the victorious **3**

[1] See *eg* the statement by the representative of Canada UNCLOT I 456; *M Bothe* The Consequences of the Prohibition of the Use of Force: Comments on Arts 49 and 70 of the ILC's 1966 Draft Articles on the Law of Treaties (1967) 27 ZaöRV 507, 517; *G Ress* Verfassung und völkerrechtliches Vertragsrecht in *K Hailbronner et al* (eds) Festschrift Karl Doehring (1989) 803, 843.

[2] *Jiménez de Aréchaga* [1966-I/2] YbILC 180.

[3] *Tunkin* [1964-I] YbILC 79.

[4] *Aust* 318. This argument was repeatedly raised in the debates. The ILC commentary, however, noted that "article 49, which provides for the nullity of any treaty procured by the threat or use of force, is confined to cases where the threat or use of force is 'in violation of the principles of the

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
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States might conclude an agreement among themselves imposing obligations on the aggressor State without it being a party. Where the agreement would collide with Arts 34 and 35 VCLT, the ILC intended to clarify[5] that the aggressor State is precluded from invoking any of the provisions of the Convention in its favour.[6] The intention to provide for an article supporting the disputed legality of the Potsdam Agreements became evident in statements by *Lachs* and *Tunkin* in the ILC.[7] Thus *Tunkin* stated "that he had been referring to the agreements concluded by the Allied Powers during the Second World War. Germany had not been a party to those agreements, and yet the agreements had concerned and had been applicable to Germany; they had not been peace treaties. In his view, cases of that kind should be mentioned, at least in the commentary."[8]

> The heads of government of the USSR, the United States and the United Kingdom concluded the so-called Potsdam Agreements in Potsdam after the unconditional surrender of the German Armed Forces on 8 May 1945 and the 'assumption of supreme authority with respect to Germany' by the Allied Powers through the declaration of 5 June 1945.[9] In relation to Germany they agreed, *inter alia*, on German reparations, on the status of the city of Königsberg and its nearby region, the course of the western border of Poland, and the relocation of the German population in the areas concerned. The legal foundation for these decisions on the provisional territorial arrangements and the relocation of the population transfer was questionable. Already the legal character of the Agreements themselves was unclear and disputed. Still, the wording of the Agreements point to a binding character, at least of parts of the Agreements. Moreover, disputes which arose between the parties to the Agreements spoke in favour of the assumption that the Potsdam Agreements were seen as binding international legal agreements by their parties.[10] However, no government which would have been recognized as representative of the German Reich had ever signed or otherwise consented to the Potsdam Agreements. Accordingly, the Federal Republic of Germany, unlike the German Democratic Republic, has never recognized that the Potsdam Agreements were legally binding.[11] Nonetheless, the Federal Republic accepted the legal

Charter of the United Nations'. A treaty provision imposed upon an aggressor State in conformity with the Charter would not run counter to the principle in article 49 of the present articles" (Final Draft, Commentary to Art 31, 227 para 3; *cf* Final Draft, Commentary to Art 70, 268 para 1;).

[5]See Final Draft, Commentary to Art 70, 268 para 1; Final Draft, Commentary to Art 31, 227 para 3: "Some Governments in their comments referred to treaty provisions imposed upon an aggressor State and raised the question of the application of the present article to such provisions. The Commission recognized that such cases would fall outside the principle laid down in this article, provided that the action taken was in conformity with the Charter [. . .]. The Commission decided by a majority vote to include in the draft a separate article containing a general reservation in regard to any obligation in relation to a treaty which arises for an aggressor State in consequence of measures taken in conformity with the Charter. The text of this reservation is in article 70."

[6]*C Tomuschat* in *Corten*/*Klein* Art 75 MN 11.

[7]*Lachs* [1966-I/2] YbILC 61.

[8]*Tunkin* [1964-I] YbILC 79.

[9]For the text, see *D Rauschning* Die Rechtsstellung Deutschlands (2nd edn 1989).

[10]*J Frowein* Potsdam Conference (1945) in MPEPIL (2009) MN 1 *et seq*.

[11]*J Frowein* Potsdam Agreements (1997) 3 EPIL 1087, 1091.

> implications of the Agreements. Especially the provisional territorial arrangements were acknowledged as laid down in Art 1 Treaty on the Final Settlement with Respect to Germany[12] and confirmed in the Treaty Concerning the Demarcation of the Established and Existing German-Polish State Frontier.[13]

Art 75 is also conceived as a safeguard against aggressor States, which unjustifiably try to terminate a regime installed by a peace treaty. Here, the Commission invoked historical examples where **4**

> "a defeated [...] State wishing to evade its obligations under a peace treaty had usually alleged that the treaty had been imposed upon it. Many other pretexts could, however, be invoked. The allegation had not infrequently been made, for example, that the persons who had signed the treaty had not had the necessary authority to represent the people or the State."[14]

Thus, an additional purpose of the provisions "was to prevent an interpretation in bad faith of provisions in the draft articles by an aggressor State seeking to escape obligations legitimately imposed upon it in conformity with the Charter."[15] To a certain extent, the "unilateral denunciation or simple breach of all the territorial provisions of parts II, III, and IV of the Versailles Peace Treaty by Germany"[16] might have been informing the discussion.

Art 75 does not reflect a norm of customary international law.[17] First, any practice before 1945 is insignificant here because the prohibition on the use of force did not come into existence before the Briand–Kellogg Pact and the UN Charter. In the period before 1945, pressure exerted against a vanquished party in order to force it to accept the conditions of a peace treaty seemed an acceptable means. The traditional rule only prohibited "direct force against the person of the negotiator or the plenipotentiary signing the treaty document".[18] A broader understanding was only introduced by Art 52 VCLT. State practice on this norm is, however, in itself not utterly consistent. Given its restricted sphere of application and the present practice of the Security Council (→ MN 28), it is doubtful that Art 75 will turn into customary international law.[19] **5**

[12] 1990 Treaty on the Final Settlement with Respect to Germany 1696 UNTS 115.

[13] 1990 Treaty Concerning the Demarcation of the Established and Existing German-Polish State Frontier 1708 UNTS 377.

[14] *Waldock* [1966-I/2] YbILC 182.

[15] *Waldock* [1966-I/2] YbILC 223.

[16] See *E von Puttkamer* Versailles Peace Treaty (2000) 4 EPIL 1277, 1281.

[17] *C Tomuschat* in *Corten/Klein* Art 75 MN 7; *G Ress* Verfassung und völkerrechtliches Vertragsrecht in *K Hailbronner et al* (eds) Festschrift Karl Doehring (1989) 803, 844; *Villiger* Art 75 MN 11.

[18] *W Grewe* Peace Treaties (1997) 3 EPIL 938, 942.

[19] See, however, *Villiger* Art 75 MN 12.

B. Historical Background and Negotiating History

6 During the discussions on the third report of SR *Waldock,* some members started to argue in favour of the necessity to include a provision concerning aggressor States into the Convention. The starting point was the Potsdam Agreements. They were taken by *Lachs* and *Tunkin* as an example for treaties imposing measures on an aggressor State without its consent. In view of these agreements, an exception to Art 35 was considered to be essential.[20] Thus, *Tunkin* stated "that certain treaties could be binding upon third States. For instance, the agreements regarding Germany made by the Allied Powers at the end of the Second World War were undoubtedly binding on the two successor States now existing in Germany."[21] The ILC dealt with the issue in the commentary to Art 59, which was to become Art 35 VCLT on treaties providing for obligations on third States. Members of the Commission considered the issue as one of State responsibility and appear to have followed the approaches of *Tunkin* and *Lachs* when accepting the possibility to impose treaty obligations on third States without their consent.[22]

7 Especially Eastern European States took up the question in their observations to Draft Art 35.[23] In his sixth report, *Waldock* suggested to include an additional paragraph in Art 59.[24] An intensive discussion followed in the ILC in which it was disputed whether the issue was a "question of [State] responsibility, which was not within the scope of the draft."[25] Furthermore, there was disagreement on the question whether a general reservation was preferable or whether only specific articles should be mentioned.[26] Moreover, there was a lengthy debate whether Art 75 should only include peace treaties concluded with an aggressor or also treaties imposing obligations on the aggressor State without it being a party to the treaty.[27] During the debates in the ILC and later at the Vienna Conference, the relation between the provision and the treaties concluded by the Allied Powers at the end of World War II became more and more evident. Thus, *Tunkin* argued that the element of consent in Art 59

> "could be used by an aggressor State to repudiate its obligations, claiming that they referred to *res inter alios acta*. Contemporary practice provided an example: not only writers in Western Germany, but even the Government were now contending that the treaties

[20] *Lachs* [1964-I] YbILC 71.

[21] *Tunkin* [1964-I] YbILC 71, 79.

[22] [1964-II] YbILC 181–182.

[23] [1966-II] YbILC 68.

[24] [1966-II] YbILC 69.

[25] *De Luna* [1966-I/2] YbILC 60; *Reuter* [1966-I/2] YbILC 63; on reasons why the issue should nonetheless be included *Tunkin* [1966-I/2] YbILC 61.

[26] For a general reservation *Waldock* [1966-I/2] YbILC 182; against such a general reservation *Castrén* [1966-I/2] YbILC 180; *Reuter* [1966-I/2] YbILC 182.

[27] *Briggs* [1966-I/2] YbILC 181; see also *Bartoš* [1966-I/2] YbILC 182.

> concluded by the Allied Powers at the end of the Second World War were without effect with respect to Germany, which was not a party to them and could therefore disregard them."[28]

Tunkin's position was countered by *Jiménez de Aréchaga*:

> "Mr. Tunkin had pleaded for a progressive attitude in the interests of developing contemporary international law, but it was precisely for that reason that the Commission ought not to concern itself with providing a legal justification for any act performed, or to be performed, in connexion with the peace treaties concluded after the Second World War. Such a justification had already been provided in a collective decision of States and expressed in Article 107 of the United Nations Charter which constituted a general dispensation for action taken or authorized as a result of that war."[29]

8 The ILC proposal was welcomed by Eastern European States, including Hungary,[30] the Ukrainian SSR[31] and the USSR.[32] In response to the debates, the ILC included a separate article (Art 70) dealing with the case of an aggressor State in its 1966 Draft.[33] For editorial reasons, the texts were later changed. In the French text, the phrase "ne préjudicient pas aux obligations" was changed to "sont sans effet sur les obligations". The English text was changed from "The present articles. . ." to "The provisions of the present convention. . .".

9 At the Vienna Conference, Japan and Thailand suggested to remove any reference to the term "aggression" in order to cover all cases arising under Art 39 UN Charter and escape the difficulties of defining the term "aggression".[34] This was, however, heavily opposed by Eastern European States, in part for historic reasons.[35] The proposal found no majority.[36] The controversial discussions continued. Again, the treaties concluded by the Allied Powers at the end of World War II explain the underlying motives of the discussion. Thus, the Eastern European States Ukrainian SSR, Bulgaria, USSR, Poland and Romania argued in favour of the provision which also found the explicit support of Cuba, Congo-Brazzaville and the Democratic Republic of Congo, the United Arab Republic, Kenya and Iraq. Germany, the United Kingdom, Switzerland, the United States and Canada opposed it. The article was, nonetheless, adopted by 100 votes to none with 4 abstentions.[37]

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[28] *Tunkin* [1966-I/2] YbILC 61.

[29] *Jiménez de Aréchaga* [1966-I/2] YbILC 64.

[30] [1966-II] YbILC 68; see also [1966-II] YbILC 293.

[31] [1966-II] YbILC 68.

[32] [1966-II] YbILC 68, 343.

[33] [1966-II] YbILC 268.

[34] UN Doc A/CONF.39/C.1/L.366, UNCLOT III 200; UN Doc A/CONF.39/C.1/L.367, UNCLOT III 200; statements by the representatives of Japan and Thailand UNCLOT I 453.

[35] See *eg* the statement by the representative of the USSR UNCLOT I 455.

[36] See *eg* the statement by the representative of the USSR UNCLOT I 457.

[37] UNCLOT II 127. *Inter alia*, Germany abstained.

C. Elements of Article 75

I. Any Obligation in Relation to a Treaty

10 Art 75 concerns international treaties regulating the situation of an aggressor State. Two types of obligation in relation to such an international treaty can in principle be distinguished. First, a treaty, *eg* a peace treaty, may be concluded with the aggressor State. Second, a treaty may impose obligations on the aggressor State without it being a party.[38]

11 The exact scope of Art 75 was already disputed during the drafting period in the ILC, *inter alia*, between *Briggs*,[39] *Ago* and *Tunkin*.[40] *Briggs* had raised the question whether the text referred "to treaties to which an aggressor State was regarded as being a party by reason of its acceptance of the treaty, or whether the text was intended to cover the situation in which an aggressor was not a party but a third State, whose failure to express consent could not in itself be invoked as a ground for noncompliance with the obligations of the treaty."[41] *Ago* opposed the inclusion of the latter option. He stressed that even a peace treaty would require the consent of the aggressor State even if it did not participate in the drafting of the treaty. If obligations were imposed on States in rare cases, these obligations would arise from other sources of international law.[42] The debate continued at the Vienna Conference[43] but no definite position was reached. Thus, a general reservation was created "which did not specify whether or not the aggressor State would be a party to the treaty creating the obligation."[44]

12 The imposition of a treaty obligation without consent of the State concerned clearly runs contrary to Arts 34 and 35 VCLT. Art 75, however, only contains a general reservation, which is subject to a restrictive interpretation because the article deals with exceptions from the law of treaties.[45] Given the principle of sovereign equality,[46] it seems doubtful that such a general phrase would suffice to derogate from a very fundamental principle of international law according to which consent is basically required in order to create international obligations for a State. Restrictions from this principle will only result from the consent of the party to a treaty, such as the UN Charter. Thus, the imposition of an obligation on a State without its consent

[38] *Villiger* Art 75 MN 4.

[39] See also *de Luna* [1966-I/2] YbILC 180; *Briggs* [1966-I/2] YbILC 181; *Bartoš* [1966-I/2] YbILC 182.

[40] [1966-I/2] YbILC 223.

[41] [1966-I/2] YbILC 181; *Bartoš* [1966-I/2] YbILC 182.

[42] *Ago* [1966-I/2] YbILC 182.

[43] Statement by the representative of Japan UNCLOT I 453.

[44] [1966-I/2] YbILC 223; *Waldock* [1966-I/2] YbILC 223.

[45] *Ress* (n 17) 844.

[46] See for this argument *C Tomuschat* in *Corten/Klein* Art 75 MN 11.

or even against its will is only permissible when a treaty organ possesses such competences. This is, above all, the case with the Security Council.[47]

The legal significance of the second alternative is also doubtful. In order to bring the aggressor State to concluding a peace treaty some form of coercion might be required. However, already Art 52 foresees that 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 UN Charter.[48] Thus, certain forms of coercion might already be justified under Art 52 so that no conflict would actually arise. Accordingly, one can assume that Art 75 only reaffirms the legal situation already described in Art 52: (peace) treaties forced upon an aggressor State are not void pursuant to Art 52 (→ Art 52 MN 3). **13**

To some extent, the disputed and unclear nature of Art 75 reflects the situation of a changing international order in the 1960's. The provision is still informed by the historical experience such as the Versailles Treaty or the Potsdam Agreements. Due to the blockade of the Security Council during the Cold War, it was not yet clear to what extent the Security Council itself would regulate the situation after the end of hostilities. Thus, the underlying understanding assumes that the Security Council might determine that an act of aggression has taken place but would leave the framing of a peace treaty to the parties. **14**

II. Aggressor State

1. Definition of Aggression

The notion of aggression is one of the most controversial terms in international law. It is used in the UN Charter in Arts 1, 39 and 53. According to Art 1 UN Charter, it is a purpose of the United Nations to take effective collective measures for the suppression of acts of aggression. According to Art 39, the Security Council shall determine the existence of, *inter alia*, any act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Arts 41 and 42, to maintain or restore international peace and security. For these purposes, aggression has been defined by the General Assembly in Resolution 3314 (XXIX).[49] According to its Art 1 aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter. Art 3 lists acts that would qualify as an act of aggression. Neither does the definition aim to bind the Security Council in its determination according to Art 39 nor would this be **15**

[47] *Bothe* (n 1) 515 *et seq*.

[48] Final Draft, Commentary to Art 70, 268 para 1; Final Draft, Commentary to Art 31, 227 para 3.

[49] See *T Bruha* Die Definition der Aggression (1980); the resolution can be considered as customary international law: ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, para 195; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, para 146.

possible.[50] While an act of aggression will always constitute a breach of peace, a determination as act of aggression allows to designate the State responsible for a certain breach of peace. So far, the Security Council has rarely used this instrument. However, one might dare the prognosis that the competence of the ICC to decide on cases of aggression after 2017 might prompt the Security Council to pay more attention to an exact determination (→ MN 18–19).[51]

> The Security Council determined that the Israeli air raid against PLO targets in Tunisia constituted an act of aggression in Security Council Resolution 573 (1985). In Resolution 577 (1985) the Security Council demanded that South Africa ceases all acts of aggression against Angola. The Iraqi invasion of Kuwait, however, was only determined as a breach of peace.[52]

16 The concept of aggression is also influenced by international criminal law. Already, the Nuremberg and Tokyo trials applied crimes against peace.[53] However, for a long time, defining aggression for purposes of international criminal law was hindered because of a dispute whether the Security Council is the only organ competent to determine what constitutes an act of aggression.[54] When the ILC codified the Draft Code of Crimes against the Peace and Security of Mankind, it included the crime of aggression without defining it. Here, the ILC explicitly excluded "the question of the definition of aggression by a State", which was considered to be "beyond the scope of the Code".[55] Likewise, the Rome Conference could only agree on a compromise. Art 5 para 1 lit d Rome Statute brings the "crime of aggression" under the jurisdiction of the International Criminal Court (ICC). However, the actual exercise of that jurisdiction depends on further action by the States Parties. According to Art 5 para 2, the ICC shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Arts 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the UN Charter. The Assembly of States Parties, which was created after the entry into force of the Rome Statute, reached an (unexpected) agreement on the definition of aggression at the Review Conference in Kampala, Uganda in 2010.[56] Here, the dispute between the States did not concern

[50] *J Frowein/N Krisch* in *B Simma* (ed) The Charter of the United Nations (2002) Art 39 MN 14.

[51] *K Schmalenbach* Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof (2010) 65 Juristenzeitung 745, 750.

[52] UNSC Res 660 (1990), 2 August 1990, UN Doc S/RES/660 (1990).

[53] Art 6 lit a Charter of the [Nuremberg] International Military Tribunal, annexed to the 1945 Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis 82 UNTS 279; Art 5 lit a Charter of the [Tokyo] International Military Tribunal for the Far East TIAS 1589.

[54] *Schmalenbach* (n 51) 745; see, however, *Frowein/Krisch* (n 50) MN 15.

[55] [1996-II/2] YbILC 43.

[56] Resolution RC/Res.6, 11 June 2010 (Advanced Version 28 June 2010); for the negotiation history see *Schmalenbach* (n 51) 746; *Y Trahan* The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference (2011) 11 ICLR 49–104; HP Kaul

the definition itself but issues of jurisdiction. As a result of the compromise, Art 8 *bis* Rome Statute will differentiate between the crime of aggression committed by an individual and an act of aggression illegal under international law. The article repeats the definition contained in Art 1 GA Res 3314 (XXIX) and lists the examples for acts of aggression included in the resolution.[57] By defining an "act of aggression" as the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter, any use of armed force justified by international law does not fall within the ambit of the provision. Since some States would only be willing to accept the amendment if not every illegal use of force under international law were considered as an act of aggression Art 8 *bis* para 1 Rome Statute introduces a further threshold. Accordingly, in order to qualify as a crime, an act of aggression must constitute a manifest violation of the UN Charter by its character, gravity and scale.[58]

17 In view of the purpose of Art 75, the question arises whether "aggression covers any threat or use of force against the territorial integrity or political independence of any State within the meaning of Art 2 para 4 UN Charter"[59] or whether a higher threshold is required. On the one hand, the conflict between the provision of the VCLT and obligations arising from measures taken according to Chapter VII will also arise in cases in which there is only a threat or breach of peace. Moreover, the reluctance of the Security Council even to qualify behavior as aggression, which evidently constitutes such an act, speaks in favour of a broad interpretation. On the other hand, according to its wording and drafting history, Art 75 clearly aims to connect the rules on aggression with the treaty regime of the VCLT. Accordingly, a Japanese proposal for an amendment of the draft, which wanted to extend the scope of the rule to all threats to and breaches of peace, was not adopted.[60] Thus, it seems appropriate to condition the applicability of Art 75 upon the gravity of the act amounting to aggression. If such a grave breach of peace has been determined by the Security Council, it would, however, be an inappropriate formalism to require that the Council explicitly uses the word 'aggression'. A pertinent example is the

Kampala June 2010 – A First Review of the ICC Review Conference (2010) 2 Göttingen Journal of International Law 649–667.

[57]Art 8 *bis* Rome Statute ("Crime of aggression"): "1. For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. 2. For the purpose of paragraph 1, 'act of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. [. . .]"

[58]For criticism from the perspective of international criminal law, see *Schmalenbach* (n 51) 747; see also *R Heinsch* The Crime of Aggression after Kampala: Success or Burden for the Future? (2010) 2 Göttingen Journal of International Law 713–743.

[59]*Villiger* Art 75 MN 3.

[60]UNCLOT I 457.

Iraqi invasion of Kuwait.[61] In the pertinent resolutions, the Security Council authorizes Member States to use all necessary means to restore international peace and security in the area and speaks of a flagrant contempt of the Council.[62] Taken together with the context of the resolutions, this should suffice to clarify that the invasion of Kuwait constituted an act of aggression in terms of Art 75. In cases where the organs of the UN collective security system do not explicitly qualify the use of armed force as an act of aggression, the findings of the ICC and the ICJ – if available – can serve as an additional indication for the applicability of Art 75.

2. Competence to Determine an Act of Aggression

18 Whether a State can be considered as an aggressor State depends on a determination of a competent international organ. Although Art 75 does not provide explicitly for such a requirement, the wording of Art 75 itself indicates that it relates to the UN collective security system. The legal structure of the international order speaks in favour of the need for such a centralized determination.[63] In the light of Art 39 UN Charter, it is first and foremost the Security Council that is competent to determine whether the use of force constitutes an act of aggression in a specific case.[64]

19 Even though the ICC will be competent to make a judicial determination on aggression from 2017 onwards, this does not undermine the competence of the UN Security Council. Although the Court is competent to decide on crimes of aggression referred to it by a State Party or initiated *proprio motu* by the prosecutor independent from a finding of the Security Council, Art 15 *bis* Rome Statute still acknowledges the primary competence of the Security Council by providing for additional procedural requirements. Thus, before proceeding with an investigation in respect of a crime of aggression, the prosecutor shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court (Art 15 para 6 Rome Statute). Moreover, the Security Council may act under Art 16 Rome Statute and stay investigation or prosecution for a period of 12 months through a resolution adopted under Chapter VII of the UN Charter. On the other hand, the ICC is free to determine on an act of aggression under its Statute independently of any findings of an organ outside the Court (Art 15 *bis* para 9 Rome Statute). Consequently, for the purposes of Art 75 VCLT, the relation between these two organs is best reflected when a finding of the ICC is used to interpret an ambiguous determination by the Security Council.

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[61] *C Tomuschat* in *Corten/Klein* Art 75 MN 14.

[62] UNSC Res 678 (1990), 29 November 1990, UN Doc S/RES/678 (1990).

[63] *C Tomuschat* in *Corten/Klein* Art 75 MN 14.

[64] See *Verdross* [1966-I/2] YbILC 179: "Since [the article] referred to the United Nations Charter, it should be made clear that, under Article 39 of the Charter, the Security Council alone was competent to determine the existence of an act of aggression and that its determination was binding on all Members under Article 25 of the Charter."

The collective security system under the UN Charter guarantees a certain amount of legal security in a decentralized order through adherence to a process with defined centralized competences. Leaving the decision on the question whether a treaty is imposed on an aggressor State to the States Parties concerned would not only (at least indirectly) undermine the monopoly of the collective security system but also entail the danger of arbitrariness and thus a loss of legal security. Thus, members of the ILC "stressed the possible danger of one party unilaterally characterizing another as an aggressor for the purpose of terminating inconvenient treaties; and the need, in consequence, to limit any reservation relating to the case of an aggressor State to measures taken against it in conformity with the Charter."[65] **20**

Additional arguments can be inferred from the Code of Crimes against Peace and Security of Mankind.[66] The draft articles establish a special system of jurisdiction for the crime of aggression explicitly excluding universal jurisdiction for national courts. The ILC argued that **21**

> "an individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. [...] [T]he exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security."[67]

Here, the ILC refers indirectly to the exclusive competence of the organs of the UN collective security system.

In line with the structure of the UN collective security system, the General Assembly is also competent to determine an act of aggression. Under the Uniting for Peace Resolution of 1950,[68] the General Assembly is competent to recommend enforcement action under Chapter VII of the UN Charter if the Security Council is paralyzed because of differences of opinion among the permanent members. Even if mandatory measures would be required in such a case, the General Assembly is not obliged to pass the question to the Security Council since this would amount to a mere formalism.[69] **22**

> In Resolution 498 (V) of 1 February 1951 the General Assembly found "that the Central People's Government of the People's Republic of China by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations forces there, has itself engaged in aggression in Korea."

[65] Final Draft, Commentary to Art 70, 268 para 3.

[66] *C Tomuschat* in *Corten/Klein* Art 75 MN 18.

[67] [1996-II/2] YbILC 30 (commentary to Draft Art 8); see *J Allain/J Jones* A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind (1997) 8 EJIL 100.

[68] UNGA Res 377 (V), 3 November 1950, UN Doc A/RES/377 (V).

[69] *K Hailbronner/E Klein* in *B Simma* (ed) The Charter of the United Nations (2002) Art 11 MN 31.

23 According to Art 53 UN Charter, the Security Council can utilize regional arrangements for enforcement action under its authority. The organization may take enforcement action subject to an authorization of the Security Council. In such a case, a determination by a regional organization is relevant for the application of Art 75.[70]

24 In view of the results of Kampala Review Conference of 2010, the ICC is also competent to decide independently on the crime of aggression. Art 15 *bis* Rome Statute deals with cases that are referred to the Prosecutor by a State Party or where the Prosecutor initiates an investigation *proprio motu*. In these cases, Art 15 *bis* established the jurisdiction of the ICC even if there is no determination by the Security Council. The competence is subject to two exceptions.[71] According to Art 15 para 5 Rome Statute in respect of a State that is not a party to this Statute, the ICC shall not exercise its jurisdiction over the crime of aggression when committed by a State's nationals or on its territory. Moreover, there is an opting-out clause included in Art 15 para 4 Rome Statute according to which a State Party may declare that it does not accept the Court's jurisdiction by lodging a declaration with the Registrar.

25 A finding of the ICJ that the use of armed force constitutes an act of aggression could also be used to interpret ambiguous resolutions of the Security Council. However, in the *Armed Activities on the Territory of the Congo* case, the ICJ only found that

> "[t]he unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter."[72]

Despite the allegations of the Democratic Republic of the Congo that Uganda had committed an act of aggression, the ICJ underlined that

> "[the] long series of carefully balanced resolutions and detailed reports recognized that all States in the region must bear their responsibility for finding a solution that would bring peace and stability. The Court notes, however, that this widespread responsibility of the States of the region cannot excuse the unlawful military action of Uganda."[73]

While the latter statement might speak in favour of the assumption of aggression, the whole reasoning of the Court demonstrates that in lack of a clear determination by the Security Council, other international organs will also be reluctant to provide such a determination. Thus, uncertainties in applying Art 75 VCLT will remain.

[70] *C Tomuschat* in *Corten/Klein* Art 75 MN 16.

[71] *Schmalenbach* (n 51) 749.

[72] ICJ *Armed Activities on the Territory of the Congo* (n 49) para 165.

[73] *Ibid* para 152.

III. In Consequence of Measures Taken in Conformity with the UN Charter

26 The expression "measures taken in conformity with the Charter of the United Nations" refers to all measures taken by the UN Security Council, the General Assembly or a regional organization authorized by the Security Council. On the basis of Art 41 UN Charter, the Security Council may impose the conclusion of treaties impeaching rights under the VCLT. Moreover, determining that an act of aggression had been committed might also constitute such a measure.[74]

27 The phrase does not cover unauthorized measures of self-defense taken under Art 51 UN Charter.[75] During the Vienna Conference, the Swiss delegation stressed that the provision was ambiguous because "measures taken in conformity with the Charter" could mean the binding decisions taken by the Security Council under Chapter VII of the Charter, but also individual or collective measures of self-defense taken under Art 51 UN Charter."[76] In order to prevent arbitrary action by States, it is not only necessary to leave the competence to decide on an act of aggression to the Security Council (→ MN 20–21). This aim also requires that a State is explicitly authorized to take measures in consequence of which the obligations for the aggressor State arises. It must be kept in mind that the right to self-defense is restricted under the Charter and procedurally tied to the competence of the Security Council. Accordingly, any measures of retaliation or punitive acts are prohibited.[77] Thus, it would mean to overstretch the consequences of the right to self-defense if one assumed that it includes a right to command the conditions of a peace treaty unilaterally in derogation from provisions of the VCLT, especially the requirement of consent.[78]

28 In view of Arts 25, 39, 41 and 103 UN Charter, it would seem superfluous if the provision would just aim to clarify that the parties to a treaty must implement the sanctions of the Security Council irrespective of contravening treaty obligations.[79] Thus, Art 75 VCLT envisages the creation of new obligations for an aggressor State.[80] Accordingly, under present-day conditions, Art 75 would only apply to very restricted constellations. After determining that an act of aggression had taken

[74] *C Tomuschat* in *Corten/Klein* Art 75 MN 19.

[75] *Bothe* (n 1) 518.

[76] Statement by the representative of Switzerland UNCLOT I 454–455; see also the statement by the representative of Australia UNCLOT I 456.

[77] *A Randelzhofer* in *B Simma* (ed) The Charter of the United Nations (2002) Art 51 MN 41–42.

[78] *C Tomuschat* in *Corten/Klein* Art 75 MN 20.

[79] See insofar Final Draft, Commentary to Art 70, 268 para 4; see however the discussion between *Tsuruoka* and *Waldock* [1966-I/2] YbILC 223 *et seq*: "'[. . .] any other international agreement, their obligations under the present Charter shall prevail'. That being so, was there any reason why the wording of article Z should not follow that of Article 103 as closely as possible? [. . .] Sir Humphrey Waldock, Special Rapporteur, said that the Drafting Committee's text was not intended to apply exclusively to States Members of the United Nations, so that it might not be wholly satisfactory to rely solely on Article 103 of the Charter."

[80] *Bothe* (n 1) 517; *C Tomuschat* in *Corten/Klein* Art 75 MN 8.

place, the Security Council would either have to authorize a victim of aggression to regulate all pertinent questions on the basis of a treaty and would have to order the aggressor to conclude this treaty or authorize the victims of aggression to conclude a pertinent treaty among themselves without any participation of the aggressor.[81]

There is no pertinent State practice for Art 75.[82] In the case of the Iraqi invasion of Kuwait the Security Council itself imposed the conditions for a return to peace in a detailed regime in Resolution 687 (1990). The practice of the UN Security Council in the case of Kosovo maybe comes closest to the situations envisaged by Art 75. NATO and Serbia concluded the Military Technical Agreement after the NATO air bombing had ended on 9 June 1999.[83] Since NATO's bombing campaign would only be halted if the agreement was fulfilled, it has been considered as an agreement procured by unauthorized force. The Security Council did not explicitly endorse the agreement in Resolution 1244 (1999) but "[a]uthorize[d] Member States and relevant international organizations to establish the international security presence in Kosovo [...] with all necessary means to fulfill its responsibilities."[84] However, whether there was an act of aggression by Serbia[85] and whether the NATO bombing campaign itself was in conformity with international law remains doubtful.[86] In other cases the Security Council often confines itself to welcoming the conclusion of treaties between parties of an armed conflict which has been brought about with the participation of the United Nations. A pertinent example is the Lusaka Ceasefire Agreement which the Council welcomes in Resolution 1258 (1999).

IV. Legal Consequences

29 Art 75 is conceived as a general reservation, which does not only deal with Arts 35 and 52 but is applicable to the draft articles as a whole. The ILC "felt that there might be other articles, for example, those on termination and suspension of the operation of treaties, where measures taken against an aggressor State might have implications."[87] However, the exact scope of the reservation remains doubtful. In the first place, its character as a reservation speaks in favour of a restrictive interpretation.[88] Given that according to Art 41, measures taken may only be maintained if a threat to or breach of peace continues, the exact scope of the

[81] *Bothe* (n 1) 515 *et seq*; *C Tomuschat* in *Corten/Klein* Art 75 MN 21.

[82] See for this evaluation and the following examples *C Tomuschat* in *Corten/Klein* Art 75 MN 24.

[83] 1999 Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, reprinted in *H Krieger* The Kosovo Conflict and International Law (2001).

[84] UNSC Res 1244 (1999), 10 June 1999, UN Doc S/RES/1244 (1999), para 7.

[85] See for a hypothetical argument *C Tomuschat* in *Corten/Klein* Art 75 MN 24.

[86] See *eg G Nolte* Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten (1999) 59 ZaöRV 941.

[87] Final Draft, Commentary to Art 70, 268 para 1; [1966-I/2] YbILC 179; *Waldock* [1966-I/2] YbILC 182: "For example, if an aggressor State in due course became a Member of the United Nations, it might try to invoke that development as a fundamental change of circumstances justifying the termination of the treaty under article 44."

[88] *Ress* (n 17) 843.

determination by the Security Council and the Council's subsequent practice will also be decisive for terminating any treaty concluded in the realm of Art 75.[89]

The aggressor State will not be bereft of all rules in the VCLT that may work in its favour. Already the commentary of the ILC stressed **30**

> "that it would be essential to avoid giving the impression that an aggressor State is to be considered as completely *exlex* with respect to the law of treaties. Otherwise, this might impede the process of bringing the aggressor State back into a condition of normal relations with the rest of the international community."[90]

It would not seem proportional to totally exclude termination for instance in case of a breach of a treaty by the parties. At least, an explicit derogation in the Security Council resolution would be required to exclude an aggressor State from all the protection that the VCLT guarantees.

A strong argument can be made that the provision is superfluous given its restricted scope of applicability (→ MN 10–14). The lack of any corresponding practice by the Security Council is a further indication for the fact that the drafting of the provision was too strongly influenced by a historical perspective and contemporaneous political disputes. **31**

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[89] *C Tomuschat* in *Corten/Klein* Art 75 MN 22.

[90] Final Draft, Commentary to Art 70, 268 para 2.

Part VII
Depositaries, Notifications, Corrections and Registration

Article 76
Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Contents

A. Purpose and Function

While in the context of bilateral treaties or treaties with a small number of parties the necessary communication between the parties relating to the life of the treaty can be carried out directly between the parties, this is scarcely feasible in the context of multilateral treaties with many parties. Such treaties may be administered more easily by entrusting all necessary functions to a neutral entity, the **"depositary"**. The VCLT contains, in several articles, the first comprehensive codification of the rules governing the institution of the depositary. **1**

Art 76 para 1 specifies how a depositary may be designated, who may designate a depositary, and who may be a depositary. Art 76 para 1 is guided by the **principle of flexibility**, with the decision of how and whom to designate being left entirely to the States concerned. Art 76 para 2 sets out the fundamental **principle of impartiality**, which is essential for the performance of the depositary functions. It aims to ensure that the depositary does not abuse its position in order to promote its own interests. **2**

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
DOI 10.1007/978-3-642-19291-3_80,

B. Historical Background and Negotiating History

3 Prior to the nineteenth century, multilateral treaties were handled the same way as bilateral treaties. All signatories of a treaty received an original text and had to exchange instruments of ratification with every other signatory. Against this background the idea of **centralizing the handling of a treaty** was developed in the early nineteenth century.[1] The Final Act of the Congress of Vienna in 1815[2] was the first treaty to entrust one of its parties (Austria) with the custody of the single original text. However, this early depositary had no other function. Such other functions as receiving and keeping custody of instruments of ratification were developed gradually throughout the nineteenth and the early twentieth century.[3] While depositaries were tasked with an increasing number of functions, their role remained **purely administrative** and **non-political**.[4] In the beginning, it was only States who were designated as depositaries. With the establishment of the League of Nations and later of the United Nations and its specialized agencies, these and other international organizations have been increasingly entrusted with depositary functions.[5]

4 Before the ILC started its codification work, the institution of the **depositary** was scarcely touched upon in scholarly literature on treaty law, although naturally mentioned in various contexts.[6] Equally, SRs *Brierly*, *Lauterpacht* and *Fitzmaurice* did not propose separate draft articles on the depositary, but referred to it only occasionally. It was finally SR *Waldock* who, for the first time, envisaged separate draft articles on the independent role and the various functions of the depositary.[7]

5 The principal issues discussed in the ILC were the possible **abuse** of depositary functions by the depositary State for its own purposes (→ MN 30), the **independent role** of the depositary (→ MN 8) and the **determinative powers** of the depositary, *ie* the issue whether the functions of the depositary, in particular those relating to the validity of instruments and the entry into force of the treaty, were more than administrative (→ Art 77 MN 8).[8] The States at the Vienna Conference shared the general approach of the Commission and supported the explicit reference to the obligation to act impartially. The ILC draft articles were thus only subject to

[1] *J Stoll* Depositary (1992) 1 EPIL 1010–1011; *R Caddell* Depositary in MPEPIL (2008) para 3.

[2] 64 CTS 452.

[3] *J Dehaussy* Le dépositaire de traités (1952) 56 RGDIP 489.

[4] *F Ouguergouz*/*S Villalpando* in *Corten*/*Klein* Art 77 MN 4–11.

[5] 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, para 12. Before the establishment of the League of Nations, the exercise of depositary functions by international bodies occurred only in exceptional cases; see *Dehaussy* (n 3) 492.

[6] *S Rosenne* The Depositary of International Treaties (1967) 61 AJIL 923, 925.

[7] *Waldock* I 80–83; *Rosenne* (n 6) 926–927; *F Ouguergouz*/*S Villalpando* in *Corten*/*Klein* Art 77 MN 12–19.

[8] See, in particular, [1962-I] YbILC 185–192; *Rosenne* (n 6) 926, 933.

minor amendments in order to simplify the text and to bring it into line with current State practice.[9]

The articles on depositaries adopted at the Conference brought clarity to an area of international law, which previously had not been governed by any generally accepted body of rules.[10] The VCLT II copied the text of Arts 76–80 with slight adaptations in light of the situation with international organizations. **6**

C. Elements of Article 76

I. Depositary

Generally, 'depositary' means a person to whom something is entrusted.[11] In his first report, SR *Waldock* defined 'depositary' as "the State or international organization designated in a treaty to be the custodian of the authentic text and of all instruments relating to the treaty and to perform with reference to such treaty and instruments the functions set out [. . .] below."[12] **7**

This definition was part of the draft article on definitions, but was later deleted.[13] Nevertheless, it remains an adequate definition of the depositary, as it highlights the function of **custodian** as the core function of the depositary. The other functions indirectly referred to in this definition comprise in particular the **receiving**, **formal examination**, and **informing** about documents and acts by States Parties or States entitled to become parties (→ Art 77). These functions are **administrative** and **non-political**. The depositary administers the treaty *for* the States Parties and the States entitled to become parties, but is not authorized to take binding decisions in this context or on questions of substance. Such decisions remain in the exclusive competence of the States. The bundling of the administrative work into one set of hands significantly simplifies the operation of a multilateral treaty.

When the ILC was working on its draft articles, the widely held assumption that the depositary was a kind of **agent of the States Parties** prevailed, which meant *eg* that a notification to the depositary was equivalent to a direct notification to the States concerned. The ILC did not follow this view and conceived of the depositary as a **completely independent institution**, with an independent role and independent rights and duties.[14] In its discussion of Art 78, the ILC concluded that the depositary was no more than a convenient mechanism for the administration of the **8**

[9]UNCLOT I 457–463, 465–468, 485–487.

[10]*R Kearney*/*R Dalton* The Treaty on Treaties (1970) 64 AJIL 495, 560.

[11]*C Soanes*/*A Stevenson* (eds) The Concise Oxford Dictionary of Current English (11th edn 2006) 384.

[12]*Waldock* I 32.

[13][1965-I] YbILC 307.

[14]*Rosenne* (n 6) 926.

treaty and could not be understood as the agent of the parties (→ Art 78 MN 4). The States did not challenge this approach at the Vienna Conference.

II. Designation of the Depositary

9 Art 76 para 1 cl 1 deals with the questions of **how** a depositary may be designated[15] and **who** may designate the depositary. Implicitly, it also deals with the **scope** of the provisions on the depositary. As a general principle, it gives States a maximum level of flexibility in their decisions ("may").

10 As to the question of **how** a depositary may be designated, para 1 cl 1 states that this may be carried out "either in the treaty itself or in some other manner". The **designation in the treaty itself** by including an explicit provision to that effect is the usual way and can be found in most multilateral treaties. However, para 1 cl 1 leaves the method of designation entirely to the States, and thus they can choose any other method. Such **other method** could be a separate treaty, *eg* in the form of an amendment, a protocol or a side letter, or any other explicit or implicit understanding in whatever form during the negotiations or at a later stage. In the context of treaties negotiated in the framework of international organizations, the depositary may be designated by a resolution or decision of a body of the international organization concerned.[16] It may also happen that it is simply **assumed** that the competent officer or unit of an international organization will act as depository.[17] The designation in some other manner than by the treaty itself also becomes relevant when a depositary ceases to exist, as *eg* in the case of the League of Nations.[18]

11 It is **common practice** that multilateral treaties adopted within an international organization or at a conference convened by an international organization designate

[15]The original term "appointed" was later replaced by "designated", which the ILC considered more appropriate, corresponding better to the French "désigné"; [1965-I] YbILC 277.

[16]According to Art 2 para 10 of the 2007 International Coffee Agreement, the depositary is designated by the decision – taken by consensus – of the International Coffee Council (ICC), a treaty body of the preceding agreement. By ICC Res 436, 25 January 2008, the International Coffee Organization was designated as depositary. This resolution, however, forms an integral part of the Agreement in accordance with its Art 2 para 10.

[17]'Mixed agreements' between the EC and its Member States and third countries usually do not contain a reference to the Secretary-General of the Council of the EU as depositary, but nevertheless he or she acts as such; see *eg* the 2004 Euro-Mediterranean Agreement Establishing an Association between the European Communities and Their Member States, of the One Part, and the Arab Republic of Egypt, of the Other Part [2004] OJ L 304, 39.

[18]The depositary functions of the League of Nations were transferred to the UN by UNGA Res 24 (I), 12 February 1946, UN Doc A/RES/24 (I). In operative para 2 of this resolution, the General Assembly "records that those Members of the United Nations which are parties to the instruments referred to above assent by this resolution to the steps contemplated below", and declares in operative para 3 that "the United Nations is willing [. . .] to assume the exercise of certain functions and powers previously entrusted to the League of Nations".

the competent chief administrative officer of this organization as depositary. Outside international organizations, it is normally the State in whose territory the conference had been convened. The ILC first tried to take this practice into account and proposed a residuary rule, which would govern the appointment of the depositary, where no depositary was designated in the treaty.[19] However, in the course of the discussion, the ILC decided to delete the residuary rule and to leave the decision on the designation entirely to the States.[20] The draft article finally adopted by the Commission[21] contained only a simple statement on the different possibilities of designation. In that sense, para 1 may be characterized as "expository".[22] Except for minor drafting changes, it was accepted by the States participating in the Vienna Conference.

As for the question of **who** may designate the depositary of a treaty, para 1 cl 1 indicates that only the negotiating States are entitled to do so. Since the depositary is usually designated by an explicit provision in the treaty itself, it seems evident that the **negotiating States** decide who will be designated as such. However, the question may arise as to whether the right to designate remains confined to the negotiating States in the case of a multilateral treaty for which no depositary was designated and which has, at the time when designation becomes necessary, signatories or States Parties that were not negotiating States. Given the flexible character of the whole provision ("may"), it does not seem justified to exclude this group of States from such a decision, which substantially affects their interests and to which they normally agree by signing or becoming party to the treaty.[23] Furthermore, the designee cannot delegate its depositary role to another State or international organization without the consent of the States, as the designation remains their decision.[24] **12**

As to the **scope**, there is no doubt that the provisions on the depositary apply equally to multilateral as well as to bilateral treaties. Arts 76–80 use the term "treaty" without explicit restriction and thus cover **both bilateral and multilateral treaties**. Attempts in the ILC and at the Vienna Conference to limit the designation of depositaries to multilateral treaties were rejected.[25] However, the designation of depositaries for bilateral treaties is not common practice. **13**

[19] *Waldock* I 81; [1962-I] YbILC 185–186.

[20] [1965-I] YbILC 190–193, 195–196, 277–278.

[21] Art 71 Final Draft.

[22] *Villiger* Art 76 MN 4, referring to the statement of the UK delegation, UNCLOT I 462.

[23] For a contrary opinion: *L Caflisch* in *Corten/Klein* Art 76 MN 16.

[24] The Government of the Italian Republic as depositary of the 1957 Treaty Establishing the European Community 298 UNTS 3 asked the EU Council Secretariat for assistance in exercising its depositary functions. The Italian Government formally remained the depositary and continues to sign the documents, but the substantial work is done by the Council Secretariat. It might be questioned whether such substantial assistance may be given without the consent of the other States Parties; in this case, however, implicit consent may be presumed.

[25] The restriction to multilateral treaties was proposed by China, UNCLOT I 458.

One of the rare examples[26] for bilateral treaties with a depositary is the 1952 Agreement between Israel and the Federal Republic of Germany[27]: due to the delicate political circumstances the parties asked the UN Secretary-General to carry out certain tasks normally related to multilateral treaties, *eg* to accept the instruments of ratification.

A specific case is the so-called mixed agreements concluded by the EC and its Member States on one side and a third State on the other, as they are a hybrid between a bilateral and a multilateral treaty: for such agreements the EU Council Secretariat usually acts as depositary, although a depositary is often not explicitly designated.[28]

14 Of course, the designation as depositary needs the consent of the State or international organization in question (→ MN 16, 22, 25).

III. One or More States

15 The issue of **who** may be depositary is laid down in para 1 cl 2. On this issue, States again have freedom of choice. Art 76 para 1 cl 2 simply states that a **State** may be depositary. Usually, it will be the State in whose territory the international conference to negotiate the treaty has been convened. However, since States are entirely free to choose the depositary for their treaty, it may also be any negotiating, signatory, or contracting State.[29] It may even be a **third-party State** that has little or no relation to the treaty.[30]

16 However, **consent of the designated State** is necessary, as the assumption of the role of depositary entails certain obligations under international law. In the case of a negotiating, signatory or contracting State, consent is deemed to be given by the adoption, signature, or ratification of the treaty. If a third State with no relation to the treaty is to be depositary, it would be necessary to obtain its consent separately.[31]

17 Although para 1 cl 2 only refers to **States** as depositaries, it is normally the **government** of a State, and not the State itself, that is designated as depositary.[32]

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[26] Brought forward by ILC member *Rosenne*, [1965-I] YbILC 193.

[27] 162 UNTS 205.

[28] See n 17.

[29] For instance, Switzerland is depositary of the 1982 Convention Concerning the Issuance of Certificates in Connection with the Attribution of Different Family Names 1509 UNTS 261 and participated in the negotiations, but neither signed it nor became party.

[30] Although concluded by five international organizations, the 1994 Agreement for the Establishment of the Joint Vienna Institute 2029 UNTS 391 may be mentioned in this context. It designates the Federal Minister for Foreign Affairs of the Republic of Austria as depositary, although Austria was neither a negotiating nor signatory nor contracting State. However, the Institute was to be located in Vienna and therefore Austria had a certain interest in the treaty. Austria later became party to the amended agreement in 2003.

[31] In the example given in n 30, the five organizations requested – and obtained – the written consent of the foreign minister before preparing the original text for signature.

[32] See *eg* Arts 110 and 111 UN Charter conferring depositary functions on the "Government of the United States of America", and Arts 313 and 314 of the 1957 Treaty Establishing the European Community 298 UNTS 3 on the "Government of the Italian Republic".

This practice does not contradict para 1 cl 2, since the government, understood in its broadest sense, is any institution through which a State acts.[33] The parallel practice of designating the **chief administrative officer** instead of the international organization itself, however, was taken explicitly into account in the drafting, on the request of the UN Secretariat (→ MN 24). Within the depositary State, it is usually the **Treaty Office** of the foreign ministry that exercises the depositary functions. If treaties concern technical matters, other ministries sometimes carry out these functions. However, depositary functions remain the same, whatever the content of the treaty. In order to avoid inconsistency in the depositary practice, it is advisable not to confer depositary functions to other institutions.[34]

18 Art 76 para 1 cl 2 also mentions the possibility of **more than one State** being depositary of one treaty, a practice that evolved during the Cold War. The most frequently given examples for this practice are the 1963 Partial Test Ban Treaty[35] and the 1968 Treaty on the Non-Proliferation of Nuclear Weapons,[36] which designate the Governments of the United States, the United Kingdom and the USSR as depositary. This arrangement was designed to bridge differences between the two blocs as to the recognition of certain entities as States, such as the German Democratic Republic. Although the exercise of depositary functions in relation to an entity does not imply recognition of this entity as a State (→ MN 32), the general understanding was that no depositary should be forced to deal with entities, which it did not recognize, while all entities not recognized by one depositary should have the possibility to adhere to the treaty.[37] The draft articles proposed by the ILC only referred to "a State" as depositary, but the Commission considered that expression to also cover cases in which two or more States are designated.[38] Nevertheless, several delegations at the Vienna Conference wanted to take the then recent practice of designating more than one State as depositary into account and a relevant amendment was adopted.[39]

19 It is important to note, however, that the designated States constitute a **single depositary** and not separate depositaries. In the multiple depositary system, a single and unitary set of functions is conferred on a plurality of States. This means *eg* that a notification entails all its legal consequences regardless of the State to which it was made.[40] On the one hand, the multiple depositary system can

[33] Similar *Dehaussy* (n 3) 493. Even a more specific determination of the competent organ within the government is possible, *eg* the foreign minister, if the designated State so agrees (see n 30 and 31).

[34] *Aust* 325.

[35] 480 UNTS 43.

[36] 729 UNTS 168.

[37] *Aust* 326–327; *J Frowein* Some Considerations Regarding the Function of the Depositary (1967) 27 ZaöRV 533, 538; *F Horn* Certain Questions Relating to the Functions of Depositaries of Treaties (1990) 1 FinnYIL 266, 269–271.

[38] See the statement by *Waldock* at the Vienna Conference UNCLOT I 467.

[39] UNCLOT I 457–463, 465–468, 485–487.

[40] *S Rosenne* More on the Depositary of International Treaties (1970) 64 AJIL 838, 842–844.

be a useful means for overcoming certain political difficulties, as was the case during the Cold War. On the other hand, it is difficult to handle and may be a source of error. Experience has shown that it produced a great deal of administrative confusion. At present, there is no need for such a system in new treaties.[41]

20 The multiple depositary system has to be distinguished from a **splitting of the depositary functions**. In the first case, all depositary functions are conferred upon all designees, who jointly exercise these functions, whereas in the latter case, only certain specific depositary functions are conferred on a State or international organization different from the depositary. The VCLT *eg* was open for signature for a certain period of time at the Federal Ministry for Foreign Affairs of the Republic of Austria, and only subsequently at UN Headquarters. Despite this authority to receive signatures, Austria did not become depositary, as all other depositary functions were carried out by the UN Secretary-General.[42]

21 Given the freedom of States to choose the depositary, it is also imaginable that **other subjects of international law** than States and international organizations, or even **non-State actors**, might be designated as depositary. However, so far there is no such practice.[43]

IV. International Organization

22 Most multilateral treaties are adopted within the framework of an international organization or at an international conference convened by an international organization. The international organization within which the treaty was adopted or which convened the conference normally also assumes the role of the depositary. In most cases, however, it is not the organization itself, but its chief administrative officer that is designated as depositary (→ MN 23).[44]

V. Chief Administrative Officer of the Organization

23 Apart from States and international organizations, para 1 cl 2 also mentions the chief administrative officer of an international organization as a possible depositary. This seems superfluous, as the chief administrative officer is already comprised in the term "international organization". However, it reflects the common

[41] *S Rosenne* Developments in the Law of Treaties 1945–1986 (1986) 420; *Aust* 327. *Aust* nevertheless identifies a more recent example, the 1991 Cambodia Agreement 31 ILM 183, which has France and Indonesia as depositary, apparently because they co-hosted the conference.

[42] Art 81 VCLT and Summary of Practice (n 5) paras 15–26, which contains more examples of split depositary functions.

[43] *L Caflisch* in *Corten/Klein* Art 76 MN 24.

[44] Some exceptions can be found in the field of air law, where the ICAO itself, and not its Secretary-General, is designated, see *eg* Art 53 para 5 of the 1999 Convention for the Unification of Certain Rules for International Carriage by Air 2242 UNTS 350.

practice to designate the chief administrative officer rather than the organization itself (→ MN 22).

The UN Secretariat first raised this issue and asked the ILC to take this practice into account. SR *Waldock* rejected the idea with the correct argument that it was for the international organization itself to determine which of its organs should be a depositary.[45] The ILC's final draft thus referred only to "a State or an international organization".[46] At the Vienna Conference, Mexico took up the suggestion of the UN Secretariat and proposed inserting the chief administrative officer.[47] **24**

Since international organizations usually do not become parties to the treaties adopted within their framework, it is necessary to obtain their **consent** prior to their designation as depositary in the treaty. Most organizations have a general policy for when to accept depositary functions. The UN Secretary-General *eg* accepts depositary functions in respect of multilateral treaties of worldwide interest, usually adopted by the UN General Assembly or concluded at conferences convened by appropriate UN organs, or in respect of regional treaties drawn up in the framework of the UN regional commissions.[48] **25**

Although not explicitly mentioned in para 1 cl 2, it is also possible that **several international organizations** or chief administrative officers are designated as depositary, or even **States and international organizations**.[49] The UN Secretary-General, however, has decided for his part not to accept such multiple designations.[50] **26**

VI. Functions of the Depositary

→ Art 77. **27**

VII. International in Character

Art 76 para 2 describes the functions of the depositary as international in character. This seems to state the obvious fact that the depositary functions have their legal basis in international and not in municipal law. The ILC Commentary explains, **28**

[45] [1962-I] YbILC 186.

[46] Art 71 Final Draft.

[47] UNCLOT I 458.

[48] Summary of Practice (n 5) paras 28–30, with reference to a few exceptions. For consent to assume the depositary functions for League of Nations treaties, see n 18.

[49] See *eg* the 1988 International COSPAS-SARSAT Programme Agreement 1518 UNTS 209, which designates the Secretary-General of the ICAO and the Secretary-General of the IMO as depositary, or the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1589 UNTS 474, which designates the Governments of the USSR, the United Kingdom and the United States, as well as the ICAO.

[50] Summary of Practice (n 5) para 16.

however, that the original term used was "representative". In revising the provision, the Commission changed it to "international", as this seemed preferable.[51] The description "international in character" therefore refers primarily to the **representative role of the depositary**, in so far as it carries out the functions *for* the States related to the treaty (→ MN 7). In doing so, the depositary is subject to strict impartiality (→ MN 29).[52]

VIII. Obligation to Act Impartially

29 According to para 2 the depositary is under the obligation to act **impartially** in the performance of its functions. This obligation reflects customary international law and is of central importance for the depositary.[53]

30 The duty to act impartially was one of the issues discussed by the ILC in 1962. Of particular concern was the possibility that a depositary could **abuse** its position for reasons of its own political objectives.[54] The ILC first dealt with the provision on impartiality in the context of the article on the functions of the depositary, but then decided to transfer it to the present, more general article on depositaries, as impartiality should apply to all the depositary's obligations.[55] At the Vienna Conference, almost every State participating in the discussion emphasized the necessity for the depositary to be impartial.[56]

31 It is crucial for the depositary to **distinguish strictly** between its own views and interests as a State or international organization and its role as a depositary, especially when the depositary is a party or intends to become a party to the treaty.[57] The duty to act impartially becomes particularly relevant when the depositary exercises its **discretionary powers** (→ Art 77 MN 8, 17). The depositary has to maintain its impartiality also with respect to **States with which it has no diplomatic relations** for whatever reason, or with respect to **entities, which it does not recognize as a State**. When the depositary receives an instrument or notification from such a State or entity, it has to refrain from judgement and inform all States concerned; it is then up to those States to draw conclusions. Nevertheless, the depositary may also circulate its own position as a State, but this should be done in a separate note.[58]

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[51] Final Draft, Commentary to Art 71, 269 para 2.

[52] *L Caflisch* in *Corten/Klein* Art 76 MN 30.

[53] *Aust* 329; *L Caflisch* in *Corten/Klein* Art 76 MN 7; *Villiger* Art 76 MN 18; see also the discussion at the Vienna Conference, in particular the statement of the UK delegation that the article "clearly reflected established international practice" (UNCLOT I 462 para 53).

[54] *Tunkin* [1962-I] YbILC 186; *Rosenne* (n 6) 933.

[55] [1965-I] YbILC 277–278; Final Draft, Commentary to Art 71, 269 para 2; UNCLOT I 467.

[56] UNCLOT I 457–463, 465–468.

[57] Final Draft, Commentary to Art 71, 269 para 2.

[58] *Aust* 329; see also the intervention by Poland at the Vienna Conference, UNCLOT I 465–466.

> For instance in 1989, the Swiss Federal Council, as depositary of the Geneva Conventions, received an "instrument of accession" of the "State of Palestine". It consequently informed States that it was not in a position to decide whether the transmitted document constituted an instrument of accession, due to the uncertainty within the international community as to the existence or non-existence of a "State of Palestine".[59]

32 Conversely, impartiality means that the exercise of depositary functions is without prejudice to the position of the depositary as a State. Therefore, informing the other States concerned of the deposit of an instrument by an entity not recognized as a State by the depositary **does not entail recognition** of this entity as a State.[60]

33 The obligation to act impartially does not prevent the depositary from assuming a certain responsibility for the proper functioning of the treaty and for the wider adherence to it. The United Nations *eg* organizes an annual high-level treaty event with a thematic focus in order to promote a wider adherence to treaties of which it is depositary.

34 The second sentence of para 2 was added at the Vienna Conference[61] and only confirms the obligation to act impartially in two specific cases: first, if a treaty has not entered into force between certain parties; and secondly, if a difference has appeared between a State and a depositary with regard to the performance of the latter's functions. However, these two cases are already covered by the first sentence of para 2.

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[59] Rapport de politique étrangère, juin 2007, Annexe 2: Le rôle de la Suisse en tant que dépositaire des Conventions de Genève [2001] Feuille fédérale 5257, 5291 *et seq*, at 5293.

[60] *Aust* 330; *Horn* (n 37) 269.

[61] The Drafting Committee took into account an amendment by the Byelorussian SSR and an amendment by Mongolia to what is now Art 77 (functions of a depositary) and added it to Art 76 para 2 for systematic reasons; UNCLOT I 458, 485.

Article 77
Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;
(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;
(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;
(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;
(e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;
(f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;
(g) registering the treaty with the Secretariat of the United Nations;
(h) performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

Contents

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A. Purpose and Function

1 Art 77 para 1 contains a **non-exhaustive list** of the main depositary functions as developed in customary international law and collected to a large extent in the Summary of Practice of the UN Secretary-General.[1] Art 77 underlines the **administrative nature** of the depositary functions and clearly limits the discretionary powers of the depositary. Particularly in the context of its duty to examine signatures, instruments, notifications and communications, the depositary can only take **preliminary decisions** and has to leave the final decision to the States concerned. This becomes particularly evident in para 2, which requires the depositary to bring any difference between a State and itself as to the performance of its functions to the attention of the signatory and contracting States.

2 Art 77 has **residuary character** and thus becomes relevant if the treaty does not provide for differing rules. This facilitates the drafting of the final clauses of a treaty, as not all depositary functions have to be listed in the treaty, but only those deviating from Art 77.[2]

B. Historical Background and Negotiating History

3 The functions of the depositary gradually developed throughout the nineteenth and early twentieth century from simply **keeping custody** of a single original text to the full scope of depositary functions to be carried out today (→ Art 76 MN 3). At the same time, the depositary remained restricted to an administrative and non-political role without any competence to take final decisions on issues relating to the treaty.[3]

4 After World War II, the UN General Assembly started considering concrete aspects of the depositary functions. The General Assembly first discussed the subject in connection with the transfer of certain depositary functions from the League of Nations to the UN. The relevant resolution[4] contains a detailed

[1]The Final Draft, Commentary to Art 72, 269 para 1 highlights that the ILC paid particular attention to the 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1, when drafting the article.

[2]Many treaties nevertheless repeat the most important depositary functions, although they are already contained in Art 77.

[3]*F Ouguergouz*/*S Villalpando* in *Corten*/*Klein* Art 77 MN 4–11; *J Dehaussy* Le dépositaire de traités (1952) 56 RGDIP 489, 496–502.

[4]UNGA Res 24 (I), 12 February 1946, UN Doc A/RES/24(I).

description of depositary functions to be taken on by the UN in respect of treaties of which the League was the depositary. These functions were considered "pertaining to a secretariat" and it was stated that they "do not affect the operation of the instruments and do not relate to the substantive rights and obligations of the parties." This indicates that the depositary functions were seen as **purely administrative**.[5] Some years later, the General Assembly had to deal with the nature of depositary functions in the context of the discussions on reservations to multilateral treaties. Due to difficult legal questions relating to reservations as to the Genocide Convention,[6] the General Assembly requested the ICJ to give an advisory opinion.[7] In its advisory opinion of 1951, the Court did not elaborate extensively on the competences of the depositary, but stated in a simple sentence that the task of the depositary would be "confined to receiving reservations and objections and notifying them."[8] This sentence, however, was the basis for the subsequent General Assembly resolutions requesting the UN Secretary-General in his or her function as depositary not to express upon the legal effect of documents containing reservations and to communicate such documents to all States concerned, "leaving it to each State to draw legal consequences from such communications."[9] The depositary was thus considered not to have the competence to determine with finality the legal effects of deposited instruments, reservations and objections.[10]

The ILC also dealt with the issue of reservations and, in this context, with the functions of the depositary. The 1951 report of SR *Brierly* on reservations[11] was probably the first attempt to codify the functions of a depositary with regard to a specific topic of treaty law.[12] However, it was SR *Waldock* who, in his first report 1962, collected together for the first time in a single article, the main functions of a depositary.[13] In drafting the article, the SR paid particular attention to the UN practice as documented in the Summary of Practice.[14] The ILC took a very cautious approach to the determinative powers of the depositary and did not confer on the depositary any competence to take binding decisions unilaterally.[15] The final draft **5**

[5] *S Rosenne* The Depositary of International Treaties (1967) 61 AJIL 923, 927–928.

[6] 78 UNTS 277.

[7] UNGA Res 478 (V), 16 November 1950, UN Doc A/RES/478(V).

[8] ICJ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 27.

[9] UNGA Res 598 (VI), 12 January 1952, UN Doc A/RES/598(VI) in respect of future conventions concluded under the auspices of the UN, later extended by UNGA Res 1452 (XIV), 12 January 1959, UN Doc A/RES/1452(XIV) to all conventions concluded under UN auspices, *ie* also to those concluded before the adoption of UNGA Res 598 (VI).

[10] *Rosenne* (n 5) 928–931.

[11] SR *JL Brierly* Report on Reservations to Multilateral Conventions [1951-II] YbILC 1.

[12] *Rosenne* (n 5) 927.

[13] *Waldock* I 82–83.

[14] *Ibid.*

[15] For discussion, see [1962-I] YbILC 187–192.

article adopted by the ILC[16] did not raise serious questions of principle at the Vienna Conference. The changes proposed at the Conference were largely of a technical or of a drafting character. The United States, as the depositary of many multilateral treaties, played an active role in the discussion and proposed most of the amendments.[17] Art 77 as adopted at the Vienna Conference is a **codification** of the relevant customary international law concerning the functions of a depositary.[18]

C. Elements of Article 77

I. Functions of a Depositary (para 1)

6 Art 77 para 1 lists the principal functions of a depositary **without being exhaustive** ("comprise in particular"), which allows the depositary to carry out any further depositary function not explicitly mentioned in the VCLT but understood as existing in practice. This may be particularly relevant in the case of treaties adopted in the framework of an international organization, as the relevant rules of that organization may apply additionally. The United Nations *eg* exercises its depositary functions according to its established practice, which is in essence codified in the VCLT, but is yet "differing somewhat from that described in the Convention".[19] In UN practice, the UN Secretary-General also provides legal opinions on treaty questions upon request and general information on the status of the treaty.[20]

7 The provision "unless otherwise provided in the treaty or agreed by the contracting States" establishes the agreement of the contracting States, and in particular the treaty itself, as the primary source of law with regard to the functions of the depositary. The rules on the depositary functions only apply as **residuary rules**, *ie* in so far as the treaty remains silent and no other agreement on this matter exists.[21] If a treaty thus refers to no or only some depositary functions, the relevant customary rules and their codification in Art 77 apply. If, on the other hand,

[16] Art 72 Final Draft.

[17] UNCLOT I 457–463, 465–468, 486–487; *S Rosenne* More on the Depositary of International Treaties (1970) 64 AJIL 838, 844; *R Kearney*/*R Dalton* The Treaty on Treaties (1970) 64 AJIL 495, 559.

[18] *J Stoll* Depositary (1992) 1 EPIL 1011; *F Ouguergouz*/*S Villalpando* in *Corten*/*Klein* Art 77 MN 4–11; *R Caddell* Depositary in MPEPIL (2008) para 6; see also the statements by the United States and Switzerland at the Vienna Conference, UNCLOT I 459 para 16, 462 para 48. *Villiger* Art 77 MN 16 notes that Art 77 was a codification, "though most likely introducing innovatory details, *eg*, in subparas 1(d)–(e)".

[19] Summary of Practice (n 1) para 13. One example of a different practice would be the communication of proposed corrections to all States entitled to become parties and not only to the signatory and contracting States, as provided in Art 79 para 2; see Summary of Practice (n 1) paras 51–52.

[20] Summary of Practice (n 1) paras 34–35.

[21] *Stoll* (n 18) 1011; *F Ouguergouz*/*S Villalpando* in *Corten*/*Klein* Art 77 MN 21.

the contracting States do not want the depositary to perform certain functions, they have to exclude these functions explicitly in the treaty or by separate agreement.

Functions such as keeping custody of the original text and all instruments as well as receiving and informing of all documents and acts of States relating to the treaty clearly show that the depositary has in essence a **notarial** or **administrative role**. The depositary administers the treaty *for* the States Parties and the States entitled to become parties. One of the most delicate issues in this context is whether or to what extent the depositary may take **decisions** regarding the **documents or acts of States** relating to the treaty. Although of an administrative nature, the depositary functions include the exercise of **control and supervision** to a certain extent, *eg* whether the requirements for entry into force are met or whether instruments are in due and proper form (→ MN 16). In the words of the ILC, "the depositary is not a mere post-box, but has a certain duty to verify."[22] However, this does not mean that the depositary is entitled to unilaterally take definitively binding decisions. The discussions in the UN General Assembly in the 1950s on reservations to multilateral treaties (→ MN 4) have clearly shown that the depositary is only in the position to make **provisional determinations** and must seek the opinion of the States concerned. It is then up to the States concerned to define their positions and to take a final decision on the matter.[23] This approach was reflected in the ILC Final Draft[24] and was not changed by the States participating in the Vienna Conference. It is also generally accepted as customary law.[25] It is to be noted, however, that the restriction to provisional determination has residuary character and nothing prevents States from conferring a wider measure of discretion upon the depositary, provided that the depositary is willing to accept such wider discretion.[26] **8**

A number of treaties entrust the depositary with **additional administrative functions**, such as the **convocation of a conference** of the States Parties, the **keeping custody of relevant documentation** or the **maintenance of a list** of qualified jurists.[27] These additional functions are often related to the depositary functions and it is thus convenient and practicable to confer these functions on the depositary also. However, they have to be distinguished from the depositary functions *stricto sensu*, *ie* those codified in Art 77 or established in customary law.[28] The addition "or agreed by the contracting States" was initiated by the United States at the Vienna Conference with the intention of also covering cases in which the depositary should be entrusted with additional functions, which had not been anticipated before the conclusion of the treaty and had therefore not been specified **9**

[22] *Waldock* I 83; [1962-I] YbILC 187–192.

[23] *Rosenne* (n 5) 935–936.

[24] Final Draft, Commentary to Art 72, 269–270 para 4, 270 para 8.

[25] See *supra* n 18.

[26] *Rosenne* (n 5) 936.

[27] For the first two examples see Art 319 para 2 of the 1982 UN Convention on the Law of the Sea 1834 UNTS 3, for the third example see the Annex to the VCLT.

[28] Summary of Practice (n 28) paras 31–33.

in the treaty. With this addition the States concerned can entrust the depositary with such functions without having to amend the treaty.[29]

II. Keeping Custody and Receiving (para 1 lit a and c)

10 Keeping custody of the original text was historically one of the first tasks of a depositary (→ Art 76 MN 3) and is still one of its **core functions**. It is set out in para 1 lit a, together with the obligation to keep custody of any full powers. According to lit c, the depositary also has to receive and keep custody of "any instruments, notifications and communications" relating to the treaty.[30] The latter expression has to be understood in the widest possible sense, encompassing all documents relating to the treaty that a State may transmit to the depositary.[31] **Receiving** and **keeping custody** in the context of lit c are two closely interrelated functions, as receiving is the necessary precondition for keeping custody. **Signatures** are singled out in lit c, because they are effected on the signature pages that are part of the original text and are thus already covered by lit a. With regard to signatures, instruments, notifications and communications relating to the treaty, the depositary not only has to perform the functions of receiving and keeping custody (lit c), but also the functions of examining (lit d) and informing (lit e).[32]

11 Art 77 para 1 lit a and c were not the subject of extensive discussions at the Vienna Conference. In the ILC Final Draft, keeping custody of the original text was followed by the restriction "if entrusted to it", as the original is sometimes permanently or temporarily deposited with the host State of a conference while an international organization acts as the depositary.[33] The States at the Vienna Conference, however, saw no need to formulate explicitly such a restriction that seems self-evident and thus deleted it.[34] The proposal at the Conference to also mention **amendments** to a treaty was rejected, since amendments were considered to be already covered by the existing provisions.[35]

III. Preparing and Transmitting (para 1 lit b)

12 According to para 1 lit b the depositary has to prepare and transmit **certified copies** (→ MN 31) and "any further text of the treaty in such additional languages as may

[29]UNCLOT I 459; *Rosenne* (n 17) 844.

[30]The United States proposed to explicitly also mention the full powers, instruments and notifications, see UNCLOT I 459.

[31]*F Ouguergouz/S Villalpando* in *Corten/Klein* Art 77 MN 38.

[32]*Ibid* MN 35.

[33]Final Draft, Commentary to Art 72, 269 para 2.

[34]UNCLOT I 486.

[35]The proposals by Finland and Mexico were rejected by the Drafting Committee, see *ibid*.

be required by the treaty". This refers principally to the preparation of the text of the treaty in an **additional *authentic* language**. Although it might be possible to task the depositary with the translation of the treaty in various non-authentic languages, it is not considered a typical function of a depositary. Such additional authentic language must be provided for in the treaty itself[36] or in a subsequent agreement[37] of the parties. In practice, an international organization closely related to the treaty, whether or not the depositary, would prepare additional language versions, as international organizations usually have a specialized linguistic service at their disposal.[38] Finally, the ILC Commentary states that the preparation of further texts "may possibly arise from the rules of an international organization".[39] This is relevant in the exceptional case that a treaty adopted within an international organization remains silent on the authentic languages; in such a case, the official languages of the organization will normally be considered as the authentic languages.[40] Similar considerations may also apply to treaties between international organizations and third countries, unless the third country concerned opposes such an approach.[41]

Although the depositary has the duty to prepare the certified copies and, if applicable, any further text, it is not tasked with the **preparation of the original**. This is usually done by the State or international organization, which has assumed the functions of secretariat of the negotiating conference. At the Vienna Conference, the United States proposed including the preparation of the original in the list of functions set out in para 1.[42] This proposal was finally rejected on the grounds that "the word 'preparing' might be interpreted as conferring on the **13**

[36]See *eg* the 1983 International Tropical Timber Agreement 1393 UNTS 67, which requires the depositary to establish the authentic Chinese text and to submit it to all signatories for adoption.

[37]Usually in an amendment to the treaty, *eg* the Amendment to Article 74 of the 1978 Constitution of the World Health Organization, World Health Assembly Res 31.18, with regard to the Arabic text of the Constitution, or EU mixed agreements with third-party States after the accession of new members, such as the 2007 Protocol to the Euro-Mediterranean Agreement Establishing an Association between the European Communities and Their Member States, of the One Part, and the Arab Republic of Egypt, of the Other Part, to Take Account of the Accession of the Republic of Bulgaria and Romania to the European Union [2007] OJ L 312, 33.

[38]Thus, the Government of Sweden, which was required to prepare the texts of the 1992 Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas 1772 UNTS 217 in the authentic languages other than English, asked the UN Secretary-General for assistance; see Summary of Practice (n 1) para 46.

[39]Final Draft, Commentary to Art 72, 269 para 3; a similar formulation for the draft article had already been proposed in *Waldock* I 82; at the Vienna Conference there was no discussion on this formulation.

[40]See *eg* the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 96 UNTS 271, adopted by UNGA Res 317 (IV), 2 December 1949, UN Doc A/RES/317 (IV).

[41]See the 2007 EC-US Air Transport Agreement [2007] OJ L 134, 4 which contains no provision as to authentic languages and which – in view of the position of the United States and according to the information of the EU Council Secretariat – is only authentic in English and French.

[42]UNCLOT I 459.

depositary a certain responsibility for the actual drafting of the treaty and for the exact agreement of the authentic texts in all the languages."[43] The States thus chose a cautious approach in order to avoid too much discretionary power for the depositary. However, given the flexible character of para 1, States are free to confer such competence on the depositary. In many cases, however, the secretary of the conference is identical with the depositary.[44]

IV. Examining (para 1 lit d)

14 According to para 1 lit d, the depositary has to exercise certain **control and supervision** with regard to documents and acts relating to the treaty. In this provision, the discretionary powers of the depositary become more evident than in any other provision. Art 77 para 1 lit d determines the object of examination, the scope of examination and the procedure for resolving problems arising in this context.

15 The depositary has to examine **signatures**, **instruments**, **notifications** and **communications relating to the treaty**, *ie* all the items the depositary has to receive and to keep in custody under para 1 lit c. Although not explicitly mentioned in lit d, the depositary also has to examine any **full powers** delivered to it for the purpose of signature. Furthermore, the depositary has to verify whether a State or international organization is **entitled to become a party** under the terms of the treaty and it may face questions related to the statehood of certain entities.

16 The scope of examination is limited to **formal aspects** and, in principle, does not include substantive matters. The wording of lit d is clear in this regard, as it stipulates the duty of the depositary to examine whether the signatures, instruments, notifications and communications are "in due and proper form". The *travaux préparatoires* also show that this provision was intended to limit the depositary's duty. The original wording chosen by the ILC in its draft articles was "in conformity with the provisions of the treaty and of the present articles".[45] In its Commentary, the ILC noted that "[i]t is no part of the functions to adjudicate on the validity of an instrument or reservation."[46] However, this wording was not entirely clear as far as the limitation to formal aspects is concerned and was thus criticized at the Vienna Conference for being "unduly wide" and appearing "to suggest that the depositary could interpret the treaty".[47] It was subsequently replaced by the present wording, referring explicitly to the "form".[48] The *travaux préparatoires* also clarify what **criteria** the depositary has to use for its examination: the provisions of the

[43] UNCLOT I 486.

[44] See *eg* most treaties adopted within the UN framework (Summary of Practice para 38).

[45] Art 72 para 1 lit d Final Draft.

[46] Final Draft, Commentary to Art 72, 269 para 4.

[47] See the intervention of Byelorussian SSR, UNCLOT I 458.

[48] UNCLOT I 486.

treaty and the "present articles", *ie* the VCLT – in that sense the applicable treaty law could be added. Therefore, the depositary has to examine the ***formal* validity** of signatures, instruments, notifications and communications by using the criteria set out in the treaty itself and the VCLT. This includes in particular the verification of the **technical requirements**, *eg* whether an instrument is duly signed by the head of State, the head of government or the foreign minister, as well as the examination whether there is any contradiction to an explicit provision of the treaty or the VCLT.[49] It should be noted, however, that the examination of the form cannot always be clearly separated from substantive matters.[50]

17 If the depositary comes to the conclusion that a signature, instrument, notification or communication appears to be **irregular**, lit d leaves only one possible action to the depositary, and that is "bringing the matter to the attention of the State in question". Only if there is a **difference** between the State concerned and the depositary does the latter have to bring the question to the attention of all signatory and contracting States in accordance with para 2 (→ MN 39). The procedure for resolving problems arising in the context of the depositary's duty to examine shows that the depositary can only take preliminary decisions. It is not up to the depositary to decide with finality on the validity of an instrument, but to the signatory and contracting States. An inadmissible instrument does not become effective through the approval of the depositary.[51] The preliminary decision of the depositary is only the **basis for the discussion** with the State concerned and subsequently with all signatory and contracting States. It is of utmost importance for the depositary to take into account its **obligation to act impartially** (→ Art 76 MN 31) when carrying out its duty under lit d.

18 The Summary of Practice of the UN Secretary-General gives a concise survey of the individual steps to be taken by the depositary in its examination. In the following the most important elements shall be highlighted:

19 **Ability to become party:** Especially when receiving signatures or binding instruments, the depositary has to examine whether the State or entity is entitled to become a party under the terms of the treaty or whether an entity claiming to be a State is in fact a State (→ MN 38). Particularly, the latter case is difficult for the depositary, as the issue of statehood and recognition is inevitably linked to highly political questions. Given the duty to act impartially, the depositary has to refrain from judgment and inform the other States concerned about the intention of an entity with questionable status to become party to the treaty (→ Art 76 MN 31–32). It is then up to the other States concerned to take a final decision. Only if no State participating in the treaty has recognized the entity or if the entity is manifestly lacking the constitutive elements of statehood, might the depositary

[49] *Dehaussy* (n 3) 508.
[50] *Stoll* (n 18) 1011.
[51] *Ibid.*

decide on its own that the entity is not qualified to become a party.[52] However, the depositary should nevertheless inform the other States concerned of its decision.[53] The UN Secretary-General has repeatedly made clear that he would not wish to determine on his own whether certain entities were States. If confronted with such a question, *eg* because a treaty contains the 'all States' formula, the Secretary-General would follow the practice of the UN General Assembly and, when advisable, would request the opinion of the General Assembly.[54]

20 **Signature and full powers:** Before receiving a signature, the depositary has to examine whether the full powers presented for that purpose are duly signed by the head of State, the head of government or the foreign minister. The depositary also has to ascertain that the signatory does not exceed his powers.[55]

21 **Instruments:** As in the case of full powers, the depositary has to examine whether the issuing authority is the head of state, the head of government or the foreign minister. Furthermore, the depositary has to ensure that the instrument contains the unambiguous expression of the **will of the State to be bound** by the treaty. However, neither in this nor in any other context does the depositary have the authority to verify the correctness of the internal procedures of a State. It must also be verified whether the instrument is in full **conformity with the provisions of the treaty**, in particular with regard to the final clauses. Some treaties *eg* allow only instruments of accession at a certain moment in time, or require certain specifications, such as the territorial or factual scope of application. Finally, the depositary might have to determine the effect of the deposit of an instrument with regard to certain other agreements, *eg* if the accession to a treaty after an amendment means accession to the amended treaty.[56]

22 **Notifications and communications:** The depositary has to examine notifications and communications in accordance with the principles set out above. As the term "notifications and communications" includes different documents (→ MN 10), no specific remarks can be made. Reservations are one particular form of notifications and are dealt with separately below (→ MN 23).

23 **Reservations:** Like in the case of any other notification or communication, the depositary has to examine whether the technical requirements are met and whether the reservation is in conformity with the provisions of the treaty and the VCLT. The examination whether the reservation is in conformity with the treaty provisions is of particular relevance in the case of treaties containing explicit provisions on

[52] *J Frowein* Some Considerations Regarding the Function of the Depositary (1967) 27 ZaöRV 533, 537–538; *F Ouguergouz/S Villalpando* in *Corten/Klein* Art 77 MN 47.

[53] For the UN Secretary-General practice in this regard, see Summary of Practice (n 1) para 88.

[54] See Summary of Practice (n 1) paras 81–83; according to the UN Secretary-General, this practice has become fully established.

[55] Summary of Practice (n 1) paras 108–111.

[56] For further details on the relevant UN Secretary-General practice, see Summary of Practice (n 1) paras 121–160.

reservations.[57] If the depositary comes to the – preliminary – conclusion that the reservation is not in conformity with the explicit treaty provisions (see in particular the cases of Art 19 lit a and b), it has to bring the matter to the attention of the reserving State and, if differences occur, to the attention of the other signatory and contracting States. It may also remain unclear whether a declaration or statement accompanying a binding instrument is tantamount to a reservation. The depositary then may **request clarification** from the declaring State.[58] If, however, a treaty remains silent on reservations or if a reservation is presumably incompatible with the object and purpose of the treaty (Art 19 lit c), the depositary should refrain from any comment and simply inform the States concerned. It is then up to the other States concerned to take a position with regard to the reservation. This is also the practice of the UN Secretary-General following the ICJ's *Genocide Convention* advisory opinion and the relevant UN General Assembly resolution (→ MN 4, 8).[59]

V. Informing (para 1 lit e and f)

The depositary's duty to inform is laid down in para 1 lit e and f. Art 77 para 1 lit e deals with the less problematic, purely administrative part of the duty, *ie* to inform the States Parties and the States entitled to become parties of **all acts**, in particular **signatures**, the **deposit of binding instruments**, **notifications** and **communications relating to the treaty**. The provision obliges the depositary to inform about all signatures, instruments, notifications and communications it has received and examined, and to keep them in custody under lit c and d. Furthermore, the depositary has to inform about **any other relevant action** relating to the treaty, *eg* the opening of a treaty for signature. The depositary may also inform about anything else, which in the opinion of the depositary should be made known to the States Parties and the States entitled to become parties.[60] **24**

[57] *Waldock* I 82 contained an extensive provision on the verification of reservations, in particular whether a reservation is not expressly prohibited or implicitly excluded by the terms of the treaty. Also in the Final Draft reservations were explicitly mentioned. At the Vienna Conference however, the reference to reservations was deleted (UNCLOT I 486 para 53), but with the understanding that the meaning of the article reflects the practice of the UN Secretary-General; see in particular the intervention of Canada and the response of *Waldock*, UNCLOT I 460, 467, 486, as well as *ibid* 131).

[58] Summary of Practice (n 1) para 195. *P Kohona* Some Notable Developments in the Practice of the UN Secretary-General as Depositary of Multilateral Treaties: Reservations and Declarations (2005) 99 AJIL 433, 440 reports of a declaration by Australia accompanying its instrument of ratification of the 1998 Rome Statute of the International Criminal Court 2187 UNTS 90; after consultations, Australia clarified its position by stating that its declaration was not intended to be a reservation.

[59] Summary of Practice (n 1) paras 161–196; UNCLOT I 131; *Kohona* (n 58) 441.

[60] See *eg* the practice of the UN Secretary-General, Summary of Practice (n 1) para 311.

25 The more delicate issue is the duty to inform the States entitled to become parties about the **date of entry into force** of the treaty (lit f), as this involves the determinative powers of the depositary. Treaties usually contain an explicit provision on their entry into force (→ Art 24). A treaty may provide that it will enter into force on a specific date or when certain conditions are met – normally, the deposit of a defined number of binding instruments, but a treaty may provide for more elaborate conditions. It is the task of the depositary to verify whether these conditions are fulfilled and to determine the exact date of entry into force of the treaty.[61] Of course, the determination is of preliminary character, as the depositary is not vested with the competence to make final determinations, and thus may be challenged by the States entitled to become parties.[62] Any difference between a State and the depositary as to the date of entry into force has to be dealt with according to para 2.

VI. Registering (para 1 lit g)

26 Art 77 para 1 lit g lists registering of treaties with the UN Secretariat as a function of the depositary. This provision has more of a **descriptive character**, as the obligation to register and the respective authorization of the depositary are set out in Art 80.[63]

VII. Performing the Functions Specified in Other Provisions (para 1 lit h)

27 Although it was the intention to collect the functions of a depositary in one single article, certain specific depositary functions can be found in other provisions of the VCLT; these other provisions are: Art 76 (general provision on depositaries), Art 78 (notifications and communications), Art 79 (correction of errors), and Art 80 para 2 (authorization for registering treaties). The depositary is also mentioned in Art 16 (deposit of a binding instrument with the depositary) and Art 24 para 4 (application of provisions relating to depositary functions as of the adoption of the text).

VIII. Original Text

28 The original text of the treaty is the physical document containing the **full text** of the treaty **in all authentic languages** as adopted by the negotiating States and, if

[61] For relevant UN Secretary-General practice see Summary of Practice (n 1) paras 221–247, referring also to specific problems that might occur in this context, *eg* the withdrawal of an instrument before the entry into force or if a State ceases to exist.

[62] The ILC underlines the preliminary character in Final Draft, Commentary to Art 72, 270 para 6. The Final Draft was not the subject of a debate at the Vienna Conference and was retained unchanged.

[63] *F Ouguergouz/S Villalpando* in *Corten/Klein* Art 77 MN 65–66.

applicable,[64] the signatures of the plenipotentiaries. It is the ultimate and only authoritative reference in case of doubt as to the contents of the treaty.

Bilateral treaties are usually drawn up in two originals, one for each party. The two originals differ insofar as in one original the name of one of the parties is put first in title, text, testimonium and signature blocks, and the name of the other party in the other original. For this reason, the originals are referred to as 'alternates'. **29**

In the case of **multilateral treaties,** there is usually[65] only one original text, which remains in the custody of the depositary (→ MN 10). The original normally consists of a multilingual title page, the text in all authentic languages, and a multilingual signature page.[66] Signature has thus to be effected only once on the multilingual signature page and not, as in the case of bilateral treaties, for every authentic language. The original is usually established by the State or international organization, which had assumed the secretariat functions of the negotiating conference.[67] **30**

IX. Certified Copies

A certified copy, also called certified true copy, reproduces faithfully and in full the provisions of the original. The signature of the depositary[68] certifies the conformity of the copy with the original.[69] Certified copies are necessary in the case of **multilateral treaties**, since only the depositary is in possession of the original text. In order to make the text of the treaty available for all States entitled to become parties, the depositary has to **prepare** and **transmit** (→ MN 12) certified copies of the original text. Governments usually need the certified copies for their **31**

[64]Not all treaties provide for signatures, *eg* UNESCO conventions such as the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expression. An exchange of letters constituting a treaty does not provide for signature either.

[65]If there are multiple depositaries (→ Art 76 MN 18–21), the treaty may provide for more than one original, *eg* the 1963 Partial Test Ban Treaty 480 UNTS 43. EU mixed agreements (→ Art 76 MN 17) regularly have two originals. The 1946 Convention on the Privileges and Immunities of the United Nations 1 UNTS 15 on the other hand has no original text at all and only exists as adopted by the General Assembly on 13 February 1946, UNGA Res 22 (I), UN Doc A/RES/22(I).

[66]For the relevant UN Secretary-General practice, see Summary of Practice (n 1) paras 43–44; the EU follows the same practice.

[67]See *eg* the remarks of the Chairman of the Drafting Committee, UNCLOT I 486 para 47; *Rosenne* (n 17) 845.

[68]Since the legal service of a foreign ministry or international organization exercises the depositary functions, it is usually the head of the legal service who signs the certified copy, *eg* the UN Legal Counsel for the UN Secretary-General. In the European Union, the Secretary-General of the Council of the EU delegated the signature of certified copies to the Director-General competent for the subject matter.

[69]Where no original text exists (see n 65), the certified copy has to be made on the basis of the adopted text, *eg* the UN Secretary-General used the text adopted by the UN General Assembly.

internal procedures, such as parliamentary approval, and for subsequent official publication.[70]

32 A certified copy normally includes, if any, the **final act** and the **signature pages**. In the more recent practice of the UN Secretary-General, however, signature pages are no longer reproduced for practical reasons and this is only done with final acts if they contain substantive provisions.[71] Additionally, the original text is nowadays reproduced and made available electronically on the website of the depositary. EU practice is slightly different, as signature pages are usually included in the certified copy. However, due to the large volume of some agreements, a complete certified copy is transmitted only **in electronic form** on a CD-ROM. Each State Party additionally receives a certified copy in paper form in its official language, which is also an authentic language of the treaty.

X. Full Powers

33 → Art 7.

XI. Signatures

34 → Arts 10–12.

XII. Instruments

35 → Art 11.

XIII. Parties

36 → Art 2 MN 46–47.

XIV. States Entitled to Become Parties

37 Most multilateral treaties determine, usually in their final clauses, the circle of States entitled to become parties. Treaties may *eg* be open to **all States**, to **Member States of an international organization** or to States belonging to a **certain geographical region**. Even **dependent or self-governing territories** may become

[70] Summary of Practice (n 1) para 63.

[71] *Ibid* para 64.

parties if the treaty so provides.[72] The depositary has to fulfil certain obligations, such as receiving an instrument, or informing of acts, notifications and communications relating to the treaty, not only *vis-à-vis* the negotiating, signatory and contracting States, but *vis-à-vis* all States entitled to become parties.[73]

38 The circle of States entitled to become parties can be easily identified if the treaty applies objective criteria, such as membership in an international organization. If the treaty only refers to "States", be it all States or a certain group of States, the question of **statehood** may arise where an entity not recognized as a State wants to become party to the treaty. The depositary then has to act according to para 1 lit d and para 2.

XV. Difference Appearing Between a State and the Depositary as to the Performance of the Latter's Functions (para 2)

39 Art 77 para 2 lays down the basic rules for the event of differences between a State and the depositary as to the performance of the latter's functions. Differences may in principle occur in connection with **all depositary functions**, but will most probably appear in those cases in which the depositary exercises its discretionary powers, in particular in the context of para 1 lit d. In the event of any difference, the depositary is limited in its action to bringing the question to the attention of the signatory and contracting States or of the competent organ of the international organization concerned. This follows from the fact that the depositary is not vested with any competence to adjudicate upon or to determine with finality, matters arising in the context of its functions. Only the States participating in the treaty may take final decisions.[74] When bringing the question to the attention of the signatory and contracting States, the depositary has to take its obligation to act impartially into account and, therefore, must not express its own opinion at this occasion. If the depositary wants to give its own opinion in its role as a signatory or contracting State, it can do so in a separate note.

40 Unlike in other provisions of Art 77, the addressees are not the States entitled to become parties, but only the **signatory and contracting States**. Bringing the question to the attention of all States entitled to become parties, as proposed in the ILC Final Draft, was considered impractical by the States participating in the Vienna Conference and was changed accordingly.[75] Where appropriate, the question also has to be brought to the attention of the competent organ of the international organization concerned.

[72] See *eg* Art 305 of the 1982 UN Convention on the Law of the Sea 1833 UNTS 3.

[73] As other entities than States might also be entitled to become parties, the UN Secretary-General's practice is to include also these entities; Summary of Practice (n 1) paras 70–71.

[74] Final Draft, Commentary to Art 72, 270 para 8.

[75] *Cf* Final Draft, Commentary to Art 72, 270 para 8; the amendment was proposed by the United States, see UNCLOT I 459.

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Article 78

Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

(a) if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;
(b) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;
(c) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1 (e).

Contents

A. Purpose and Function

States may make or have to make various **notifications** or **communications** relating to the life of a treaty. The transmission of notifications and communications – either directly or through a depositary – inevitably takes a certain amount of time. This fact raises the questions as to *when* such a notification or communication has been **validly made** by the sending State, and *when* it becomes **legally effective** for the State for which it was intended. Art 78 was designed as a general rule for the exact determination of these two dates and is therefore important for the **calculation of time limits**. It applies only if the treaty concerned or other provisions of the VCLT do not provide for specific rules. A general article on the temporal aspect of notifications and communications allowed the ILC to simplify other articles as far as these aspects were concerned.[1] 1

[1]Final Draft, Commentary to Art 73, 270 para 1.

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DOI 10.1007/978-3-642-19291-3_82,

2 Art 78 sets out rules for **two different procedures**: (1) for treaties without a depositary, and (2) for treaties with a depositary. Both procedures are based on the principle that a notification or communication is considered as having been made by the sending State **upon receipt** by the State for which it was intended or by the depositary, if any, and can only become legally effective for a State upon receipt either of the direct notification or of the depositary information, *ie* as of the moment the State formally has knowledge of it. The main problem in the latter case is the inevitable time lag between receipt by the depositary and the information of the State for which the notification was intended.

B. Historical Background and Negotiating History

3 The temporal aspect of notifications and communications was not raised in international practice before the *Right of Passage* case.[2] In that case, Portugal instituted proceedings against India only a few days after it had declared the acceptance of the compulsory jurisdiction of the ICJ according to Art 36 para 2 ICJ Statute and thus before the depositary had informed the States concerned, including India, about the acceptance of jurisdiction. India, therefore, had no knowledge of the Portuguese declaration at the time when proceedings were instituted and, for this reason, contended that the Court lacked jurisdiction. It argued that the declaration of acceptance did not become effective upon its deposit with the UN Secretary-General, but only upon information of the States Parties by the Secretary-General. The key issue before the Court was thus the determination of the exact point in time when a notification transmitted to a depositary becomes legally effective in relation to the other parties. In its decision, the Court concluded that a declaration of acceptance becomes **effective upon its deposit** with the depositary, as Art 36 ICJ Statute does not provide for any additional requirement, such as a certain lapse of time or the information by the UN Secretary-General.[3] The Court thus dismissed the preliminary objection on the basis of a strict interpretation of the treaty provision.[4]

4 The ILC first dealt with the temporal aspect of notifications and communications in the context of various articles, *eg* the articles on reservations and objections.[5] However, it did not enter into a general discussion before 1965, when the suggestion was made to concentrate all the rules governing notifications and their taking effect into one single article.[6] At the same time, a provision was proposed that

[2]ICJ *Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125. For the lack of international practice prior to that case, see *R Daoudi* in *Corten/Klein* Art 78 MN 8.

[3]ICJ *Right of Passage* (n 2) 145–147.

[4]*S Rosenne* The Depositary of International Treaties (1967) 61 AJIL 923, 940.

[5]*Rosenne* (n 4) 939; see the set of draft articles adopted in 1962, in particular Arts 18–22, ILC Report 14th Session [1962-II] YbILC 175–182.

[6][1966-I/2] YbILC 176, 200.

sought to limit the consequences of the *Right of Passage* case by stipulating that a notification will become legally effective 90 days after receipt by the depositary, which would allow the depositary to inform the parties.[7] However, in its debate in 1966, the Commission soon abandoned the idea of an arbitrary time lag.[8] It also discussed whether a notification becomes effective for the State for which it was intended already upon receipt by the depositary or only upon receipt of the respective depositary information by the State for which it was intended. This led to a question of principle as to the role of the depositary, since the depositary was to be considered either the **agent of each party** so that the receipt of a notification by the depositary must be treated as being equivalent to receipt by the State for which it was intended or no more than a **convenient mechanism for the administration of the treaty**, in this particular case for the transmission of notifications. The majority of ILC members favoured the second option and rejected the view of the depositary as a general agent of the parties.[9] The Commission concluded that, if the contrary view had been adopted, a lack of diligence on the part of the depositary could lead to a situation where the intended recipient, still unaware of the notification, might in all innocence commit an act, which infringed the legal right of the State making the notification.[10] As neither the arbitrary time lag nor the concept of the depositary as a general agent of the parties was incorporated in the final draft article, the problem of an **interval** between **transmission** by the sending State to the depositary and **receipt** of the information by the intended addressee from the depositary remained unsolved. In its Commentary, the ILC admitted the existence of this problem, but did not think that it should attempt to solve all such questions in advance by a general rule and confined itself to stating the rules regarding the making of a notification or communication by the sending State, and its receipt by the State for which it was intended.[11]

The States participating in the Vienna Conference did not enter into a discussion **5**
on the draft article as proposed by the ILC and accepted it with minor drafting amendments.[12] The article was also incorporated into the VCLT II without any change in substance.[13] Except for lit a, Art 78 is not a codification of existing customary law, but a **progressive development**.[14]

[7]Addition to Draft Art 29 or new Draft Art 29 *bis*, proposed by *Rosenne* [1965-II] YbILC 73.

[8][1966-I/2] YbILC 274.

[9][1966-I/2] YbILC 134–139, 275–278; Final Draft, Commentary to Art 73, 271 para 4.

[10]Final Draft, Commentary to Art 73, 271 para 4.

[11]Final Draft, Commentary to Art 73, 271 para 5.

[12]UNCLOT I 468, 487, as well as *ibid* 130–131.

[13]See Art 79 VCLT II.

[14]See in particular [1966-I/2] YbILC 338. Today, the entire article may be seen as a customary rule (*M Villiger* Art 78 MN 14).

C. Elements of Article 78

I. Notification

6 Generally, notification may be understood as "a formal, unilateral act in international law, by a State informing other States or organizations of legally relevant facts."[15] However, Art 78 is limited to notifications "to be made by any State under the present Convention", *ie* to **notifications relating to the life of a treaty**. This limitation of scope is the result of a longer discussion within the ILC.[16] It was correctly pointed out that several multilateral treaties required the States Parties to make certain notifications not to the depositary, but directly to other States Parties. For instance, Art 10 Vienna Convention on Diplomatic Relations[17] obliges a State to notify the members of its mission to the receiving State. It would not be practicable to make such notifications via the depositary.[18] The ILC thus clearly distinguished between notifications relating to the life of the treaty and notifications relating to substantive matters as defined in the treaty, and decided to limit the scope of Art 78 to the first category of notifications.[19] However, Art 78 does in fact not apply to all notifications relating to the life of a treaty. Notifications establishing the **consent to be bound** and concerning the **entry into force** are governed by other articles (→ MN 8). Art 78 is mainly relevant for objections to reservations, suspension and termination.[20]

II. Communication

7 The VCLT contains no indication that there is a difference between the terms "notification" and "communication".[21] In the context of the VCLT, they have thus to be understood as synonyms. In practice, however, the term "communication" is sometimes used by depositaries to indicate a certain difference or deviation from a standard procedure. For instance, the UN Secretary-General

[15] *MF Dominick* Notification (1992) 3 EPIL 695.

[16] [1966-I/2] YbILC 275–276, 288–291.

[17] 500 UNTS 95.

[18] See in particular the intervention by *Tsurouka* [1966-I/2] YbILC 288–289.

[19] Final Draft, Commentary to Art 73, 270 para 2, 271 para 8. Earlier drafts had also applied to notifications relating to substantive matters; see [1966-I/2] YbILC 134, 274, 288.

[20] *R Daoudi* in *Corten/Klein* Art 78 MN 17.

[21] *R Daoudi* in *Corten/Klein* Art 78 MN 3–4. Besides Art 78, only Art 23 and Art 67 refer to a communication. *M Villiger* Art 78 MN 2 understands communication as "the process of exchanging information" and notification as the "formality through which a State undertakes the communication".

characterizes late objections to reservations as "communications" instead of "objections".[22]

III. Except as the Treaty or the Present Convention Otherwise Provide

The introductory phrase of Art 78 clarifies that this article has **residuary character** and does not apply if the treaty or the VCLT contains specific rules. The precedence of treaty provisions preserves the autonomy of the parties, as they remain entirely free to form their treaty relations according to their needs. As for the **specific rules of the VCLT**, the ILC had two particular cases in mind: first, Art 16 on the **exchange or deposit of instruments**, which stipulates that the deposit of an instrument is sufficient to establish a legal nexus between the depositing State and any other State that has expressed its consent to be bound. The depositary has to inform the other States of the deposit, but the notification through which the depositary informs the other States is not an integral part of the transaction establishing the legal nexus between the depositing State and the other States Parties. The view of the ICJ in the *Right of Passage* case is thus reflected in this article.[23] The second is Art 24 on the **entry into force**, under which the notification by the depositary of the date of entry into force is equally not decisive for the actual entry into force of the treaty. In order to allow previous information of the contracting States, many treaties provide for a certain lapse of time, *eg* 90 days, between the establishment of consent to be bound and the entry into force.[24] Notifications relating to the expression of consent to be bound and the entry into force are thus governed by Art 16 and Art 24 and do not fall within the scope of Art 78, except if the treaty provides otherwise. **8**

The exceptions formulated in the introductory phrase bring Art 78 into line with the *Right of Passage* case, in which the ICJ gave precedence to treaty provisions (→ MN 3).[25] This was challenged in the *Cameroon v Nigeria* case,[26] but the Court concluded that the rules of the VCLT, *ie* in particular Arts 16, 24 and 78, correspond to the solution adopted in the *Right of Passage* case and maintained the latter decision. **9**

[22] *P Kohona* Reservations: Discussion of Recent Developments in the Practice of the Secretary-General of the United Nations as Depositary of Multilateral Treaties (2005) 33 Georgia JICL 415, 429; UN Office of Legal Affairs, Treaty Section, Treaty Handbook (2002) 14.

[23] Final Draft, Commentary to Art 13, 201 para 3; Final Draft, Commentary to Art 73, 271 para 7.

[24] Final Draft, Commentary to Art 73, 271 para 7.

[25] *Rosenne* (n 4) 944.

[26] ICJ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria, Equatorial Guinea intervening)* (Preliminary Objections) [1998] ICJ Rep 275, para 31.

IV. If There Is No Depositary

10 If there is no depositary, a notification has to be transmitted **directly to the State** for which it is intended (lit a). The notification is considered as having been made by the sending State **upon receipt** by the State to which it was transmitted (lit b). At the same point in time, *ie* upon receipt, the notification becomes **legally effective** for the receiving State. In this case, no temporal problem arises, as there is no time lag between the date on which the sending State has validly made the notification and the date when it becomes legally effective for the receiving State.

V. If There Is a Depositary

11 If there is a depositary, a notification has to be transmitted **to the depositary** (lit a). The notification is considered as having been made by the sending State **upon receipt** by the depositary (lit b). However, at this moment the notification is **not yet legally effective** for the State for which it was intended, since the latter has no knowledge of the notification yet. Only upon receipt of the information by the depositary in accordance with Art 77 para 1 lit e does the notification become legally effective for the State for which it was intended (lit c). The 12 months time limit for objections to reservations according to Art 20 para 5 *eg* starts to run upon receipt of the depositary information, and not upon receipt of the reservation by the depositary.[27]

12 The moment when a notification is validly made and the moment when it becomes legally effective for the State for which it was intended are thus **two different dates**. Art 78 does not solve the problems that might arise out of this time lag (→ MN 4), leaving it to States to find a solution for each particular case in accordance with the principle of good faith.[28] Any problems arising out of an omission of the depositary to inform the parties of a notification have to be solved in accordance with the general rules on State responsibility.[29]

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S Rosenne The Depositary of International Treaties (1967) 61 AJIL 923–945.

[27] In the UN Secretary-General's practice, however, the date of the depositary notification to the States Parties is considered relevant and not the date of receipt, as the latter may vary from State to State; see Treaty Handbook (n 22) 14.

[28] Final Draft, Commentary to Art 73, 271 para 5.

[29] See, in particular, the intervention by SR *Waldock* [1966-I/2] YbILC 276–277.

Article 79

Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;
(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or
(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;
(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.
4. The corrected text replaces the defective text *ab initio*, unless the signatory States and the contracting States otherwise decide.
5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.
6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and to the contracting States.

Contents

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A. Purpose and Function

1 Errors occur quite frequently in the preparation of treaty texts. This may be due to the complexity or the technical character of a treaty, the time pressure under which many treaties are drafted or simply to a lack of diligence. Art 79 deals with the **correction of errors** found at any time *after* the authentication of the text of a treaty, *ie* after the text has been established as authentic and definitive (→ Art 10 MN 3). The **agreement**[1] on the **existence** of an error and the **method of rectifying** it is essential for the application of Art 79 (→ MN 4). Art 79 provides for specific methods for the correction of errors in treaties **without a depositary** (para 1) and in treaties **with a depositary** (para 2). The same applies in the case of a **lack of congruency** between two or more authentic language versions (para 3). The corrected text replaces the defective text *ab initio* (para 4) and the correction of registered treaties has to be notified to the UN Secretary-General (para 5). A simpler procedure for the correction of errors in certified copies is set out in para 6.

B. Historical Background and Negotiating History

2 Before the adoption of the VCLT, State practice in the area of corrections of treaty texts was not uniform and was marked by considerable flexibility and *ad hoc* solutions. Prior consultations and consent of the parties were, however, key elements of the correction procedure. In the case of treaties with a depositary, a shift from the positive consent of the parties to the simpler system of a tacit procedure can be observed.[2] In his first report of 1962, SR *Waldock* proposed two separate draft articles on the correction of errors, one with regard to treaties without a depositary and one with regard to treaties with a depositary.[3] These draft articles already contained most elements of the present Art 79. Subsequent changes were aimed mainly at a simplification of the provisions, which also resulted in merging the original two draft articles into one single draft article.[4] The debates within the ILC focused on the definition of error (→ MN 4) and, with regard to treaties with a depositary, on the question to which States a proposal for correction has to be notified and which States are entitled to object (→ MN 9).[5] At the Vienna

[1] "Agreement" in this context means the consent of the States concerned and not a treaty.

[2] *R Kolb* in *Corten/Klein* Art 79 MN 15–16.

[3] *Waldock* I 80–81. Basis for these two articles was the practice as documented in *G Hackworth* Digest of International Law vol 5 (1943) 93–101, and in the 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, UN Doc ST/LEG/7/Rev.1.

[4] [1965-I] YbILC 276.

[5] See, in particular, [1962-I] YbILC 182–185; [1965-I] YbILC 185–190; [1966-I/2] YbILC 334–335.

Conference, a discussion on the latter question led to the only substantial amendment of the ILC's draft article.[6]

Art 79 is a **codification** of existing State practice, but contains **elements of progressive development** with regard to treaties with a depositary (para 2).[7] It had a strong influence on subsequent State practice, as many depositaries brought their procedures into line with it and can now be seen as reflecting customary law.[8] The corresponding Art 80 VCLT II does not deviate from the provisions of the present article. 3

C. Elements of Article 79

I. Error

Art 79 is intended to cover errors relating to the **wording** of the text of a treaty.[9] Typical errors subject to a correction procedure according to Art 79 are physical errors in typing or printing, spelling, punctuation, numbering, cross-referencing, *etc*, but also a **lack of conformity** of the original of the treaty with the official records of the diplomatic conference, which adopted the treaty or other relevant *travaux préparatoires*, or a **lack of congruency** between the different authentic texts constituting the original of the treaty.[10] As such errors may affect the substance of the treaty,[11] the question arises whether errors affecting the substance are also within the scope of this article. The ILC had a relatively long debate on this question and finally decided that the present article should cover **all kinds of error**, whether technical or substantive, provided only that the States concerned agree that an alleged error is in fact an error.[12] The **agreement on the existence of an error** is thus the criterion for the applicability of Art 79 ("are agreed that it contains an 4

[6]The circle of States was enlarged from "contracting States" to "signatory States and contracting States", see UNCLOT I 468–469.

[7]*R Kolb* in *Corten/Klein* Art 79 MN 3, 14, and *M Villiger* Art 79 MN 19, both referring in particular to the methods of correction.

[8]*R Kolb* in *Corten/Klein* Art 79 MN 3, 14. For practice differing from Art 79 → MN 9.

[9]Final Draft, Commentary to Art 74, 272–273 paras 1–9. See also Art 48 para 3; Final Draft, Commentary to Art 45, 244 para 9; *I Sinclair* The Vienna Convention on the Law of Treaties (1984) 172 n 57.

[10]Summary of Practice (n 3) para 48; Final Draft, Commentary to Art 74, 272 para 5.

[11]After the Rome Statute of the International Criminal Court 2187 UNTS 3 was opened for signature, the UN Secretary-General, as depositary, proposed several corrections. Although some of the corrections were arguably substantive (see the note by the United States (1999) 93 AJIL 484), no objections were raised and the corrections effected accordingly.

[12][1962-I] YbILC 183–184; [1965-I] YbILC 187–190; Final Draft, Commentary to Art 74, 272 para 1. *R Kolb* in *Corten/Klein* Art 79 MN 21 identifies two conflicting views within the ILC, one concentrating on the nature of the error, *ie* whether it is technical or substantial (objective view) and the other focusing on the agreement of the parties on the existence of the error (subjective view). *Waldock* I 80 only referred to "typographical error".

error"). Once there is agreement, it does not matter whether the error is purely technical or whether it affects the substance of the treaty.[13] Conversely, if there is **no agreement** on the existence of an error, the problem is outside the scope of Art 79. It may then be a matter for Art 48, which deals with errors that affect the validity of the consent to be bound by the treaty.[14] Art 79 covers **errors affecting the expression of consent**, but not errors affecting the formation of consent.[15]

5 A question often occurring in practice is whether any undisputed defect of a text can be corrected in accordance with Art 79 or whether that requires an **amendment** of the treaty. Correction and amendment are to be distinguished by referring to the **original consent** of the States at the time of the adoption of the treaty.[16] If the original consent is not adequately reflected in the text of the treaty, this represents an error within the scope of Art 79. If, on the other hand, the text is not at variance with the original intentions of the parties, a change of the text requires an amendment.[17] It is not always easy to identify clearly the consent of the States at the time of adoption, and thus the borderline between the application of the correction and amendment procedures is fluent. However, since agreement on the existence of an error is sufficient for the applicability of Art 79, States can in fact resort to a correction procedure even if an amendment would be more adequate. From the point of view of international treaty law, the consent of the parties is the decisive element for a change of a treaty, not the labelling of such change. However, specific amendment procedures provided in a treaty have to be taken into account (→ Art 39). The importance of the distinction lies for most States at the level of municipal law, as normally different internal procedures apply for corrections and amendments.

6 The correction at the level of international treaty law is independent from the **internal procedures** a State has to apply according to its constitution. For instance, it may be deemed necessary to submit a proposal for correction of a treaty already

[13]As an example, the ILC referred to an agreement between France and Yugoslavia on the settlement of pre-war debts of 1958 ([1959] Journal officiel de la République Française 5244), where a confusion of dollars and francs was detected. Both parties agreed on the existence of the error and corrected it accordingly. However, since a matter of substance was involved, the parties renewed their ratifications, [1962-I] YbILC 183.

[14]Final Draft, Commentary to Art 74, 272 para 1.

[15]See *Yasseen* [1965-I] YbILC 188.

[16]The principal understanding that the corrected text replaces the defective text *ab initio* (para 4) supports this criterion. In contrast, an amendment is effective only as of its entry into force.

[17]See also the intervention of *Waldock* [1965-I] YbILC 190. *Aust* 336 mentions the Comprehensive Nuclear Test Ban Treaty, GA Res 50/245, 10 September 1996, UN Doc A/RES/50/245, which contains in an attachment the locations of monitoring stations, some of which were found to be unsuitable after the authentication of the text. The depositary proposed a "correction" of the locations in accordance with the procedure in Art 79 VCLT. *Aust* points out that this would amount to a substantive change, which could only be carried out by amending the text. However, it is not the change in substance that is decisive for the qualification as an amendment, but the clear fact that the negotiating States truly intended the locations that only later turned out to be unsuitable.

ratified to parliament if the substance is affected.[18] In practice, however, often only foreign ministries and eventually governments deal with corrections.

II. Treaties Without a Depositary

Art 79 para 1 deals with the correction of errors in treaties where there is no depositary, which mainly concerns bilateral treaties. The States concerned are free to choose the method of correction they deem appropriate. The procedures set out in para 1 lit a–c are **purely residuary** and have rather to be understood as proposals.[19] In practice, a State that detects an error will usually inform the other State by diplomatic note of the error and propose a correction. If the other State agrees, it confirms the correction by diplomatic note.[20] **7**

III. Treaties with a Depositary

In the case of treaties where there is a depositary (para 2 in connection with para 1), the depositary plays a central role in the correction procedure. If the **depositary** detects an error in the treaty or an error is brought to its attention, it has as a first step to **notify** the signatory States and the contracting States of the error and of the proposal to correct it. In this note, the depositary also has to specify an appropriate **time limit** within which States may object to the proposed correction. Based on UN practice, the time limit is usually 90 days, but this may vary according to the concrete circumstances.[21] If there is **no objection**, the depositary has to correct the treaty accordingly and execute a *procès-verbal*, which has to be sent to the parties and the States entitled to become parties (para 2 lit a). If there is an **objection**, para 2 lit b states only that the depositary shall communicate the objection to the signatory States and to the contracting States, but does not specify the legal consequences. This raises the question whether one State can **veto** a proposed correction. The ILC discussed this issue and some members considered a kind of majority rule. However, it decided not to regulate the matter but to leave it to be **8**

[18]See also the ILC debate on the application of different procedures of correction for technical and substantive errors, [1962-I] YbILC 183–185. For a renewal of ratification, see n 13. For examples in US practice, where corrections involving a substantive modification had to be submitted to the Senate, see *M Whiteman* Digest of International Law vol 14 (1970) 127–128.

[19]Final Draft, Commentary to Art 74, 272 para 3. However, these procedures are binding if States have not decided upon other methods of correction (*M Villiger* Art 79 MN 9).

[20]See also *Aust* 336–337. Sometimes, it is also carried out by an informal exchange of e-mails.

[21]Summary of Practice (n 3) paras 55–58. For instance, in the case of the 1962 Coffee Agreement 469 UNTS 169, the UN Secretary-General set a 30-day time limit for objections, because the errors were obviously typographical and the 90-day time limit would have exceeded the period during which the treaty was opened for signature, Summary of Practice para 57.

settled by consultation between the States concerned.[22] Following the logic of Art 79, which always requires agreement, even a single objection prevents the correction from succeeding. If there is no agreement, the question is outside the scope of Art 79. In UN practice, **consultations** are held with the objecting State, which has thus far always resulted in a withdrawal of the objection.[23] Objections after the specified time limit have no legal effect, but are usually communicated to the other States.[24]

9 A particular problem in the context of treaties with a depositary is the definition of the **group of States to be notified** of an error and entitled to object. The ILC came to the conclusion that only **contracting States** should have a legal right to be notified and to object, but emphasized at the same time that this does not exclude a notification to a wider group of States, *eg* to all negotiating States, if it seems appropriate for diplomatic reasons.[25] The States participating in the Vienna Conference nevertheless found this too restrictive and extended the legal right to be notified and to object also to the **signatory States**.[26] The communication of the *procès-verbal* was even extended to **all States entitled to become parties**, as they should be aware of any change in the text before accepting it as binding.[27] In the practice of the UN Secretary-General and of many other depositaries, the error and the proposal to correct it are notified to all States entitled to become parties.[28] In this respect, the practice differs from Art 79 para 2.[29] However, neither in Art 79 para 2 nor in practice is an objection by a State other than a signatory or contracting State considered to be valid for the purpose of rejecting the correction.[30]

IV. Replacement *Ab Initio*

According to para 4, the corrected text replaces the defective text *ab initio*. Interpreted in the context of para 1, a replacement *ab initio* means a replacement effective as of the date of the original authentication of the text of the treaty.

[22] [1962-I] YbILC 218.

[23] Summary of Practice (n 3) paras 61–62. However, the UN Secretary-General does not exclude the application of a majority rule, if consultations should fail.

[24] Summary of Practice (n 3) para 56. Of course, a late objection that justifiably points out that the time limit was too short does have a legal effect.

[25] Final Draft, Commentary to Art 74, 273 para 7.

[26] UNCLOT I 468–469.

[27] UNCLOT I 469.

[28] Summary of Practice (n 3) paras 50–52, which also describes the development of the UN Secretary-General practice; *R Kolb* in *Corten/Klein* Art 79 MN 22.

[29] Another practice differing from Art 79 is the application of a simplified procedure, which is sometimes used for technical treaties where errors frequently occur, see Summary of Practice (n 3) para 60.

[30] Summary of Practice (n 3) para 54, referring to a correction of the 1972 Customs Convention on Containers 988 UNTS 43.

However, the *travaux préparatoires* indicate that the corrected text should operate only "from the date when the original text came into force",[31] as an operation as of the date of authentication might be problematic for States that have submitted the defective text for parliamentary approval.[32] Since para 4 is formulated as a residuary rule, the signatory States and the contracting States may agree on any other date for the replacement of the defective text.

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[31] Final Draft, Commentary to Art 74, 273 para 6.

[32] *Waldock* I 80.

Article 80

Registration and publication of treaties

1. **Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.**
2. **The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.**

Contents

A. Purpose and Function

The system of registration and publication of treaties first established under the League of Nations and continued in the framework of the UN seeks to prevent the negative effects of **secret treaties**.[1] Furthermore, it facilitates access of scholars and practitioners to treaties and thus allows a **systematic examination of the treaty practice**, which ultimately also contributes to the development of international law.[2] **1**

Art 102 para 1 UN Charter sets out the obligation on every UN Member State to register its treaties with the UN Secretariat. At the time of drafting and adopting of the VCLT, this obligation did not exist for a number of States, as they were not UN members. Art 80 para 1 was therefore designed to extend this obligation to States that are not UN Member States, but parties to the future convention. The purpose of Art 80 para 1 is thus to **generalize the obligation to register treaties** with the UN Secretariat. Given the universal membership of the United Nations today, Art 80 para 1 has lost its original purpose and is only of symbolic significance.[3] **2**

[1] *M Hudson* The Registration and Publication of Treaties (1925) 19 AJIL 273; *M Tabory* Recent Developments in United Nations Treaty Registration and Publication Practices (1982) 76 AJIL 350; *R Lillich* The Obligation to Register Treaties and International Agreements with the United Nations (1971) 65 AJIL 771.

[2] *Hudson* (n 1) 292.

[3] The Holy See is the only party to the VCLT which is not a member of the United Nations.

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Art 80 para 2 was introduced to facilitate registration by the depositary and is still relevant.

B. Historical Background and Negotiating History

3 First attempts to achieve a more systematic publication of treaties can be traced back to the nineteenth century[4] and yet a general register maintained by an international organization was not realized prior to World War I. In 1917 the new Soviet Government published the secret treaties of Tsarist Russia and called for the abolition of secret diplomacy. Shortly afterwards, in January 1918, President Wilson demanded in his Fourteen Points that treaties should be open and diplomacy always proceeded in the public view. Public opinion throughout the world largely shared this demand and other States also started publishing their secret treaties. Secret diplomacy and secret treaties were commonly identified as one of the reasons for the outbreak of World War I. This view ultimately led to the adoption of **Art 18 League of Nations Covenant**, which obliged members of the League of Nations to register every treaty or international engagement entered into for publication by the Secretariat of the League. Art 18 further determined that no such treaty should be binding until registered.[5] The registration of treaties was soon widely practiced, although not every treaty that would have been subject to registration was duly registered. After World War II, the system of registration was continued in the UN framework.[6] **Art 102 UN Charter**, which was drafted on the basis of Art 18 League of Nations Covenant, reads as follows:

> "(1) Every treaty and every international agreement entered into by any Member State of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
> (2) No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations."

4 For the implementation of Art 102 UN Charter, the UN General Assembly adopted specific Regulations.[7] Over the decades, the United Nations developed a vast practice, which is documented in the Repertory of Practice[8] and the Treaty

[4] In 1875, the German scholar *Franz von Holtzendorff* demanded a publication of international treaties for scientific reasons; see *K Zemanek* Treaties, Secret (1992) 4 EPIL 985, 986. In 1883 the Institute of International Law started to discuss how a more universal publication of treaties could be achieved; see *Hudson* (n 1) 288–289.

[5] *Hudson* (n 1) 273–276; *U Knapp/E Martens* in *Simma* Art 102 MN 1.

[6] *U Knapp/E Martens* in *Simma* Art 102 MN 2.

[7] Regulations to Give Effect to Article 102 of the Charter of the United Nations, UNGA Res 97 (I), 14 December 1946, UN Doc A/RES/97 (I), as modified by UNGA Res 364 B (IV), 1 December 1949, UN Doc A/RES/364 (IV), UNGA Res 482 (V), 12 December 1950, UN Doc A/RES/482 (V), and UNGA Res 33/141 A, 19 December 1978, UN Doc A/RES/33/141.

[8] Starting with (1945–1954) 5 RoP Art 102, most recently (2000–2009) 6 RoP Supp No 10 Art 102.

Handbook.[9] Although the UN register today contains a large number of treaties,[10] it is far from comprehensive. A substantial number of treaties are not registered, mainly due to practical reasons, such as the administrative or ephemeral character of some treaties. Non-registration does not necessarily mean that such treaties are kept secret,[11] as they are usually published elsewhere, *eg* in national publication organs. The fact that today secret treaties do not play an essential role is less a result of Art 102 UN Charter than of an overall change in the conduct of international relations.[12]

In the context of the work of the ILC on the law of treaties, the obligation to register was first proposed by SR *Lauterpacht* in his first report in 1953.[13] However, the ILC started its discussion almost a decade later on the basis of the first report of SR *Waldock* in 1962.[14] The ILC considered it desirable to generalize the obligation to register treaties with the UN Secretariat in order to make its register as complete as possible.[15] The discussion within the ILC focused on the question of how to extend the obligation of Art 102 UN Charter to non-UN members that are parties to the future convention. The ILC was concerned in particular about the legal interaction between the UN Charter and the future convention and wanted to avoid any direct or indirect amendment of the UN Charter through the future convention.[16] For this reason, the ILC reduced an originally extensive draft article also containing provisions of the above-mentioned Regulations[17] to its substance, *ie* to the obligation of all States Parties to the future convention to register their treaties with the Secretariat.[18] At the Vienna Conference, the ILC draft article was subject to minor changes and para 2 was added as a new provision.[19] The provision of Art 80 was included in the VCLT II as Art 81. **5**

[9]UN Office of Legal Affairs, Treaty Section, Treaty Handbook (2002), in particular 26–37.

[10]From 1946 to 2005 over 158,000 treaties and related subsequent actions were collected.

[11]A secret treaty is defined as an "international agreement in which contracting parties have agreed, either in the treaty instrument or separately, to conceal its existence or at least its substance from other States and the public" (*Zemanek* (n 4) 985).

[12]*Zemanek* (n 4) 987. Today, secret treaties may be found in the context of the establishment of military bases; see *P Leschanz* Die Militärbasis im Völkerrecht: Der US-Stützpunkt auf Santo Stefano und La Maddalena (2006) 89–109.

[13]*Lauterpacht* I 160–162.

[14]*Waldock* I 71–73.

[15]Final Draft, Commentary to Art 75, 273 para 1. For the ILC discussion, see [1962-I] YbILC 181–182, 212.

[16][1962-I] YbILC 180–182, 259; [1965-I] YbILC 178–183, 276. This problem was also briefly discussed at the Vienna Conference, see UNCLOT I 469–471.

[17]See n 7.

[18]See *Waldock* I 71–73; [1962-I] YbILC 212, 259; [1965-I] YbILC 276.

[19]UNCLOT I 469–471, 487–488.

C. Elements of Article 80

I. Treaties

6 The term "treaties" in Art 80 has to be understood as defined in Art 2 para 1 lit a (→ Art 2 MN 3–36).[20] As the obligation of Art 102 UN Charter is only relevant for instruments that have entered into force, Art 80 was likewise **confined to treaties that have entered into force**.[21] Consequently, Art 80 does not cover treaties not yet in force, including provisionally applied treaties.

II. Registration

7 Treaties entered into by at least one UN Member State after the entry into force of the UN Charter have to be *registered* with the UN Secretariat (see Art 102 para 1 UN Charter). Registration is thus an **obligation on UN Member States** on the basis of the UN Charter.[22] Art 80 repeats that obligation for UN Member States Parties to the VCLT. The technical details for the registration procedure, *eg* which documents have to be submitted to the Secretariat, are set out in the Regulations adopted by the UN General Assembly.[23] The ILC considered the incorporation of the Regulations in the draft articles, but given the administrative character of the Regulations and the fact that they are subject to amendment by the UN General Assembly, it finally decided not to do so (→ MN 5).[24] The ILC emphasized that Art 80 has no impact on the registration procedure, as the latter is governed exclusively by the Regulations.[25] It only establishes an obligation for all parties to the VCLT to transmit their treaties for registration or filing and recording (→ MN 9). Which of the procedures

[20]It should be noted that Art 102 UN Charter has a slightly different scope, as it also applies to unilateral declarations intending to create legal obligations under international law. In practice this concerns in particular the acceptance of the compulsory jurisdiction of the ICJ pursuant to Art 36 para 2 ICJ Statute. For details, see *M Brandon* Analysis of the Term 'Treaty' and 'International Agreement' for Purposes of Registration under Article 102 of the United Nations Charter (1953) 47 AJIL 53; *U Knapp/E Martens* in *Simma* Art 102 MN 10; (1945–1954) 5 RoP Art 102 paras 19–29.

[21]For the understanding of Art 102 UN Charter in this regard, see (1945–1954) 5 RoP Art 102 paras 32–34; *U Knapp/E Martens* in *Simma* Art 102 MN 22.

[22]It should be noted that registration is not an obligation on the UN Secretariat. Art 102 UN Charter refers to registration "with" rather than "by" the Secretariat (*M Tabory* Registration of the Egypt-Israel Peace Treaty: Some Legal Aspects (1983) 32 ICLQ 981, 999).

[23]For reference, see n 7. Art 5 of the Regulations provides for the technical requirements.

[24][1962-I] YbILC 181–182; Final Draft, Commentary to Art 75, 274 para 3. Art 75 Final Draft referred to the Regulations in general terms, but this reference was deleted at the Conference (UNCLOT I 487).

[25]Final Draft, Commentary to Art 75, 274 para 3. The same view was shared by the States at the Vienna Conference, see UNCLOT I 469–471.

is applicable, *ie* registration or filing and recording, has to be determined by the Secretariat on the basis of the Regulations ("as the case may be").

Unlike Art 102 UN Charter, Art 80 remains silent on a **sanction for non-registration**. The ILC decided not to explicitly extend the sanction of Art 102 para 2 UN Charter to non-UN Member States, but understood this sanction to be relevant for such States.[26] **8**

III. Filing and Recording

Treaties not subject to registration according to Art 102 UN Charter, *ie* treaties entered into by **non-UN Member States** or before the entry into force of the UN Charter may be transmitted to the Secretariat for *filing and recording* in accordance with Art 10 Regulations of the UN General Assembly. Filing and recording is in essence a voluntary procedure for non-UN Member States. At the time of drafting of the VCLT, it was common practice of non-UN Member States to transmit their treaties for filing and recording.[27] Art 80 para 1 took this practice into account and transformed it into an obligation for non-UN Member States that are parties to the VCLT.[28] Given the universal membership of the UN today, this provision has largely lost its original purpose. **9**

IV. Publication

Publication is not an obligation on UN Member States or States Parties to the VCLT, but on the UN Secretariat alone. The UN Secretariat publishes a Monthly Statement containing a number of details on the treaties registered or filed and recorded in the preceding month, and the UNTS containing all relevant information including the full text and, if necessary, a translation into English and French.[29] **10**

[26]Final Draft, Commentary to Art 75, 273–274 para 2. The idea of SR *Lauterpacht* to reinforce the sanction of Art 102 para 2 UN Charter by determining that a treaty shall be void if not registered within six months after its entry into force was rejected; see *Lauterpacht* I 162 and subsequently *Waldock* I 71–73.

[27]Final Draft, Commentary to Art 75, 273 para 1.

[28]Art 75 Final Draft mentions only "registration", but with the understanding that this also comprises filing and recording (Final Draft, Commentary to Art 75, 273 para 1). Filing and recording was later introduced at the Vienna Conference on the basis of a Byelorussian proposal (UNCLOT I 470–471, 487).

[29]Arts 12 and 13 of the Regulations; Treaty Handbook (n 9) 34–36; for the logistical problems, the backlog in publication and the introduction of computer systems, see *U Knapp/E Martens* in *Simma* Art 102 MN 37–42; *Tabory* (n 1) 352–360.

V. Authorization of the Depositary

11 Prior to the adoption of the VCLT, registration by the depositary was only accepted if the depositary was a party to the treaty or if the depositary had been expressly authorized to that effect, either in the treaty itself or in a separate instrument.[30] Art 80 para 2 provides that the designation of a depositary constitutes the authorization to register the treaty or to transmit it for filing and recording.[31] Consent by the parties is now deemed a given through Art 80 para 2.

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[30] For the exceptions regarding the United Nations and specialized agencies, see Art 4 of the Regulations.

[31] Art 80 para 2 was inserted at the Vienna Conference on the basis of a proposal by the United States and Uruguay. The problem that registration by the depositary required prior agreement of all parties was raised by the OAS (UNCLOT I 469–471).

Part VIII
Final Provisions

Article 81
Signature

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, as follows: until 30 November 1969, at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York.

Contents

A. Purpose and Function

Art 81 is the first provision in a set of five **final clauses of the VCLT**. Its primary object is to define which States shall be entitled to sign the Convention and under what conditions. Furthermore, as ratification of the Convention is only open to the signatory States (→ Art 82 MN 3), and due to the fact that, according to Art 83, only those States belonging to one of the categories enumerated in Art 81 are entitled to adhere to the Convention following the expiry of the relevant time limits, Art 81 defines once and for all which States may become parties to the Convention.[1] Thus, the provision clarifies that the VCLT is not an 'open treaty' *stricto sensu*.[2] While that fact, if viewed from today's perspective, might appear to be of little practical relevance in light of the virtually universal membership of the United Nations (UN), it constituted a matter of high political controversy at the Vienna Conference and in the course of the years that followed. **1**

> For the time being, Art 81 in conjunction with Art 83 excludes accession by Kosovo, Abkhazia, South Ossetia, the Turkish Republic of Northern Cyprus, Western Sahara and the Palestinian National Authority, whose status as sovereign States is unclear and which have, therefore, not (yet) become members to the UN. A far more problematic issue is the question of membership of the Republic of China (Taiwan). The Republic of China was one of the founding members of the UN and held a permanent seat in the Security Council since its creation in 1945. When it signed the VCLT in 1970, the permanent missions of the

[1] *N Burniat* in *Corten/Klein* Art 81 MN 1.

[2] See generally *R Bernhardt* Treaties (2000) 4 EPIL 926, 928.

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USSR and Bulgaria to the UN submitted a declaration to the UN Secretary General stating that the signature of the Republic of China was irregular due to the fact that it could not be regarded as the sole representative of the Chinese people.[3] Initially, the office of the Secretary-General did not show any reaction to that declaration. However, in 1971, the People's Republic of China was recognized as the sole legitimate government of China with UN General Assembly Resolution 2758 stating "that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations". Since 1992, Taiwan has several times unsuccessfully re-applied for UN membership. As regards its status as a party to the VCLT, one must conclude that the UN Secretary-General has acquiesced to the position of the People's Republic of China, which, upon accession to the Convention in 1997, issued a declaration stating that the signature of the Republic of China of 1970 was illegal.[4]

B. Historical Background and Negotiating History

2 The ILC neither drafted any of the final provisions, nor did it give any advice to the Vienna Conference as to how the provisions concerned should be designed. Having said that, the Commission had already discussed in 1959 whether a **basic general right of a State to participate** in multilateral treaties or conventions of general interest, or treaties that create norms of general international law, existed.[5] While some members of the ILC considered that in relation to treaties of such a character, no State should be excluded from participation,[6] others did not share that view, since "[e]ither a treaty of this kind made provision for the States or category of States to be admitted to participation, or it did not."[7] Eventually, in light of the fundamental difference of opinions, the ILC decided to defer consideration of a general article on participation, preferring first to consider articles on the right to sign, to accede, *etc*.[8] The issue came up again in 1962[9] and resulted in the adoption of Draft Art 8, which stated in its para 1 that "[i]n the case of a general multilateral treaty, every State may become a party to the treaty unless it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization."[10]

3 In the course of the Vienna Conference, discussions primarily focused on **two proposals of a general character**, one submitted to the Committee of the Whole by

[3]Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions (1971) UN Doc ST/LEG/SER.D/4, 387 n 2; Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions (1972) UN Doc ST/LEG/SER.D/5, 399 n 2.

[4]Multilateral Treaties Deposited with the Secretary-General (1998) UN Doc ST/LEG/SER.E/16, 855.

[5][1959-II] YbILC 107 (Draft Art 17).

[6]*Ibid* 108.

[7]*Ibid*; see also *Fitzmaurice* [1959-I] YbILC 61.

[8][1959-II] YbILC 108.

[9]*Cf* [1962-I] YbILC 207 *et seq*, 246 *et seq*, 274 *et seq*.

[10]ILC Report 14th Session [1962-II] YbILC 157, 167–168.

Brazil and the United Kingdom,[11] the other by Hungary, Poland, Romania and the USSR.[12] These proposals differed fundamentally in respect of whether the Convention should be open to signature by all States, and were thus directly linked to the final clause, which later became Art 81 VCLT (→ MN 5–8). The high degree of controversy, which was provoked by that question, prompted one delegate to state that "drafting the final clauses was one of the most difficult tasks of a codification conference."[13]

4 Three further points were raised in the debates on the final provisions. First, Switzerland proposed to insert a new Art 76 into the Convention, which was intended to make all disputes arising out of the interpretation or application of the Convention subject to the **compulsory jurisdiction** of the ICJ.[14] Secondly, Venezuela as well as a group of five other States each submitted a proposal for a new Art 77, which was aimed at addressing the **question of non-retroactivity** of the rules of the Convention.[15] While the latter issue was finally solved by adoption of a compromise formula proposed by seven States (including the sponsors of the original two proposals),[16] which, upon review by the Drafting Committee, was then included in the Convention as Art 4 (→ Art 4 MN 2–3), the Swiss proposal was ultimately rejected by 48 votes to 37, with 20 abstentions.[17] Prior to the vote on the proposal, delegations had expressed their opposition by referring to the considerable degree of disenchantment with the principal judicial organ of the UN among certain States[18] as well as to the inconsistency of compulsory adjudication with the general concept embodied in Art 33 UN Charter and Art 36 ICJ Statute.[19] Thirdly, discussions briefly touched on whether the final clauses should include a provision on **reservations** to the Convention and/or a revision clause,[20] but no formal proposals were submitted in this respect.

5 Regarding the central issue of whether there should be any **restriction in respect of the entitlement to sign the Convention**, Nigeria had submitted a draft resolution in the course of the first session of the Conference, which asked the UN Secretary-General to prepare a set of standard clauses on the basis of international treaty practice for assisting the work in the second session. The resolution was adopted at the end of the 83rd meeting of the Committee of the

[11]UN Doc A/CONF.39/C.1/L.386/Rev.1, UNCLOT III 253.

[12]UN Doc A/CONF.39/C.1/L.389, UNCLOT III 255.

[13]UNCLOT I 320; see also *ibid* 326: the final clauses "were a source of concern to all delegations from the very earliest stage of drafting a convention, for they related to the scope of the convention in time and space."

[14]UN Doc A/CONF.39/C.1/L.250, UNCLOT III 251.

[15]UN Doc A/CONF.39/C.1/L.399 and L.400, UNCLOT III 252.

[16]UNCLOT III 253.

[17]UNCLOT II 341, UNCLOT III 252.

[18]UNCLOT II 319, 341.

[19]*Cf* UNCLOT II 325, 334, 338.

[20]See UNCLOT II 314, 317, 326, 331.

Whole.[21] In February 1969, the UN Secretary-General circulated the requested document on standard final clauses.[22] It concluded that participation in multilateral treaties could either be modelled on the relevant provisions contained in the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations and the four Geneva Conventions on the Law of the Sea ('Vienna formula') or on those of the 1963 Nuclear Test Ban Treaty and the 1967 Outer Space Treaty ('Moscow formula').[23] Whereas in the latter case, signature was **open to all States**, the Vienna formula attempted to identify in detail the entities, which were eligible to sign the treaty concerned.

6 The dispute that arose during the course of the Vienna Conference between the advocates of the 'Vienna formula' and the proponents of the 'Moscow formula' must be evaluated against the background of Cold War developments. Both groups of States accused each other of political motives while at the same time seeking to submit legal arguments in favour of their respective positions. On the one hand, the USSR and its Warsaw Pact allies, who suggested drafting the final clauses on the basis of the 'Moscow formula',[24] argued that the 'Vienna formula' as proposed by Brazil and the United Kingdom[25] discriminated against some socialist States and thus **violated the principle of sovereign equality** of States.[26] Account had to be taken of recent trends in international treaty practice.[27] As the Convention regulated questions, which were to be classified as 'constitutional', its universal character had to be recognized.[28] Only in the event of adoption of the 'Moscow formula' did the Convention have the opportunity to achieve widespread implementation in practice and principle.[29] Additionally, the right of all States to participate in general multilateral treaties could not be disputed.[30]

7 On the other hand, the advocates of the alternate proposal submitted by Brazil and the United Kingdom took the position that the overwhelming number of precedents militated in favour of the 'Vienna formula',[31] which thus had to be considered as being **valid under customary law**.[32] That formula was not at all discriminatory, because any State, which did not fall into one of the specified categories, could seek an invitation from the **General Assembly**, which was the

[21] UNCLOT I 493.

[22] UN Doc A/CONF.39/L.1; see also the United Nations Handbook on Final Clauses of Multilateral Treaties (2003) 12–17.

[23] UNCLOT I 3–4.

[24] See n 12 above.

[25] See n 11 above.

[26] See UNCLOT II 311, 314, 317, 318.

[27] *Ibid* 322, 331.

[28] *Ibid* 316, 322, 324, 332.

[29] *Ibid* 316.

[30] *Ibid* 322.

[31] *Ibid* 313.

[32] *Ibid* 315, 324, 333, 334, 335.

only appropriate body to determine whether a certain entity constituted a State or not.[33] In contrast, the 'Moscow formula' would amount to authorizing any one of the three designated depositaries to decide whether or not an entity was a State.[34] Allowing an entity whose status was disputed to become a party to the Convention might also prevent other States from acceding to it.[35] Finally, bearing in mind that none of the entities whose status was disputed on the international plane was universally recognized, the 'Vienna formula' had the advantage of avoiding difficulties with regard to the question of recognition.[36]

In light of these **fundamental differences of opinion**, Ghana and India submitted an amendment to the proposal of Brazil and the United Kingdom, which added a new paragraph to the 'Vienna formula'.[37] According to that paragraph, the Convention was also open for signature by the parties of the 1963 Nuclear Test Ban Treaty and the 1967 Outer Space Treaty. The Indian delegate expressed its hope that the proposed compromise would come to be known as the "new Vienna formula".[38] The amendment, however, met with the criticism of many Western States who feared that an entity whose status as a State was contested might circumvent the requirements of the 'Vienna formula' by becoming a party to the Nuclear Test Ban Treaty or the Outer Space Treaty.[39] Eventually, both the 'Moscow formula' proposal submitted by Hungary, Poland, Romania and the USSR[40] and the amendment proposed by Ghana and India[41] were rejected. The 'Vienna formula' proposed by Brazil and the United Kingdom was subsequently adopted by 60 votes to 29, with 19 abstentions.[42] **8**

In a **final attempt** to include the 'Moscow formula' in Art 81, a group of six States (Hungary, Poland, Romania, Tanzania, USSR and Zambia) proposed an **amendment** to the plenary meeting on 15 May 1969 to replace the wording of Art A as adopted by the Committee of the Whole, and subsequently submitted by the Drafting Committee, by the following text: "The present Convention shall be open for signature by all States until 30 November 1969 at the Federal Ministry for **9**

[33] *Ibid* 313, 315, 318, 321, 323, 329, 331–332, 339; but see the statement made by the delegate of Poland *ibid* 320: "But that additional clause concerning States invited by the General Assembly had never been applied and it was unlikely, in view of the contemporary situation, that it ever would be."

[34] *Ibid* 339.

[35] *Ibid* 318.

[36] *Ibid* 327, 328.

[37] UN Doc A/CONF.39/C.1/L.394, UNCLOT III 254.

[38] UNCLOT II 311; the amendment received support by, *inter alia*, the delegates of El Salvador and Nigeria (*ibid* 326).

[39] *Ibid* 315, 318, 321, 323, 333, 338–339; for a critique by a supporter of the 'Moscow formula', see *ibid* 319.

[40] Rejection by 56 votes to 32, with 17 abstentions; see UNCLOT II 342, UNCLOT III 255.

[41] Rejection by 48 votes to 32, with 25 abstentions; see UNCLOT II 342, UNCLOT III 255–256.

[42] UNCLOT II 343, UNCLOT III 256.

Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York."[43] However, the amendment was, again, rejected by 43 votes to 33, with 17 abstentions in the course of the 34th plenary meeting of the Conference. Art A (which later became Art 81 VCLT) was then ultimately adopted by 84 votes to 11, with 5 abstentions.[44]

10 Viewed from today's perspective, one must conclude that **none of the legal arguments** submitted by either of the two sides was **persuasive**. In particular, it seems difficult from the outset to argue that the one formula or the other represents **customary international law**, since it is generally up to the contracting parties of a treaty to decide upon the conditions that must be fulfilled by an entity in order to be able to become a party to the agreement concerned. Notwithstanding the fact that Art 82 VCLT II was later drafted in terms of the 'all States formula', to this day, no consistent practice exists as to the conditions for participation in multilateral agreements. In this respect, reference made by one source to an understanding by the members of the UN General Assembly of 14 December 1973 seems to be particularly relevant.[45] According to that document

> "[i]t is the understanding of the General Assembly that the Secretary-General, in discharging his functions as depositary of a convention with an 'all States' clause, will follow the practice of the Assembly in implementing such a clause and, whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession."[46]

Thus, the General Assembly not only accepted the 'all States formula' as equally valid in international treaty practice, but also extended its claim for competence to determine whether an entity is to be considered as a State or not to the 'Moscow formula'. Against this background, one cannot but agree with the statement made by one delegate of the Vienna Conference, according to whom "the issue of the accession clause was entirely political".[47] The main cause for the fierce discussions, which took place at the Conference, must be seen in the well-known differences between the Western and Eastern States over whether certain entities, in particular the German Democratic Republic, North Korea and North Vietnam, were to be considered as States and were thus capable of becoming parties to international agreements.[48]

[43] UN Doc A/CONF.39/L.41, UNCLOT III 271.

[44] UNCLOT II 195.

[45] *N Burniat* in *Corten/Klein* Art 81 MN 7.

[46] [1973] UNJYB 79 n 9.

[47] UNCLOT II 321.

[48] *Cf* only the statement made by the delegate of the Federal Republic of Germany *ibid* 315 ("the so-called German Democratic Republic") and the immediate reaction of the USSR delegation *ibid* 316; see also *ibid* 318.

C. Elements of Article 81

The elements of Art 81 are **self-explanatory**. Suffice it to say that the Convention was open for signature (→ Art 12 MN 14–15) by those States that fulfilled the respective criteria of the 'Vienna formula'.[49] From the date of adoption of the Convention (23 May 1969) until the deadline mentioned therein (30 April 1970), 45 States had signed the Convention. Since the expiry of that time-limit, accession in accordance with Art 83 has been the only way for a State to become a party to the VCLT (→ Art 83). **11**

Selected Bibliography

S Rosenne Final Clauses in MPEPIL (2008).
United Nations Handbook on Final Clauses of Multilateral Treaties (2003).

[49]The notion of 'specialized agencies' is defined in Art 57 UN Charter. It refers to autonomous organizations such as the Food and Agriculture Organization (FAO) and the International Maritime Organization (IMO), which are brought into a relationship with the UN in accordance with Art 63 UN Charter.

Article 82
Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Contents

A. Purpose and Function

Art 82 serves a **twofold and obvious purpose**: on the one hand, the provision clarifies that for the signatory States of the Convention, consent to be bound by its terms is expressed by ratification (→ Art 14 MN 9–12); on the other hand, it determines that the UN Secretary-General shall act as depositary of the instruments of ratification (→ Art 16 MN 10–11) in terms of Arts 76 and 77. **1**

B. Historical Background and Negotiating History

Similar to the preceding article, Art 82 was modelled on the provisions of the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations respectively, which both distinguish between ratification and accession as means of expressing the consent of a State to be bound by their terms (*cf* Arts 49, 50 and Arts 75, 76 respectively). At the request of the Vienna Conference, the UN Secretary-General in February 1969 prepared and circulated a document on standard final clauses, which contained references to, *inter alia*, the two Vienna Conventions (→ Art 81 MN 5). This document was intended to assist the Conference in the drafting of the final clauses. However, during the second session, delegations immediately engaged themselves in a fierce debate on whether participation in the Convention should be open to all States (→ Art 81 MN 6–8). Despite this highly controversial issue, the draft provision on ratification (Art B) proposed by Brazil and the United Kingdom[1] attracted almost no attention in the course of the Conference negotiations[2] due to its neutral wording, which made it seem acceptable **2**

[1] UN Doc A/CONF.39/C.1/L.386/Rev.1, UNCLOT III 253.

[2] It should be noted, though, that under the amendment proposed by Ghana and India (UN Doc A/CONF.39/C.1/L.394, UNCLOT III 254), the instruments of ratification were to "be deposited, in the first instance, with the Initial Depositary" (Draft Art B para 2).

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to both the advocates of the 'Vienna formula' and those of the 'Moscow formula'. Art 82 was finally adopted by 103 votes to none in the course of the 34th plenary meeting.[3]

C. Elements of Article 82

3 The elements of Art 81 are **self-explanatory** and do not require further discussion here. A contextual interpretation of Art 82 reveals that ratification[4] under the terms of the provision may only become relevant for those States who lawfully signed the Convention within the time limit established by Art 81. Consequently, Art 82 not only indirectly absorbs the restrictions on participation in the VCLT embodied in the 'Vienna formula', but also clarifies that since 1 May 1970, a State can only become a party to the Convention by way of accession under Art 83.[5] This explains the comparatively low number of ratifications to the Convention to date (29).

Selected Bibliography

See the bibliography attached to the commentary on Art 81.

[3] UNCLOT II 195.

[4] For an early approach, see *B Herzog* Der Begriff der Ratifikation und die Bedeutung seiner Technik für das Völkerrecht (1929).

[5] *N Burniat* in *Corten*/*Klein* Art 81 MN 2.

Article 83
Accession

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Contents

A. Purpose and Function

The **purpose** of Art 83 is, similar to that of Art 82, **twofold**: first, the provision clarifies which States are entitled to accede to the Convention, and secondly, with a view to the instruments of accession, it assigns the functions of the depositary as laid down in Art 77 to the UN Secretary-General. Since a contextual analysis of the final clauses reveals that ratification is only open to States that have signed the Convention (→ Art 82 MN 3), accession (→ Art 15 MN 7–10) is the only way to become a party to the VCLT for those States that have not signed it within the time-limit provided for by Art 81.[1] By explicitly referring to the latter provision, Art 83 also restricts entitlement to adhere to the Convention to the categories of States mentioned therein. **1**

B. Historical Background and Negotiating History

At the Vienna Conference, Art 83, which is modelled on the respective provisions of the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, did not become subject to any particular discussion. While it is true that the question whether the Convention should be open to participation by all States attracted major attention during the negotiations of the Committee of the Whole, that debate was undertaken in the context of Art 81 and not that of the provision relevant here. Art C (which later became Art 83 VCLT) was enclosed in the proposal submitted by Brazil and the United Kingdom,[2] and was therefore adopted together with Art 81 as part of the 'package deal' on which the final clauses of the Convention were based. In this respect, it should be noted that Art C, as accepted by **2**

[1] See also *N Burniat* in *Corten/Klein* Art 83 MN 1.

[2] UNCLOT III 253–254.

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the Committee of the Whole, referred to "*four* categories" of States,[3] but the word "four" was deleted from the final clauses in the version submitted to the plenary meeting by the Drafting Committee in order to avoid misunderstandings.[4] Thus, it cannot be doubted that the Convention is also open for accession by States that are invited by the UN General Assembly to become a party to the Convention.[5]

3 Prior to its final adoption in the course of the 34th plenary meeting by 83 votes to 13, with 6 abstentions,[6] Hungary, Poland, Romania, Tanzania, the USSR and Zambia **proposed to replace Art C** as adopted by the Committee of the Whole by the following text: "Any State may accede to the present Convention by depositing an instrument of accession with the Secretary-General of the United Nations."[7] The amendment was, however, rejected by 45 votes to 32, with 20 abstentions,[8] the introduction of the 'Moscow formula' into the Convention being ultimately defeated thereby.

C. Elements of Article 83

4 The elements of Art 83 do not require further examination. Suffice it to say that accession to the VCLT was and is open for all States that belong to one of the categories mentioned in Art 81. As of 1 August 2010, 73 States have acceded to the VCLT.

Selected Bibliography

See the bibliography attached to the commentary on Art 81.

[3] *Ibid* 256.

[4] See UNCLOT II 195.

[5] Note that in the *Corten/Klein* commentary, the text of Art 83 is inadvertently reproduced in the manner adopted by the Committee of the Whole ("de tout État appartenant à l'une des *quatre* categories mentionnées à l'article 81").

[6] UNCLOT II 195.

[7] UN Doc A/CONF.39/L.41, UNCLOT III 271.

[8] UNCLOT II 195.

Article 84
Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Contents

A. Purpose and Function

Art 84 implements the general rule contained in Art 24 para 1 in respect of the entry into force of the VCLT itself. While para 1 addresses the minimum standards that have to be met for the entry into force of the Convention, para 2 is dedicated to the conditions under which the Convention enters into force for an individual State after the general requirement of para 1 is fulfilled. It follows from Art 2 para 1 lit g and h that a State for which the VCLT has entered into force according to Art 84 may no longer be considered a third-party State in relation to the Convention (→ Art 34 MN 10). Given that Art 24 para 1 VCLT stipulates that the condition of the entry into force of a treaty ought to be established by the contracting parties for each specific agreement individually, it seems, as a matter of logic, **impossible to determine any clear and uniform practice** in terms of Art 38 para 1 lit b ICJ Statute. This conclusion is supported by the inconsistency of relevant treaty practice as compiled in the UN Handbook on Final Clauses of Multilateral Treaties.[1] **1**

B. Historical Background and Negotiating History

As was the case with the other final clauses, the rule contained in Art 84 had not been subject to any proposal made by the ILC prior to the Vienna Conference. Upon the request of the delegations participating in the Conference (→ Art 81 MN 5), the UN Secretary-General submitted a document on **standard final clauses**, which also contained a rule on the issue of entry into force.[2] The provision concerned was **2**

[1] UN Handbook on Final Clauses of Multilateral Treaties (2003) 57–66; see also *C Denis* in *Corten/Klein* Art 84 MN 5, 7.

[2] UN Doc A/CONF.39/L.1, 5.

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drafted on the basis of the corresponding norms contained in the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations (Arts 51 and 77 respectively) and included as Art D in the proposal submitted by Brazil and the United Kingdom.[3]

3 In the course of the Conference, discussions circulated around the **number of instruments of ratification or accession** necessary for the Convention to enter into force. Whereas the proposal of Brazil and the United Kingdom demanded 45 instruments, the amendment submitted by Ghana and India (→ Art 81 MN 8) contained the number of 35. A further amendment introduced by Switzerland argued for 60 instruments.[4] The Swiss delegate justified the amendment by stating that it simply adopted the two-thirds majority rule, which was applied, *inter alia*, in the UN General Assembly and in the principal organs of other international organizations.[5] However, while the number of delegates advocating the first and second proposal was virtually divided,[6] many delegations felt that the number of instruments contained in the Swiss proposal was too high and could ultimately **prevent the Convention from entering into force**.[7] In this respect, *Waldock*, who participated in the Conference as an expert consultant, argued that "the more a convention contained codifying elements, the less there was to the argument that a large number of ratifications was needed to bring it into force."[8] Thus, in the course of the 102nd meeting, the delegate for Iran suggested waiting for the final vote of the Conference before taking a decision on the number of ratifications or accessions needed.[9] After the first proposals relevant to the final clauses had been put to the vote in the course of the 104th meeting of the Committee of the Whole, the delegate for Switzerland announced that his delegation's amendment would be withdrawn.[10] After an exchange of views, the delegate of India thereupon suggested that when voting on the proposal submitted by Brazil and the United Kingdom, the number of ratifications or accession necessary for the entry into force of the Convention should be left for the plenary Conference to determine at a later point of time.[11] The Committee accepted the Indian suggestion and went on to adopt the proposal submitted by Brazil and the United Kingdom (→ Art 81 MN 5, 9).

4 Prior to the 34th plenary meeting, a group of ten States submitted an amendment to the then Art D, which recommended that the number of ratifications and accessions

[3]UN Doc A/CONF.39/C.1/L.386/Rev.1, UNCLOT III 253–254.

[4]UN Doc A/CONF.39/C.1/L.396, UNCLOT III 255.

[5]UNCLOT II 312.

[6]In favour of 35 ratifications or accessions: UNCLOT II 312, 316, 319, 326, 338; in favour of 45 instruments: *ibid* 314, 324, 330, 331.

[7]UNCLOT II 311, 322, 331; but see *ibid* 317, 327.

[8]*Ibid* 337–338.

[9]*Ibid* 328.

[10]See *ibid* 342; see also UNCLOT III 255.

[11]UNCLOT II 343; UNCLOT III 255.

respectively necessary to bring the Convention into force should be 35.[12] The amendment was adopted by 92 votes to none, with 8 abstentions, and so was, ultimately, the amended article.[13] The VCLT entered into force on 27 January 1980, following the accession by Togo on 28 December 1979.

C. Elements of Article 84

Neither para 1 nor para 2 of Art 84 give rise to **any interpretive problems**, since the VCLT addresses the central elements of that norm in specific provisions on ratification, accession and deposit (→ Arts 14–16 and 76–77). **5**

With regard to the specific date of entry into force, reference must be made to the **practice established by the UN Secretary-General** applicable to situations in which a provision requires it to announce its entry into force after a specified number of instruments has been deposited, but where some of the instruments received contain reservations. This practice, which was followed by the Secretary-General also in the case of the VCLT,[14] was described in a report submitted to the UN General Assembly in 1965 in view of a parallel situation: **6**

> The Secretary-General, in a circular letter addressed to all interested States, called their attention to the provision of the convention stipulating the conditions for its entry into force and informed them that he had received the specified number of instruments from States eligible to become parties thereto, reserving and objecting States included. Since the convention provided for only a thirty-day delay for its entry into force – a time not considered sufficient to give an opportunity to the States concerned to draw the legal consequences of the reservations and objections and communicate their conclusions – the Secretary-General waited ninety days from the date of his communication, the traditional time-lapse considered necessary to assume tacit consent. Having received no objection to the entry into force of the convention, he proceeded with the registration at the end of the ninety-day period, specifying the date of entry into force, pursuant to the relevant provisions of the convention, that is to say thirty days after the deposit of the required number of instruments.[15]

The cautious approach followed by the Secretary-General originates from the fact that this organ is generally not entitled to legally determine the date of entry into force of a Convention when it functions as depositary.[16] Having said that, it must be emphasized that, regarding the VCLT, the practice concerned **ignored the clear wording** of Art 84,[17] and did not therefore have any influence on the entry

[12] UN Doc A/CONF.39/L.48, UNCLOT III 273.

[13] UNCLOT II 197.

[14] *Cf P-H Imbert* A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités – Réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l'exercice de ses fonctions de dépositaire (1980) 26 AFDI 524, 526.

[15] [1965-II] YbILC 74, 103.

[16] *Ibid*; see also UNGA Res 598 (VI), 12 January 1952, UN Doc A/RES/598 (VI), para 3 lit b, [1965-II] YbILC 106–107.

[17] *C Denis* in *Corten/Klein* Art 84 MN 11.

into force of the Convention on 27 January 1980. Furthermore, it is to be noted that the contracting parties intentionally abstained from adopting a **general provision on reservations** to the Convention, since they took the position that its general articles (Arts 19–23) were applicable also to the VCLT itself.[18] The Spanish proposal to include an Art C *bis* in the final clauses, which aimed at prohibiting reservations to Part V of the Convention,[19] was rejected by 62 votes to 9, with 33 abstentions by the delegations participating in the 34th plenary meeting.[20] Against this background, it has been conclusively argued that the practice of the UN Secretary-General also failed to take account of the presumption contained in Art 20 para 5.[21] Indeed, States wishing to file a reservation to the VCLT were not in need of any further protection.

Selected Bibliography

See the bibliography attached to the commentary on Art 81.

[18] See UNCLOT II 314–315, 317, 326; see also *ibid* 196.

[19] UN Doc A/CONF.39/L.39, UNCLOT III 270–271.

[20] UNCLOT II 196.

[21] *Imbert* (n 14) 538 *et seq*; *C Denis* in *Corten*/*Klein* Art 84 MN 11.

Article 85
Authentic texts

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.
DONE AT VIENNA this twenty-third day of May, one thousand nine hundred and sixty-nine.

Contents

A. Purpose and Function

Art 85 determines the authentic texts of the VCLT as well as the depository of its original. Determination of the **authentic languages** of the Convention is particularly relevant with regard to its **interpretation**, since the text of a treaty constitutes one of the central elements of its context in terms of Art 31 para 1 (→ Art 31 MN 38).[1] In this respect, Art 33 para 1 makes it clear that "[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail." This is why the UN Handbook on Final Clauses of Multilateral Treaties considers it a desirable practice that treaties contain provisions on the authentic texts.[2] **1**

B. Historical Background and Negotiating History

Similar to the other final clauses (→ Art 81 MN 2), there was no draft provision adopted by the ILC that could have served as a basis for Art 85. Rather, it was modelled on the basis of the corresponding norms contained in the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations (Arts 53 and 79 respectively) and included as Art E in the proposal submitted by Brazil and the **2**

[1] No reason exists as to why the provisions of the Convention should not apply to the VCLT itself. See also → Art 84 MN 6.

[2] UN Handbook on Final Clauses of Multilateral Treaties (2003) 77–78.

O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties*,
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United Kingdom.[3] A conflicting proposal made by Hungary, Poland, Romania and the USSR[4] only differed from the former insofar as under the latter's terms, the original of the Convention was to be deposited in the archives of the United Nations (instead of the UN Secretary-General). Art E was adopted by the Committee of the Whole as part of the 'package deal' on which the final clauses of the Convention were based. As regards its content, it had **not received any attention** in the course of the meetings of the Committee. Following the adoption of the proposal submitted by Brazil and the United Kingdom, the Drafting Committee replaced the established expression "faisant foi" by the term "authentique" in the French version of Art E in order to provide for conformity with the French wording of Art 10.[5] At the 34th plenary meeting, Art E was adopted by 103 votes to none.[6]

C. Elements of Article 85

3 A detailed commentary on the elements of Art 85 is not necessary here. Suffice it to say that the languages mentioned therein refer to five of today's six official languages of the United Nations.[7] Thus, it is not surprising that determination of the authentic texts in the manner performed by Art 85 reflects **current treaty practice**.[8] As regards the relationship between the five authentic languages, Art 33 para 3 clarifies that "[t]he terms of the treaty are presumed to have the same meaning in each authentic text." In the event of differing meanings being evident, recourse to the process contained in Art 79 is possible.

Selected Bibliography

See the bibliography attached to the commentary on Art 81.

[3] UN Doc A/CONF.39/C.1/L.386/Rev.1, UNCLOT III 253–254.

[4] UN Doc A/CONF.39/C.1/L.389, UNCLOT III 255.

[5] UNCLOT II 195; see also *C Denis* in *Corten/Klein* Art 85 MN 2. Art 10 VCLT corresponds to Draft Art 9 as adopted by the ILC. Authentication in terms of Art 10 refers to "the process by which this definitive text [not susceptible of alteration] is established, and it consists in some act or procedure which certifies the text as the correct and authentic text" (Final Draft, Commentary to Art 9, 195 para 1).

[6] UNCLOT II 197.

[7] The original official languages were those of the permanent members of the UN Security Council. Spanish (which is the second most widely spoken language in the world) and Arabic were added to the list for political reasons in 1973.

[8] See UN Handbook (n 1) 77.

Annex

Final Act of the United Nations Conference on the Law of Treaties and Annexes thereto[1]

1. The General Assembly of the United Nations, having considered chapter II of the report of the International Law Commission on the work of its eighteenth session (A/6309/Rev.I,1 Part II), which contained final draft articles and commentaries on the law of treaties,2 decided, by its resolution 2166 (XXI) of 5 December 1966, to convene an international conference of plenipotentiaries to consider the law of treaties and to embody the results of its work in an international convention and such other instruments as it might deem appropriate. By the same resolution, the General Assembly requested the Secretary-General to convoke the first session of the conference early in 1968 and the second session early in 1969. Subsequently, the General Assembly, noting that an invitation had been extended by the Austrian Government to hold both sessions of the conference at Vienna, decided, by resolution 2287 (XXII) of 6 December 1967, that the first session should be convened at Vienna in March 1968. At its fifth meeting, held on 24 May 1968, at the conclusion of the first session, the Conference adopted a resolution3 requesting the Secretary-General to make all the necessary arrangements for the Conference to hold its second session at Vienna from 9 April to 21 May 1969.

2. The first session of the United Nations Conference on the Law of Treaties was held at the Neue Hofburg, Vienna, from 26 March to 24 May 1968. The second session of the Conference was also held at the Neue Hofburg, from 9 April to 22 May 1969.

3. One hundred and three States were represented at the first session of the Conference, and one hundred and ten States at the second session, as follows:

Afghanistan, *Algeria*, *Argentina*, *Australia*, *Austria*, *Barbados* (second session only), *Belgium*, *Bolivia*, *Brazil*, *Bulgaria*, *Burma* (second session only), *Byelorussian Soviet Socialist Republic*, *Cambodia*, *Cameroon* (second session only), *Canada*, *Central African Republic*, *Ceylon*, *Chile*, *China*, *Colombia*, *Congo (Brazzaville)*, *Congo (Democratic Republic of)*, *Costa Rica*, *Cuba*, *Cyprus*, *Czechoslovakia*, *Dahomey*, *Denmark*, *Dominican*

[1]UN Doc A/CONF.39/26, reproduced from UNCLOT III, 281.

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Republic, *Ecuador*, *El Salvador* (second session only), *Ethiopia*, *Federal Republic of Germany*, *Finland*, *France*, *Gabon*, *Ghana*, *Greece*, *Guatemala*, *Guinea* (first session only), *Guyana*, *Holy See*, *Honduras*, *Hungary*, *Iceland* (second session only), *India*, *Indonesia*, *Iran*, *Iraq*, *Ireland*, *Israel*, *Italy*, *Ivory Coast*, *Jamaica*, *Japan*, *Kenya*, *Kuwait*, *Lebanon*, *Lesotho* (second session only), *Liberia*, *Libya* (second session only), *Liechtenstein*, *Luxembourg* (second session only), *Madagascar*, *Malaysia*, *Mali* (first session only), *Malta* (second session only), *Mauritania* (first session only), *Mauritius*, *Mexico*, *Monaco*, *Mongolia*, *Morocco*, *Nepal*, *Netherlands*, *New Zealand*, *Nigeria*, *Norway*, *Pakistan*, *Panama* (second session only), *Peru*, *Philippines*, *Poland*, *Portugal*, *Republic of Korea*, *Republic of Viet-Nam*, *Romania*, *San Marino*, *Saudi Arabia*, *Senegal*, *Sierra Leone*, *Singapore*, *Somalia* (first session only), *South Africa*, *Spain*, *Sudan* (second session only), *Sweden*, *Switzerland*, *Syria*, *Thailand*, *Trinidad and Tobago*, *Tunisia*, *Turkey*, *Uganda* (second session only), *Ukrainian Soviet Socialist Republic*, *Union of Soviet Socialist Republics*, *United Arab Republic*, *United Kingdom of Great Britain and Northern Ireland*, *United Republic of Tanzania*, *United States of America*, *Uruguay*, *Venezuela*, *Yemen* (first session only), *Yugoslavia* and *Zambia*.

4. The General Assembly invited the specialized agencies and interested intergovernmental organizations to send observers to the Conference. The following specialized agencies and interested intergovernmental organizations accepted this invitation:

Specialized and related agencies
International Labour Organization
Food and Agriculture Organization of the United Nations
United Nations Educational, Scientific and Cultural Organization
International Civil Aviation Organization
International Bank for Reconstruction and Development and International Development Association
International Monetary Fund
World Health Organization
Universal Postal Union
Inter-Governmental Maritime Consultative Organization
International Atomic Energy Agency

Intergovernmental organizations
Asian-African Legal Consultative Committee
United International Bureaux for the Protection of Intellectual Property
Council of Europe
General Agreement on Tariffs and Trade
League of Arab States

5. The Conference elected Mr. Roberto Ago (*Italy*) as President.

6. The Conference elected as Vice-Presidents the representatives of the following States:

Afghanistan, Algeria, Austria, Chile, China, Ethiopia, Finland, France, Guatemala (for 1969), Guinea, Hungary, India, Mexico, Peru, Philippines, Romania, Sierra Leone, Spain (for 1968), Union of Soviet Socialist Republics, United Arab Republic, United

Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela and Yugoslavia.

7. The following committees were set up by the Conference:

General Committee
Chairman: The President of the Conference
Members: The President and Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee.

Committee of the Whole
Chairman: Mr. Taslim Olawale Elias (*Nigeria*)
Vice-Chairman: Mr. Josef Smejkal (*Czechoslovakia*)
Rapporteur: Mr. Eduardo Jimenez de Arechaga (*Uruguay*)

Drafting Committee
Chairman: Mr. Mustafa Kamil Yasseen (*Iraq*)
Members: Argentina, *China*, *Congo* (*Brazzaville*), *France*, *Ghana*, *Japan*, *Kenya*, *Netherlands*, *Poland*, *Sweden*, *Union of Soviet Socialist Republics*, *United Kingdom of Great Britain and Northern Ireland*, *United States of America* and, *ex-officio* in accordance with rule 48 of the Rules of Procedure, Mr. Eduardo Jimenez de Arechaga (*Uruguay*), Rapporteur of the Committee of the Whole.

Credentials Committee
Chairman: Mr. Eduardo Suarez (Mexico)
Members: Ceylon, *Dominican Republic*, *Japan*, *Madagascar*, *Mali* (first session), *Mexico*, *Switzerland*, *Union of Soviet Socialist Republics*, *United Republic of Tanzania* (second session) and *United States of America*.

8. Sir Humphrey Waldock, Special Rapporteur of the International Law Commission on the law of treaties, acted as Expert Consultant.

9. The Secretary-General of the United Nations was represented by Mr. C. A. Stavropoulos, Under-Secretary-General, The Legal Counsel. Mr. A. P. Movchan, Director of the Codification Division of the Office of Legal Affairs of the United Nations, acted as Executive Secretary.

10. The General Assembly, by its resolution 2166 (XXI) convening the Conference, referred to the Conference, as the basis for its consideration of the law of treaties, chapter II of the report of the International Law Commission on the work of its eighteenth session (A/6309/Rev.l, Part II), containing the text of the final draft articles and commentaries on the law of treaties adopted by the Commission at that session.

11. The Conference also had before it the following documentation:

(*a*) the relevant records of the General Assembly and of the International Law Commission relating to the law of treaties;
(*b*) comments and amendments relating to the final draft articles on the law of treaties submitted by Governments in 1968 in advance of the Conference in

accordance with General Assembly resolution 2287 (XXII) (A/CONF.39/6 and Add. 1–2);
(*c*) written statements submitted by specialized agencies and intergovernmental bodies invited to send observers to the Conference (A/CONF.39/7 and Add. 1–2 and Add.l/Corr.l);
(*d*) a selected bibliography on the law of treaties (A/CONF.39/4), an analytical compilation of comments and observations made in 1966 and 1967 on the final draft articles on the law of treaties (A/CONF.39/5, Vols. I and II), standard final clauses (A/CONF.39/L.1), a guide to the draft articles on the law of treaties (A/C.6/376) and other pertinent documentation prepared by the Secretariat of the United Nations.

12. The Conference assigned to the Committee of the Whole the consideration of the final draft articles on the law of treaties adopted by the International Law Commission and the preparation of the final provisions and of any other instruments it might consider necessary. The Drafting Committee, in addition to its responsibilities for drafting, and for co-ordinating and reviewing all the texts adopted, was entrusted by the Conference with the preparation of the preamble and the Final Act.

13. On the basis of the deliberations recorded in the records of the Conference (A/CONF.39/SR.1 to SR.36) and the records (A/CONF.39/C.1/SR.1 to SR.105) and reports (A/CONF.39/14, Vols. I and II and A/CONF.39/15 and Corr.l (Spanish only) and Corr.2) of the Committee of the Whole, the Conference drew up the following Convention:

Vienna Convention on the Law of Treaties

14. The foregoing Convention was adopted by the Conference on 22 May 1969 and opened for signature on 23 May 1969, in accordance with its provisions, until 30 November 1969 at the Federal Ministry for Foreign Affairs of the Republic of Austria and, subsequently, until 30 April 1970 at United Nations Headquarters in New York. The same instrument was also opened for accession in accordance with its provisions.

15. After 30 November 1969, the closing date for signature at the Federal Ministry for Foreign Affairs of the Republic of Austria, the Convention will be deposited with the Secretary-General of the United Nations.

16. The Conference also adopted the following declarations and resolutions, which are annexed to this Final Act:

Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties

Declaration on universal participation in the Vienna Convention on the Law of Treaties

Resolution relating to article 1 of the Vienna Convention on the Law of Treaties

Resolution relating to the Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties

Resolution relating to article 66 of the Vienna Convention on the Law of Treaties and the Annex thereto

Tribute to the International Law Commission

Tribute to the Federal Government and people of the Republic of Austria

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE at Vienna this twenty-third day of May, one thousand nine hundred and sixty-nine, in a single copy in the Chinese, English, French, Russian and Spanish languages, each text being equally authentic. By unanimous decision of the Conference, the original of this Final Act shall be deposited in the archives of the Federal Ministry for Foreign Affairs of the Republic of Austria.

ANNEXES TO THE FINAL ACT:

Declaration on the prohibition if military, political or economic coercion in the conclusion of treaties
for the text → Art 52 MN 55

Declaration on universal participation in the Vienna Convention on the Law of Treaties
for the text → Art 15 n 34.

Resolution relating to article I of the Vienna Convention on the Law of Treaties
for the text → Art 1 n 23

Resolution relating to the Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties
for the text → Art 52 MN 31

Resolution relating to article 66 of the Vienna Convention on the Law of Treaties and the Annex thereto
for the text of the resolution → Annex to Art 66 n 51. For the text of the Annex and the commentary thereto → Annex to Art 66

Status of the Convention

as of 1 August 2011[2];
Parties to the Convention: 111
Signatures without Ratification: 15

Participant	Signature	Ratification	Accession	Succession
Afghanistan	23 May 1969			
Albania			27 Jun 2001	
Algeria			8 Nov 1988	
Andorra			5 Apr 2004	
Argentina	23 May 1969	5 Dec 1972		
Armenia			17 May 2005	
Australia			13 Jun 1974	
Austria			30 Apr 1979	
Barbados	23 May 1969	24 Jun 1971		
Belarus			1 May 1986	
Belgium			1 Sep 1992	
Bolivia	23 May 1969			
Bosnia and Herzegovina				1 Sep 1993
Brazil	23 May 1969	25 Sep 2009		
Bulgaria			21 April 1987	
Burkina Faso			25 May 2006	
Cambodia	23 May 1969			
Cameroon			23 Oct 1991	
Canada			14 Oct 1970	
Central African Republic			10 Dec 1971	
Chile	23 May 1969	9 Apr 1981		
China			3 Sep 1997	
Colombia	23 May 1969	10 Apr 1985		
Congo	23 May 1969	12 Apr 1982		
Costa Rica	23 May 1969	22 Nov 1996		
Côte d'Ivoire	23 Jul 1969			
Croatia				12 Oct 1992

(*continued*)

[2]Source: Multilateral Treaties Deposited With the Secretary-General of the United Nations; current status to be found at http://treaties.un.org.

Participant	Signature	Ratification	Accession	Succession
Cuba			9 Sep 1998	
Cyprus			28 Dec 1976	
Czech Republic				22 Feb 1993
Democratic Republic of Congo			25 Jul 1977	
Denmark	18 Apr 1970	1 Jun 1976		
Dominican Republic			1 Apr 2010	
Ecuador	23 May 1969	11 Feb 2005		
Egypt			11 Feb 1982	
El Salvador	16 Feb 1970			
Estonia			21 Oct 1991	
Ethiopia	30 Apr 1970			
Finland	23 May 1969	19 Aug 1977		
Gabon			5 Nov 2004	
Georgia			8 Jun 1995	
Germany	30 Apr 1970	21 Jul 1987		
Ghana	23 May 1969			
Greece			30 Oct 1974	
Guatemala	23 May 1969	21 Jul 1997		
Guinea			16 Sep 2005	
Guyana	23 May 1969	15 Sep 2005		
Haiti			25 Aug 1980	
Holy See	30 Sep 1969	25 Feb 1977		
Honduras	23 May 1969	20 Sep 1979		
Hungary			19 Jun 1987	
Iran (Islamic Republic of)	23 May 1969			
Ireland			7 Aug 2006	
Italy	22 Apr 1970	25 Jul 1974		
Jamaica	23 May 1969	28 Jul 1970		
Japan			2 Jul 1981	
Kazakhstan			5 Jan 1994	
Kenya	23 May 1969			
Kiribati			15 Sep 2005	
Kuwait			11 Nov 1975	
Kyrgyzstan			11 May 1999	
Lao People's Democratic Republic			31 Mar 1998	

(*continued*)

Participant	Signature	Ratification	Accession	Succession
Latvia			4 May 1993	
Lesotho			3 Mar 1972	
Liberia	23 May 1969	29 Aug 1985		
Libyan Arab Jamahiriya			22 Dec 2008	
Liechtenstein			8 Feb 1990	
Lithuania			15 Jan 1992	
Luxembourg	4 Sep 1969	23 May 2003		
Madagascar	23 May 1969			
Malawi			23 Aug 1983	
Malaysia			27 Jul 1994	
Maldives			14 Sep 2005	
Mali			31 Aug 1998	
Mauritius			18 Jan 1973	
Mexico	23 May 1969	25 Sep 1974		
Mongolia			16 May 1988	
Montenegro				23 Oct 2006
Morocco	23 May 1969	26 Sep 1972		
Mozambique			8 May 2001	
Myanmar			16 Sep 1998	
Nauru			5 May 1978	
Nepal	23 May 1969			
Netherlands			9 Apr 1985	
New Zealand	29 Apr 1970	4 Aug 1971		
Niger			27 Oct 1971	
Nigeria	23 May 1969	31 Jul 1969		
Oman			18 Oct 1990	
Pakistan	29 Apr 1970			
Panama			28 Jul 1980	
Paraguay			3 Feb 1972	
Peru	23 May 1969	14 Sep 2000		
Philippines	23 May 1969	15 Nov 1972		
Poland			2 Jul 1990	
Portugal			6 Feb 2004	
Republic of Korea	27 Nov 1969	27 Apr 1977		
Republic of Moldova			26 Jan 1993	

(*continued*)

Participant	Signature	Ratification	Accession	Succession
Russian Federation			29 Apr 1986	
Rwanda			3 Jan 1980	
Saudi Arabia			14 Apr 2003	
Senegal			11 Apr 1986	
Serbia				12 Mar 2001
Slovakia				28 May 1993
Slovenia				6 Jul 1992
Solomon Islands			9 Aug 1989	
Spain			16 May 1972	
St. Vincent and the Grenadines			27 Apr 1999	
Sudan	23 May 1969	18 Apr 1990		
Suriname			31 Jan 1991	
Sweden	23 Apr 1970	4 Feb 1975		
Switzerland			7 May 1990	
Syrian Arab Republic			2 Oct 1970	
Tajikistan			6 May 1996	
The former Yugoslav Republic of Macedonia				8 Jul 1999
Togo			28 Dec 1979	
Trinidad and Tobago	23 May 1969			
Tunisia			23 Jun 1971	
Turkmenistan			4 Jan 1996	
Ukraine			14 May 1986	
United Kingdom of Great Britain and Northern Ireland	20 Apr 1970	25 Jun 1971		
United Republic of Tanzania			12 Apr 1976	
United States of America	24 Apr 1970			
Uruguay	23 May 1969	5 Mar 1982		
Uzbekistan			12 Jul 1995	
Viet Nam			10 Oct 2001	
Zambia	23 May 1969			

Vienna Convention on the Law of Treaties Between States and International Organizations or between International Organizations (VCLT II), 21 March 1986[3]

The Parties to the present Convention,

Considering the fundamental role of treaties in the history of international relations,

Recognizing the consensual nature of treaties and their ever-increasing importance as a source of international law,

Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,

Affirming the importance of enhancing the process of codification and progressive development of international law at a universal level,

Believing that the codification and *progressive* development of the rules relating to treaties between States and international organizations or between international organizations are means of enhancing legal order in international relations and of serving the purposes of the United Nations,

Having in mind the principles of *international* law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Bearing in mind the provisions of the Vienna *Convention* on the Law of Treaties of 1969,

Recognizing the relationship between the law of treaties between States and the law of treaties between States and international organizations or between international organizations,

Considering the importance of treaties between States and international organizations or between international organizations as a useful means of developing international relations and ensuring conditions for peaceful cooperation among nations, whatever their constitutional and social systems,

Having in mind the specific features of treaties to which international organizations are parties as subjects of international law distinct from States,

Noting that international organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes,

[3]UN Doc A/CONF.129/15.

Recognizing that the practice of international organizations in concluding treaties with States or between themselves should be in accordance with their constituent instruments,

Affirming that nothing in the present Convention should be interpreted as affecting those relations between an international organization and its members, which are regulated by the rules of the organization,

Affirming also that disputes concerning treaties, like other international disputes, should be settled, in conformity with the Charter of the United Nations, by peaceful means and in conformity with the principles of justice and international law,

Affirming also that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

Have agreed as follows:

Part I
Introduction

Article 1
Scope of the present Convention

The present Convention applies to:

(*a*) treaties between one or more States and one or more international organizations, and

(*b*) treaties between international organizations.

Article 2
Use of terms

1. For the purposes of the present Convention:

(*a*) "treaty" means an international agreement governed by international law and concluded in written form:

(i) between one or more States and one or more international organizations; or
(ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(*b*) "ratification" means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(*b* bis) "act of formal confirmation" means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty;

(*b* ter) "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State or an international organization establishes on the international plane its consent to be bound by a treaty;

(*c*) "full powers" means a document emanating from the competent authority of a State or from the competent organ of an international organization designating a person or persons to represent the State or the organization for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State or of the organization to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

(*d*) "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization;

(*e*) "negotiating State" and "negotiating organization" mean respectively:

(i) a State, or
(ii) an international organization,

which took part in the drawing up and adoption of the text of the treaty;

(*f*) "contracting State" and "contracting organization" mean respectively:

(i) a State, or
(ii) an international organization,

which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(*g*) "party" means a State or an international organization, which has consented to be bound by the treaty and for which the treaty is in force;

(*h*) "third State" and "third organization" mean respectively:

(i) a State, or
(ii) an international organization,

not a party to the treaty;

(*i*) "international organization" means an intergovernmental organization;
(*j*) "rules of the organization" means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings that may be given to them in the internal law of any State or in the rules of any international organization.

Article 3
International agreements not within the scope of the present Convention

The fact that the present Convention does not apply:

(i) to international agreements to which one or more States, one or more international organizations and one or more subjects of international law other than States or organizations are parties;

(ii) to international agreements to which one or more international organizations and one or more subjects of international law other than States or organizations are parties;

(iii) to international agreements not in written form between one or more States and one or more international organizations, or between international organizations; or

(iv) to international agreements between subjects of international law other than States or international organizations;

shall not affect:

(*a*) the legal force of such agreements;

(*b*) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

(*c*) the application of the Convention to the relations between States and international organizations or to the relations of organizations as between themselves, when those relations are governed by international agreements to which other subjects of international law are also parties.

Article 4
Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the Convention, the Convention applies only to such treaties concluded after the entry into force of the present Convention with regard to those States and those organizations.

Article 5
Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to any treaty between one or more States and one or more international organizations, which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization.

Part II
Conclusion and Entry into Force of Treaties
Section 1. Conclusion of Treaties

Article 6
Capacity of international organizations to conclude treaties

The capacity of an international organization to conclude treaties is governed by the rules of that organization.

Article 7
Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(*a*) that person produces appropriate full powers; or

(*b*) it appears from practice or from other circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the State for such purposes without having to produce full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of
performing all acts relating to the conclusion of a treaty between one or more States and one or more international organizations;

(*b*) representatives accredited by States to an international conference, for the purpose of adopting the text of a treaty between States and international organizations;

(*c*) representatives accredited by States to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that organization or organ;

(*d*) heads of permanent missions to an international organization, for the purpose of adopting the text of a treaty between the accrediting States and that organization.

3. A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty, or expressing the consent of that organization to be bound by a treaty, if:

(*a*) that person produces appropriate full powers; or

(*b*) it appears from the circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the organization for such purposes, in accordance with the rules of the organization, without having to produce full powers.

Article 8
Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State or an international organization for that purpose is without legal effect unless afterwards confirmed by that State or that organization.

Article 9
Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States and international organizations or, as the case may be, all the organizations participating in its drawing up except as
provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place in accordance with the procedure agreed upon by the participants in that conference. If, however, no agreement is reached on any such procedure, the adoption of the text shall take place by the vote of two thirds of the participants present and voting unless by the same majority they shall decide to apply a different rule.

Article 10
Authentication of the text

1. The text of a treaty between one or more States and one or more international organizations is established as authentic and definitive:

(*a*) by such procedure as may be provided for in the text or agreed upon by the States and organizations participating in its drawing up; or

(*b*) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States and those organizations of the text of the treaty or of the Final Act of a conference incorporating the text.

2. The text of a treaty between international organizations is established as authentic and definitive:

(*a*) by such procedure as may be provided for in the text or agreed upon by the organizations participating in its drawing up; or

(*b*) failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States and those organizations of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 11
Means of expressing consent to be bound by a treaty

1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed.

Article 12
Consent to be bound by a treaty expressed by signature

1. The consent of a State or of an international organization to be bound by a treaty is expressed by the signature of the representative of that State or of that organization when:

(*a*) the treaty provides that signature shall have that effect;

(*b*) it is otherwise established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations were agreed that signature should have that effect; or

(*c*) the intention of the State or organization to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(*a*) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations so agreed;

(*b*) the signature *ad referendum* of a treaty by the representative of a State or an international organization, if confirmed by his State or organization, constitutes a full signature of the treaty.

Article 13
Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty

The consent of States or of international organizations to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(*a*) the instruments provide that their exchange shall have that effect; or

(*b*) it is otherwise established that those States and those organizations or, as the case may be, those organizations were agreed that the exchange of instruments should have that effect.

Article 14
Consent to be bound by a treaty expressed by ratification, act of formal confirmation, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(*a*) the treaty provides for such consent to be expressed by means of ratification;

(*b*) it is otherwise established that the negotiating States and negotiating organizations were agreed that ratification should be required;

(*c*) the representative of the State has signed the treaty subject to ratification; or

(*d*) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of an international organization to be bound by a treaty is expressed by an act of formal confirmation when:

(*a*) the treaty provides for such consent to be expressed by means of an act of formal confirmation;

(*b*) it is otherwise established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations were agreed that an act of formal confirmation should be required;

(*c*) the representative of the organization has signed the treaty subject to an act of formal confirmation; or

(*d*) the intention of the organization to sign the treaty subject to an act of formal confirmation appears from the full powers of its representative or was expressed during the negotiation.

3. The consent of a State or of an international organization to be bound by a treaty is expressed by acceptance or approval under conditions similar to those that apply to ratification or, as the case may be, to an act of formal confirmation.

Article 15
Consent to be bound by a treaty expressed by accession

The consent of a State or of an international organization to be bound by a treaty is expressed by accession when:

(*a*) the treaty provides that such consent may be expressed by that State or that organization by means of accession;

(*b*) it is otherwise established that the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations were agreed that such consent may be expressed by that State or that organization by means of accession; or

(*c*) all the parties have subsequently agreed that such consent may be expressed by that State or that organization by means of accession.

Article 16
Exchange or deposit of instruments of ratification, formal confirmation, acceptance, approval or accession

1. Unless the treaty otherwise provides, instruments of ratification, instruments relating to an act of formal confirmation or instruments of acceptance, approval or accession establish the consent of a State or of an international organization to be bound by a treaty between one or more States and one or more international organizations upon:

(*a*) their exchange between the contracting States and contracting organizations;

(*b*) their deposit with the depositary; or

(*c*) their notification to the contracting States and to the contracting organizations or to the depositary, if so agreed.

2. Unless the treaty otherwise provides, instruments relating to an act of formal confirmation or instruments of acceptance, approval or accession establish the consent of an international organization to be bound by a treaty between international organizations upon:

(*a*) their exchange between the contracting organizations;

(*b*) their deposit with the depositary; or

(*c*) their notification to the contracting organizations or to the depositary, if so agreed.

Article 17
Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles 19 to 23, the consent of a State or of an international organization to be bound by part of a treaty is effective only if the treaty so permits, or if the contracting States and contracting organizations or, as the case may be, the contracting organizations so agree.

2. The consent of a State or of an international organization to be bound by a treaty, which permits a choice between differing provisions, is effective only if it is made clear to which of the provisions the consent relates.

Article 18
Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State or an international organization is obliged to refrain from acts that would defeat the object and purpose of a treaty when:

(*a*) that State or that organization has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, act of formal confirmation,

acceptance or approval, until that State or that organization shall have made its intention clear not to become a party to the treaty; or

(*b*) that State or that organization has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Section 2. Reservations

Article 19
Formulation of reservations

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(*a*) the reservation is prohibited by the treaty;

(*b*) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20
Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the contracting States and contracting organizations or, as the case may be, by the contracting organizations unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and negotiating organizations or, as the case may be, of the negotiating organizations and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(*a*) acceptance of a reservation by a contracting State or by a contracting organization constitutes the reserving State or international organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the reserving State or organization and for the accepting State or organization;

(*b*) an objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization;

(*c*) an act expressing the consent of a State or of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one contracting State or one contracting organization has accepted the reservation.

5. For the purposes of paragraphs 2 and 4, and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21
Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(*a*) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(*b*) modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

Article 22
Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization that has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(*a*) the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization;

(*b*) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization that formulated the reservation.

Article 23
Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

Section 3. Entry into Force and Provisional Application of Treaties

Article 24
Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States and negotiating organizations or, as the case may be, all the negotiating organizations.

3. When the consent of a State or of an international organization to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State or that organization on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of consent to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25
Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) the treaty itself so provides; or

(*b*) the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Part III
Observance, Application and Interpretation of Treaties
Section 1. Observance of Treaties

Article 26
Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27
Internal law of States, rules of international organizations and observance of treaties

1. A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.

3. The rules contained in the preceding paragraphs are without prejudice to article 46.

Section 2. Application of Treaties

Article 28
Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact that took place or any situation that ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29
Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty between one or more States and one or more international organizations is binding upon each State party in respect of its entire territory.

Article 30
Application of successive treaties relating to the same subject matter

1. The rights and obligations of States and international organizations parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) as between two parties, each of which is a party to both treaties, the same rule applies as in paragraph 3;

(*b*) as between a party to both treaties and a party to only one of the treaties, the treaty to which both are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility, which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards a State or an organization under another treaty.

6. The preceding paragraphs are without prejudice to the fact that, in the event of a conflict between obligations under the Charter of the United Nations and obligations under a treaty, the obligations under the Charter shall prevail.

Section 3. Interpretation of Treaties

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty that was made between all the parties in connection with the conclusion of the treaty;

(*b*) any instrument that was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty that establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(*a*) leaves the meaning ambiguous or obscure; or

(*b*) leads to a result that is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of a treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning that the application of articles 31 and 32 does not remove, the meaning that best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Section 4. Treaties and Third States or Third Organizations

Article 34
General rule regarding third States and third organizations

A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

Article 35
Treaties providing for obligations for third States or third organizations

An obligation arises for a third State or a third organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State or the third organization expressly accepts that obligation in writing. Acceptance by the third organization of such an obligation shall be governed by the rules of that organization.

Article 36
Treaties providing for rights for third States or third organizations

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A right arises for a third organization from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of international organizations to which it belongs, or to all organizations, and the third organization assents thereto. Its assent shall be governed by the rules of the organization.

3. A State or an international organization exercising a right in accordance with paragraph 1 or 2 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37
Revocation or modification of obligations or rights of third States or third organizations

1. When an obligation has arisen for a third State or a third organization in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State or the third organization, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State or a third organization in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State or the third organization.

3. The consent of an international organization party to the treaty or of a third organization, as provided for in the foregoing paragraphs, shall be governed by the rules of that organization.

Article 38
Rules in a treaty becoming binding on third States or third organizations through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State or a third organization as a customary rule of international law, recognized as such.

Part IV
Amendment and Modification of Treaties

Article 39
General rule regarding the amendment of treaties

1. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide.

2. The consent of an international organization to an agreement provided for in paragraph 1 shall be governed by the rules of that organization.

Article 40
Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States and all the contracting organizations, each one of which shall have the right to take part in:

(*a*) the decision as to the action to be taken in regard to such proposal;

(*b*) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State or international organization entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State or international organization already a party to the treaty that does not become a party to the amending agreement; article 30, paragraph 4 (*b*), applies in relation to such State or organization.

5. Any State or international organization that becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State or that organization:

(*a*) be considered as a party to the treaty as amended; and

(*b*) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41
Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) the possibility of such a modification is provided for by the treaty; or

(*b*) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does 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.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Part V
Invalidity, Termination and Suspension of the Operation of Treaties

Section 1. General Provisions

Article 42
Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State or an international organization to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 43
Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State or of any international organization to fulfill any obligation embodied in the treaty to which that State or that organization would be subject under international law independently of the treaty.

Article 44
Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(*a*) the said clauses are separable from the remainder of the treaty with regard to their application;

(*b*) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(*c*) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State or international organization entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45
Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

1. A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(*a*) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(*b*) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

2. An international organization may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(*a*) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(*b*) it must by reason of the conduct of the competent organ be considered as having renounced the right to invoke that ground.

Section 2. Invalidity of Treaties

Article 46
Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

Article 47
Specific restrictions on authority to express the consent of a State or an international organization

If the authority of a representative to express the consent of a State or of an international organization 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 negotiating States and negotiating organizations prior to his expressing such consent.

Article 48
Error

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation that was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

2. Paragraph 1 shall not apply if the State or international organization in question contributed by its own conduct to the error or if the circumstances were such as to put that State or that organization on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 80 then applies.

Article 49
Fraud

A State or an international organization induced to conclude a treaty by the fraudulent conduct of a negotiating State or a negotiating organization may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50
Corruption of a representative of a State or of an international organization

A State or an international organization the expression of whose consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by a negotiating State or a negotiating organization may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51
Coercion of a representative of a State or of an international organization

The expression by a State or an international organization of consent to be bound by a treaty that has been procured by the coercion of the representative of that State or that organization through acts or threats directed against him shall be without any legal effect.

Article 52
Coercion of a State or of an international organization by the threat or use of force

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 Chatter of the United Nations.

Article 53
*Treaties conflicting with a peremptory norm of general international law (*jus cogens*)*

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.

Section 3. Termination and Suspension of the Operation of Treaties

Article 54
Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

(*a*) in conformity with the provisions of the treaty; or

(*b*) at any time by consent of all the parties after consultation with the contracting States and contracting organizations.

Article 55
Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56
Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty that contains no provision regarding its termination and that does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(*a*) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(*b*) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57
Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(*a*) in conformity with the provisions of the treaty; or

(*b*) at any time by consent of all the parties after consultation with the contracting States and contracting organizations.

Article 58
Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(*a*) the possibility of such a suspension is provided for by the treaty; or

(*b*) the suspension in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59
Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

(*a*) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60
Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:
(*a*) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State or international organization;

or

(ii) as between all the parties;

(*b*) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State or international organization;

(*c*) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(*a*) a repudiation of the treaty not sanctioned by the present Convention; or

(*b*) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61
Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62
Fundamental change of circumstances

1. A fundamental change of circumstances that has occurred with regard to those existing at the time of the conclusion of a treaty, and that was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(*a*) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(*b*) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations if the treaty establishes a boundary.

3. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty, it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63
Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between States Parties to a treaty between two or more States and one or more international organizations does not affect the legal relations established between those States by the treaty except insofar as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64
*Emergence of a new peremptory norm of general international law (*jus cogens*)*

If a new peremptory norm of general international law emerges, any existing treaty that is in conflict with that norm becomes void and terminates.

Section 4. Procedure

Article 65
Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party that, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefore.

2. If, after the expiry of a period, which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure that it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. The notification or objection made by an international organization shall be governed by the rules of that organization.

5. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

6. Without prejudice to article 45, the fact that a State or an international organization has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66
Procedures for judicial settlement, arbitration and conciliation

1. If, under paragraph 3 of article 65, no solution has been reached within a period of twelve months following the date on which the objection was raised, the procedures specified in the following paragraphs shall be followed.

2. With respect to a dispute concerning the application or the interpretation of article 53 or 64:

(*a*) if a State is a party to the dispute with one or more States, it may, by a written application, submit the dispute to the International Court of Justice for a decision;

(*b*) if a State is a party to the dispute to which one or more international organizations are parties, the State may, through a Member State of the United Nations if necessary, request the General Assembly or the Security Council or, where appropriate, the competent organ of an international organization, which is a party to the dispute and is authorized in accordance with Article 96 of the Charter of the United Nations, to request an advisory opinion of the International Court of Justice in accordance with Article 65 of the Statute of the Court;

(*c*) if the United Nations or an international organization that is authorized in accordance with Article 96 of the Charter of the United Nations is a party to the dispute, it may request an advisory opinion of the International Court of Justice in accordance with Article 65 of the Statute of the Court;

(*d*) if an international organization other than those referred to in subparagraph (*c*) is a party to the dispute, it may, through a Member State of the United Nations, follow the procedure specified in subparagraph (*b*);

(*e*) the advisory opinion given pursuant to subparagraph (*b*), (*c*) or (*d*) shall be accepted as decisive by all the parties to the dispute concerned;

(*f*) if the request under subparagraph (*b*), (*c*) or (*d*) for an advisory opinion of the Court is not granted, any one of the parties to the dispute may, by written notification to the other party or parties, submit it to arbitration in accordance with the provisions of the Annex to the present Convention.

3. The provisions of paragraph 2 apply unless all the parties to a dispute referred to in that paragraph by common consent agree to submit the dispute to an arbitration procedure, including the one specified in the Annex to the present Convention.

4. With respect to a dispute concerning the application or the interpretation of any of the articles in Part V, other than articles 53 and 64, of the present Convention, any one of the parties to the dispute may set in motion the conciliation procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Article 67
Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument emanating from a State is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. If the instrument emanates from an international organization, the representative of the organization communicating it may be called upon to produce full powers.

Article 68
Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

Section 5. Consequences of the Invalidity, Termination or Suspension of the Operation of a Treaty

Article 69
Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(*a*) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(*b*) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of the consent of a particular State or a particular international organization to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State or that organization and the parties to the treaty.

Article 70
Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(*a*) releases the parties from any obligation further to perform the treaty;

(*b*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State or an international organization denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State or that organization and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71
Consequences of the invalidity of a treaty that conflicts with a peremptory norm of general international law

1. In the case of a treaty that is void under article 53, the parties shall:

(*a*) eliminate as far as possible the consequences of any act performed in reliance on any provision, which conflicts with the peremptory norm of general international law; and

(*b*) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty that becomes void and terminates under article 64, the termination of the treaty:

(*a*) releases the parties from any obligation further to perform the treaty;

(*b*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72
Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(*a*) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(*b*) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

Part VI
Miscellaneous Provisions

Article 73
Relationship to the Vienna Convention on the Law of Treaties

As between States Parties to the Vienna Convention on the Law of Treaties of 1969, the relations of those States under a treaty between two or more States and one or more international organizations shall be governed by that Convention.

Article 74
Questions not prejudged by the present Convention

1. The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty between one or more States and one or more international organizations from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

2. The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from the international responsibility of an international organization, from the termination of the existence of the organization or from the termination of participation by a State in the membership of the organization.

3. The provisions of the present Convention shall not prejudge any question that may arise in regard to the establishment of obligations and rights for States members of an international organization under a treaty to which that organization is a party.

Article 75
Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between two or more of those States and one or more international organizations. The conclusion of such a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 76
Case of an aggressor State

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty between one or more States and one or more international organizations, which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

Part VII
Depositaries, Notifications, Corrections and Registration

Article 77
Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State or an international organization and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 78
Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations or, as the case may be, by the contracting organizations, comprise in particular:

(*a*) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

(*b*) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States and international organizations entitled to become parties to the treaty;

(*c*) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(*d*) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State or international organization in question;

(*e*) informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(*f*) informing the States and international organizations entitled to become parties to the treaty when the number of signatures or of instruments of ratification, instruments relating to an act of formal confirmation, or of instruments of acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(*g*) registering the treaty with the Secretariat of the United Nations;

(*h*) performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(*a*) the signatory States and organizations and the contracting States and contracting organizations; or

(*b*) where appropriate, the competent organ of the international organization concerned.

Article 79
Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State or any international organization under the present Convention shall:

(*a*) if there is no depositary, be transmitted direct to the States and organizations for which it is intended, or if there is a depositary, to the latter;

(*b*) be considered as having been made by the State or organization in question only upon its receipt by the State or organization to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(*c*) if transmitted to a depositary, be considered as received by the State or organization for which it was intended only when the latter State or organization has been informed by the depositary in accordance with article 78, paragraph 1 (*e*).

Article 80
Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and international organizations and the contracting States and contracting organizations are agreed that it contains an error, the error shall, unless those States and organizations decide upon some other means of correction,
be corrected:

(*a*) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(*b*) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(*c*) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and international organizations and the contracting States and

contracting organizations of the error and of the proposal to correct it and shall specify an appropriate time limit within which objection to the proposed correction may be raised. If, on the expiry of the time limit:

(*a*) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procés-verbal of the rectification of the text and communicate a copy of it to the parties and to the States and organizations entitled to become parties to the treaty;

(*b*) an objection has been raised, the depositary shall communicate the objection to the signatory States and organizations and to the contracting States and contracting organizations.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance that the signatory States and international organizations and the contracting States and contracting organizations agree should be corrected.

4. The corrected text replaces the defective text ab initio, unless the signatory States and international organizations and the contracting States and contracting organizations otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procés-verbal specifying the rectification and communicate a copy of it to the signatory States and international organizations and to the contracting States and contracting organizations.

Article 81
Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

Part VIII
Final Provisions

Article 82
Signature

The present Convention shall be open for signature until 31 December 1986 at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 June 1987, at United Nations Headquarters, New York by:

(*a*) all States;

(*b*) Namibia, represented by the United Nations Council for Namibia;

(*c*) international organizations invited to participate in the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations.

Article 83
Ratification or act of formal confirmation

The present Convention is subject to ratification by States and by Namibia, represented by the United Nations Council for Namibia and to acts of formal confirmation by international organizations. The instruments of ratification and those relating to acts of formal confirmation shall be deposited with the Secretary-General of the United Nations.

Article 84
Accession

1. The present Convention shall remain open for accession by any State, by Namibia, represented by the United Nations Council for Namibia, and by any international organization that has the capacity to conclude treaties.

2. An instrument of accession of an international organization shall contain a declaration that it has the capacity to conclude treaties.

3. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 85
Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession by States or by Namibia, represented by the United Nations Council for Namibia.

2. For each State or for Namibia, represented by the United Nations Council for Namibia, ratifying or acceding to the Convention after the condition specified in paragraph 1 has been fulfilled, the Convention shall enter into force on the thirtieth day after deposit by such State or by Namibia of its instrument of ratification or accession.

3. For each international organization depositing an instrument relating to an act of formal confirmation or an instrument of accession, the Convention shall enter into force on the thirtieth day after such deposit, or at the date the Convention enters into force pursuant to paragraph 1, whichever is later.

Article 86
Authentic texts

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized by their respective Governments, and duly authorized representatives of the United Nations Council for Namibia
and of international organizations have signed the present Convention.

DONE at Vienna, this twenty-first day of March one thousand nine hundred and eighty-six.

Annex

Arbitration and Conciliation Procedures Established in Application of Article 66

I. Establishment of the Arbitral Tribunal or Conciliation Commission

1. A list consisting of qualified jurists, from which the parties to a dispute may choose the persons who are to constitute an arbitral tribunal or, as the case may be, a conciliation commission, shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State that is a Member of the United Nations and every Party to the present Convention shall be invited to nominate two persons, and the names of the persons so nominated shall constitute the list, a copy of which shall be transmitted to the President of the International Court of Justice. The term of office of a person on the list, including that of any person nominated to fill a casual vacancy, shall be five years and may be renewed. A person whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraphs.

2. When notification has been made under article 66, paragraph 2, subparagraph (*f*), or agreement on the procedure in the present Annex has been reached under paragraph 3, the dispute shall be brought before an arbitral tribunal. When a request has been made to the Secretary-General under article 66, paragraph 4, the Secretary-General shall bring the dispute before a conciliation commission. Both the arbitral tribunal and the conciliation commission shall be constituted as follows:

The States, international organizations or, as the case may be, the States and organizations that constitute one of the parties to the dispute shall appoint by common consent:

(*a*) one arbitrator or, as the case may be, one conciliator, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) one arbitrator or, as the case may be, one conciliator, who shall be chosen from among those included in the list and shall not be of the nationality of any of the States or nominated by any of the organizations that constitute that party to the dispute, provided that a dispute between two international organizations is not considered by nationals of one and the same State.

The States, international organizations or, as the case may be, the States and organizations that constitute the other party to the dispute shall appoint two arbitrators or, as the case may be, two conciliators, in the same way. The four persons chosen by the parties shall be appointed within sixty days following the date on which the other party to the dispute receives notification under article 66, paragraph 2, subparagraph (*f*), or on which the agreement on the procedure in the present Annex under paragraph 3 is reached, or on which the Secretary-General receives the request for conciliation.

The four persons so chosen shall, within sixty days following the date of the last of their own appointments, appoint from the list a fifth arbitrator or, as the case may be, conciliator, who shall be chairman.

If the appointment of the chairman, or any of the arbitrators or, as the case may be, conciliators, has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General of the United Nations within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute. If the United Nations is a party or is included in one of the parties to the dispute, the Secretary-General shall transmit the above-mentioned request to the President of the International Court of Justice, who shall perform the functions conferred upon the Secretary-General under this subparagraph.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

The appointment of arbitrators or conciliators by an international organization provided for in paragraphs 1 and 2 shall be governed by the rules of that organization.

II. Functioning of the Arbitral Tribunal

3. Unless the parties to the dispute otherwise agree, the Arbitral Tribunal shall decide its own procedure, assuring to each party to the dispute a full opportunity to be heard and to present its case.

4. The Arbitral Tribunal, with the consent of the parties to the dispute, may invite any interested State or international organization to submit to it its views orally or in writing.

5. Decisions of the Arbitral Tribunal shall be adopted by a majority vote of the members. In the event of an equality of votes, the vote of the Chairman shall be decisive.

6. When one of the parties to the dispute does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and to make its award. Before making its award, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

7. The award of the Arbitral Tribunal shall be confined to the subject matter of the dispute and state the reasons on which it is based. Any member of the Tribunal may attach a separate or dissenting opinion to the award.

8. The award shall be final and without appeal. It shall be complied with by all parties to the dispute.

9. The Secretary-General shall provide the Tribunal with such assistance and facilities as it may require. The expenses of the Tribunal shall be borne by the United Nations.

III. Functioning of the Conciliation Commission

10. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

11. The Commission may draw the attention of the parties to the dispute to any measures that might facilitate an amicable settlement.

12. The Commission shall hear the parties, examine the claims and objections and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

13. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

14. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

Status of the VCLT II

as of 1 August 2011[4];
Ratifications: 41

Not yet in force: According to Art 85 VCLT II (printed above), the Convention enters into force upon the deposit of 35 ratifications or accessions by States; as of 1 August 2011, 29 such instruments had been deposited.

Participant	Signature, Succession to signature (s)	Ratification	Accession Succession (s)	Formal confirmation
Argentina	30 Jan 1987	17 Aug 1990		
Australia			16 Jun 1993	
Austria	21 Mar 1986	26 Aug 1987		
Belarus			30 Dec 1999	
Belgium	9 Jun 1987	1 Sep 1992		
Benin	24 Jun 1987			
Bosnia and Herzegovina	12 Jan 1994(s)			
Bulgaria			10 Mar 1988	
Burkina Faso	21 Mar 1986			
Colombia			24 Jul 2009	
Côte d'Ivoire	21 Mar 1986			
Council of Europe	11 May 1987			
Croatia			11 Apr 1994	
Cyprus	29 Jun 1987	5 Nov 1991		
Czech Republic			22 Feb 1993 (s)	
Democratic Republic of the Congo	21 Mar 1986			
Denmark	8 Jun 1987	26 Jul 1994		
Egypt	21 Mar 1986			
Estonia			21 Oct 1991	
Food and Agricultural Organization of the United Nations	29 Jun 1987			

(*continued*)

[4]Source: Multilateral Treaties Deposited With the Secretary-General of the United Nations; current status to be found at http://treaties.un.org.

Participant	Signature, Succession to signature (s)	Ratification	Accession Succession (s)	Formal confirmation
Gabon			5 Nov 2004	
Germany	27 Apr 1987	20 Jun 1991		
Greece	15 Jul 1986	28 Jan 1992		
Hungary			17 Aug 1988	
International Atomic Energy Agency			26 Apr 2001	
International Civil Aviation Organization	29 June 1987			24 Dec 2001
International Criminal Police Organization			3 Jan 2001	
International Labour Organization	31 Mar 1987			31 Jul 2000
International Maritime Organization	30 Jun 1987			14 Feb 2000
International Telecommunication Union	29 Jun 1987			
Italy	17 Dec 1986	20 Jun 1991		
Japan	24 Apr 1987			
Liberia			16 Sep 2005	
Liechtenstein			8 Feb 1990	
Malawi	30 Jun 1987			
Mexico	21 Mar 1986	10 Mar 1988		
Montenegro	23 Oct 2006(s)			
Morocco	21 Mar 1986			
Netherlands	12 Jun 1987	18 Sep 1997		
Organization for the Prohibition of Chemical Weapons			2 Jun 2000	
Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization			11 Jun 2002	
Republic of Korea	29 Jun 1987			
Republic of Moldowa			26 Jan 1993	

(*continued*)

Participant	Signature, Succession to signature (s)	Ratification	Accession Succession (s)	Formal confirmation
Senegal	9 Jul 1986	6 Aug 1987		
Serbia	12 Mar 2001(s)			
Slovakia			28 May 1993	
Spain			24 Jul 1990	
Sudan	21 Mar 1986			
Sweden	18 Jun 1987	10 Feb 1988		
Switzerland			7 May 1990	
United Kingdom of Great Britain and Northern Ireland	24 Feb 1987	20 Jun 1991		
United Nations	12 Feb 1987			21 Dec 1998
United Nations Educational, Scientific and Cultural Organization	23 Jun 1987			
United Nations Industrial Development Organization			4 Mar 2002	
United States of America	26 Jun 1987			
Universal Postal Union			19 Oct 2004	
Uruguay			10 Mar 1999	
World Health Organization	30 Apr 1987			22 Jun 2000
World Intellectual Property Organization			24 Oct 2000	
World Meteorological Organization	30 Jun 1987			
Zambia	21 Mar 1986			

Index

Numbers in bold print indicate the article, numbers in standard print refer to the margin numbers in the commentary to that article.

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