Treaties

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Subject(s):

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A. Introduction

1 International law relating to treaties has largely been codified in the → Vienna Convention on the Law of Treaties (1969) (‘VCLT’). For the purposes of the VCLT, a ‘treaty’ is defined as ‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’ (Art. 2(1)(a); see paras 16–19 below).

2 The present article is principally concerned with the law of treaties within the confines of the VCLT, taking also into account the relevant rules of → customary international law. Treaties need to be regarded in a wider context; they constitute the major mechanism for the development of legally binding norms among States. To the extent such norms become binding on the national level or determine the content of national law their → legitimacy has been put into question (→ International Law and Domestic (Municipal) Law).

3 An agreement between a State and a non-State entity does not constitute an international treaty, although such an agreement may be governed by international law and may regulate international law issues (see para. 19 below).

B. Scope and Development of Treaties

1. Formal Requirements

4 The concept of a treaty in general international law is, in fact, broader than the definition of a treaty for the purposes of the VCLT, and includes treaties between States and international organizations (see para. 13 below). The concept of an ‘international treaty’ is also wider than the VCLT definition of a treaty, as it includes oral agreements which, though extremely rare between States, are recognized as binding under the rules of customary international law.

5 Within the terms of the 1969 VCLT, treaties may take an infinite number of forms, from the most elaborately drafted, and formally executed document, to a mere exchange of notes. A broad concept of the definition of treaties was already advocated by the → International Law Commission (ILC), which, when defining the notion, stated that an agreement concluded by exchange of notes, exchange of letters, agreed minutes, joint declarations, or other instrument may constitute a treaty (UN ILC ‘Report of the International Law Commission to the General Assembly Covering the Work of its Fourteenth Session’ [24 April–29 June 1962] [1962] vol II UNYBILC 157, 161). This view is also reflected in international jurisprudence. The → International Court of Justice (ICJ) in the → South West Africa/Namibia (Advisory Opinions and Judgments) (South-West Africa Cases [Ethiopia v South Africa; Liberia v South Africa] [Preliminary Objections] [1962] ICJ Rep 319) stated ‘terminology is not a determinant factor as to the character of an international agreement or undertaking’ (at 331). In Aegean Sea Continental Shelf Case (‘Aegean Sea Case’) it affirmed that ‘it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement’ (at 39). In the 1994 → Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) (‘Case between Qatar and Bahrain: 1994’) the ICJ considered the value of minutes as an international agreement in the light of Art. 2(1)(a) VCLT and concluded that minutes ‘constitute an international agreement creating rights and obligations for the Parties’ (at 122). Treaties may be bilateral, between two States only, or multilateral, between three or
more States including the so-called ‘universal treaties’ to which, at least as a matter of aspiration, all States are intended to be parties (see paras 22–28 below).

2. Sources of International Law and Treaties

6 Treaties are listed as one of the sources in Art. 38(1) Statute of the International Court of Justice ([adopted 26 June 1945, entered into force 24 October 1945] 145 BSP 832; ‘ICJ Statute’) next to → customary international law and the → general principles of law (→ Sources of International Law). Art. 38(1) ICJ Statute does not stipulate a hierarchy between treaty law, customary international law, and the general principles of law. It is possible that the same matter is governed by a treaty and by customary international law and that these rules coexist. In general, when there exists more than one applicable rule, the choice between them is to be made by recourse to established principles of interpretation such as by applying the maxims lex specialis derogat legi generali and lex posterior derogat legi priori (UN ILC ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (2006) GAOR 61st Session Supp 10, 400, at 408–18 ; → Interpretation in International Law). It will normally be the case that the treaty is the lex specialis rule and prevails over inconsistent customary international law. The situation may be different if a new norm of customary international law arises after the conclusion of the treaty. Then the question may arise of whether custom overrides the treaty.

7 Besides the sources mentioned in Art. 38(1) ICJ Statute, there are other sources of international law, such as decisions of international organizations or unilateral acts (→ Unilateral Acts of States in International Law).

3. Normative Treaties, Traité-Lois, and Traité-Contrats

8 Regarding the content of treaties, a distinction is sometimes made between so-called ‘law-making’ or ‘normative’ treaties and ‘contract’ or ‘reciprocal’ or ‘synallagmatic’ treaties (at one time these two categories of treaty were frequently referred to, respectively, as traités-lois and traités-contrats). Normative or contractual treaties are considered to further community interests by setting up international standards which are best achieved by universal participation and are not based on the principle of → reciprocity. These standards have been described by ILC Special Rapporteur Pellet as being created, above all, to institute common international regulation on the basis of shared values (UN ILC ‘Report of the International Law Commission Covering the Work of its Forty-Eighth Session’ [6 May–26 July 1996] GAOR 51st Session Supp 10, 81). They constitute a divergent category, consisting of conventions codifying private international law, → International Labour Organization (ILO) conventions, treaties on the law of armed conflict, trade and the environment, and human rights treaties. Contractual or reciprocal treaties, on the other hand, are seen to further the individual interests of the participating States, aiming at their mutual benefit which is best achieved through reciprocal obligations (do ut des). However, Pellet and the ILC observed that treaties are rarely entirely normative or entirely synallagmatic (reciprocal) (UN ILC ‘Report of the International Law Commission Covering the Work of its Forty-Ninth Session’ [12 May–18 July 1997] GAOR 52nd Session Supp 10, 47). In most cases, including human rights treaties, they contain both contractual clauses providing for reciprocal rights and obligations as well as ‘normative’ clauses. The term ‘normative treaty’ is therefore generally used to refer to one in which the provisions of a normative character dominate.
4. The Historic Development of Treaties

9 Since ancient times, political entities have used treaties as a tool to shape their international or neighbourly relations. First examples of such instruments go back to the third millennium BC. In antiquity, law and religion were closely related, belonging to the same domain of morals. For example, religious elements were present in the ceremony relating to the conclusion of treaties. An oath was sworn at the conclusion of treaties. As a consequence, God(s) witnessed the legal undertakings and their performance so that a breach thereof would result in a religious sanction. Historically, the most important role was fulfilled by → peace treaties. They originated many basic principles, which were later refined by States through general treaty practice.

10 An important step in the historical development of treaties has been the emergence of multilateral treaties. At first, multilateral agreements were concluded in the form of a set of bilateral treaties without any express link between them. The Peace of Westphalia is an example of this and is considered the prototype of the first multilateral treaty (→ Westphalia, Peace of [1648]). The first multilateral agreement in the form of a single instrument was the Final Act of the → Vienna Congress (1815) which summarized the transactions of the Congress (Acte du Congrès de Vienne, signé le 9 Juin 1815 in GF de Martens [ed] Supplément au Recueil des Principaux Traités d’Alliance, de Paix, de Trêves, de Neutralité, de Commerce, de Limites, d’Échange etc. [Librairie de Dieterich Gottingue 1818] vol 6, 379).

5. Codifications of the Law of Treaties


(a) The 1969 Vienna Convention on the Law of Treaties (VCLT)

12 The VCLT was the result of the work of the ILC and of the 1968 and 1969 United Nations (UN) Conference on the Law of Treaties. It entered into force on 27 January 1980. The VCLT has been taken to reflect, in general, customary international law in its substantive provisions, although, at the time of its entry into force, some doubts were raised as to the customary international law status of some of its provisions, such as Arts 34–38 (treaties and third States) and Arts 65–68 (procedure in case of alleged invalidity or suspension of treaties), which probably still do not represent customary international law. Art. 73 VCLT states that its ‘provisions...shall not prejudge any question that may arise in regard to a treaty arising from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States’, issues which were left outside its scope.
(b) The 1978 and 1986 Vienna Conventions (‘VCSS-T’ and ‘VCLT-IO’)  

13 There are two further Vienna Conventions which relate to the law of treaties: the 1978 VCSS-T on the → succession of States in respect to treaties and the 1986 VCLT-IO, which deals with treaties between States and international organizations or between international organizations themselves. The VCLT-IO adapts the rules of the VCLT to treaty relations concerning international organizations. The VCSS-T is in force, though not all of its provisions are considered to represent customary international law. The VCLT-IO, on the other hand, has not entered into force, though its rules are generally considered to constitute customary international law.

6. Extent of the Binding Force of Treaties  

14 The general rule under the law relating to treaties, whether bilateral, contractual, or reciprocal, treaties or multilateral normative treaties, is that they are legally binding for their parties. They are binding, however, only for their parties. There are limited exceptions to this general principle (see paras 97–101 below). Apart from that, treaties which are the constitutive instrument of an international organization can be seen as implying a special normative relevance in relation to non-member States in that the organization may have an objective international legal personality (→ Obligations erga omnes), as indicated in 1949 by the ICJ in → Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) ([1949] ICJ Rep 174).

15 Treaties may also extend their normative relevance beyond their actual parties and the scope of their operation through the influence they may have on the development of new rules of customary international law through → State practice (including the practice of non-parties to a treaty). In the → North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) ([1969] ICJ Rep 3), the ICJ illustrated the conditions under which such a process may take place. The ICJ observed, first, that the provision concerned should be of a fundamentally norm-creating character, such as could be regarded as forming the basis of a general rule of law; and, secondly, that a very widespread and representative participation in the convention might suffice of itself, provided it included those States whose interests were specifically affected, even without the passage of any considerable period of time. The ICJ further explained the relationship between customary international law and the law of treaties in the 1986 → Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America) (‘Nicaragua Case’) in which it particularly focused on the parallel existence of treaty rules and rules of customary international law with the same or similar obligations. In such cases, the ICJ stated, the treaty continues to operate as between the parties to it, while the parallel relations between non-parties, or between non-parties and parties, are governed by the corresponding customary international law.

C. The Legal Nature of Treaties  

1. What Constitutes a Treaty Under International Law?  

(a) Description  

16 A treaty may be described in a multitude of ways, as was stated by the ILC. The names such as ‘convention’, ‘protocol’, ‘charter’, ‘pact’, ‘agreement’, ‘concordat’, or ‘joint communiqué’ may be used.
(b) **Legally Binding/Intention to be Bound**

17 Each treaty has to be separately assessed to ascertain whether it constitutes a binding agreement or not. According to the jurisprudence of the ICJ the legal character of an agreement has to be decided on the basis of an objective analysis of the text rather than on the subjective intention of the parties. The ICJ has held that an instrument, in order to constitute a binding treaty, must enumerate commitments to which the parties have consented in order to create rights and obligations in international law for the parties (*Case between Qatar and Bahrain: 1994* 121). The ICJ also determined that the nature of the transaction, the text, and the circumstances of its conclusion must be taken into consideration. (*Aegean Sea Case* 39; *Case between Qatar and Bahrain: 1994* 121; → *Land and Maritime Boundary between Cameroon and Nigeria Case [Cameroon v Nigeria]* 431).

(c) **Governed by International Law**

18 The term ‘governed by international law’ forms a part of the definition of a treaty contained in Art. 2(1)(a) VCLT. This is aimed at the exclusion from the definition of those agreements which, although with the participation of a State or States, are governed by a law other than international.

19 There are groups of agreements which, although concluded by → *subjects of international law*, fall under national law—such as the purchase of property by a State. Another group are agreements between States and a foreign natural or legal private law person (→ *Contracts between States and Foreign Private Law Persons*), such as concession agreements, the character of which is not entirely clear. One view is that such an agreement can be a treaty governed by international law, if the parties so intended, and the opposite view maintains that the *conditio sine qua non* of an international treaty is the existence of at least two parties who are subjects of international law. The ICJ in the 1952 → *Anglo-Iranian Oil Company Case*, adhered to the view that a concession agreement between the United Kingdom and the Iranian Oil Company was a private contract (at 112).

2. **Non-binding Agreements**

20 States have always, in the course of their normal diplomatic or political relations, entered into non-binding arrangements (or informal agreements), frequently referred to as memoranda of understanding or → *modus vivendi*.

21 More recently, in particular in the fields of international economic law, → *human rights* law, and international environmental law, it has become a practice for States to enter into arrangements, or make extensive formal declarations, which are not intended to be legally binding on them, though they may be intended to create political or moral pressure on the participating parties to act in accordance with their provisions. These arrangements are often referred to as *soft law*. It may often be difficult to distinguish between treaties and such so-called soft law instruments (eg → *codes of conduct*), which may assume a form similar to an international agreement (see eg Food and Agriculture Organization of the United Nations ‘Code of Conduct for Responsible Fisheries’ [adopted 31 October 1995]).

3. **Categories of Treaties**

(a) **General Rule**

22 The VCLT does not introduce any differentiation of treaties. A few articles of the VCLT refer to certain categories of treaties, such as Art. 62(2)(a) relating to treaties establishing
a boundary and Art. 5 relating to treaties which are a constituent instrument of an international organization.

23 A number of categorizations or distinctions among treaties have, however, been suggested by academic or practicing lawyers, on the basis of the purposes for which treaties exist, or of certain effects which they may have. Such categorizations are merely for convenience of grouping certain types of treaty with respect to which common practices or contents are in the course of being developed (e.g. the so-called Multilateral Environmental Agreements [‘MEAs’]; → Environment, Multilateral Agreements). International environmental law in particular has established a creative manner of international treaty-making through the use of so-called ‘framework’ and ‘umbrella’ conventions, which stipulate general rights and obligations of the parties (→ Framework Agreements). A more concrete catalogue of rights and obligations, as well as new developments in the areas covered by the framework and umbrella conventions, is supplemented by protocols or other agreements. These are, in fact, independent international treaties (such as the Vienna Convention for the Protection of the Ozone Layer [adopted 22 March 1985, entered into force 22 September 1988] 1513 UNTS 324; ‘VCPOL’) and the Montreal Protocol on Substances that Deplete the Ozone Layer ([adopted 16 September 1987, entered into force 1 January 1989] 1522 UNTS 3; ‘Montreal Protocol’).

Appendices or Annexes may also supplement such framework agreements (consider, for example, the International Convention for the Prevention of Pollution from Ships, 1973 [signed 2 November 1973, entered into force 2 October 1983] 1340 UNTS 184 [MARPOL Convention] which is supplemented by six Annexes).

(b) Categorization by Subject-Matter

24 According to their subject-matter there are numerous types of agreements: such as peace treaties, military → alliances, cultural agreements, → arbitration and conciliation treaties, → guarantee treaties, and → concordats. A concordat is an agreement concluded between the → Holy See and a State regulating the legal position of the Church in that State or on matters of immediate relevance to the Catholic Church as such. An example of a concordat between the Holy See and a federal state of the Federal Republic of Germany (‘Germany’) is the ‘Konkordat zwischen dem Heiligen Stuhl und dem Lande Niedersachsen’ ([done 26 February 1965] [1965] 57 Acta Apostolicae Sedis 834).

(c) Multilateral/Bilateral

25 Treaties can be bilateral or multilateral. Treaties which aspire to attract universal participation are generally called ‘universal treaties’, perhaps the most important example being the → United Nations Charter. But there are many other treaties which aspire to universal participation, and a number which have come close, at least, to achieving it—such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora ([opened for signature 3 March 1973, entered into force 1 July 1975] 993 UNTS 243), and the Convention on the Rights of the Child ([adopted 20 November 1989, entered into force 2 September 1990] 1577 UNTS 3), which has been ratified by every country except the United States and Somalia. Other examples are to be found in the major MEAs. For instance, both the VCPOL and the Montreal Protocol, as well as the UN Framework Convention on Climate Change (with Annexes) ([adopted 9 May 1992, entered into force 21 March 1994] 1771 UNTS 107) and its Kyoto Protocol ([adopted 10 December 1997, entered into force 16 February 2005] [1998] 37 ILM 32), aspired to universal participation. But, while the VCPOL and the Montreal Protocol were ratified by all but one country, the Kyoto Protocol never actually achieved anything near universal ratification.
26 Treaties may be ‘open’ or ‘closed’. There are different categories of closed treaties: they can enumerate or limit the number of States which can participate, or they may condition the participation on unanimous acceptance of new members by signatory States. For example, the 1928 General Act for the Pacific Settlement of International Disputes ([concluded 26 September 1928, entered into force 16 August 1929] 93 LNTS 343) ‘is open...to accession by all the heads of states or other competent authorities of the members of the League of Nations and the non-member states to which the Council of the League of Nations has communicated a copy for this purpose’ (Art. 43(1)). There is also a category of treaties, which while less strict than ‘closed’ treaties in this respect, are not entirely ‘open’ for the accession of any State. In these treaties, the acceptance of a new member depends on a majority of signatory States voting in its favour. An example of such a treaty is the 1974 Agreement on an International Energy Program (with Annex) ([concluded 18 November 1974, entered into force 19 January 1976] 1040 UNTS 271). ‘Open’ treaties also form a very divergent category: they may be unconditionally open to all States; or may prescribe a special admission procedure, such as Art. 4 UN Charter. Another example is the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea ([adopted 9 April 1992, entered into force 17 January 2000] 2099 UNTS 195), which is ‘open for accession by any other State or regional economic integration organization interested in fulfilling the aims and purposes of this Convention, provided that this State or organization is invited by all the contracting parties’ (Art. 35).

27 The constituent instruments of international organizations are widely regarded as forming a special category of treaties, in particular because of the special rules of interpretation that are held to apply to them, involving both a more teleological approach to their interpretation than that applied to other forms of treaty, as well as the special regard accorded to the practice developed by their organs.

(d) Pactum de Contrahendo, Pactum de Negotiando

28 Finally, mention must be made of the notions of → pactum de contrahendo, pactum de negotiando. These concepts relate to obligations to reach an agreement and to negotiate with a view of reaching an agreement. These obligations often arise from an existing treaty, which binds the parties to negotiate and, as is the case in → pactum de contrahendo, to enter into further agreements. The content of the obligations is controversial, as are the consequences of not reaching an agreement due to unsuccessful negotiations.

D. Formulation of Treaties

1. Introductory

29 States may adopt any procedure they choose to bring a legally binding agreement into existence between them. However, in the absence of any other agreement, the elaborate procedures set out in the VCLT apply; these procedures reflect the practice which had developed between States before the codification of the law in the VCLT.

30 Broadly, this procedure may be divided into two parts. First comes the procedure of → negotiation and adoption of the text of a treaty (see paras 31–37 below), and secondly the formal procedure whereby States express their → consent to be bound by that text (see paras 52–55 below). This, it may be observed here, generally but not invariably, involves a two-step procedure, consisting of first, the signature of the treaty, and second, its ratification.

2. Treaty Negotiations and the Adoption of a Text
(a) Negotiation

31 The first stages in the formulation of a treaty consist of discussions and negotiations at which the subject matter to be included in the treaty is agreed and a draft text is prepared. There is no particular form prescribed for treaty negotiations, which can be oral, in written form, or both. In the case of bilateral treaties, discussions and negotiations are generally initiated at the level of the parties themselves, and can be conducted at different levels, by Heads of State[s] or Governments, by Ministers of Foreign Affairs or, more often in diplomatic practice, at the level of officials (Heads of Governments and Other Senior Officials).

32 The negotiation of multilateral treaties is often instigated not by States, but by international organizations, such as the UN, International Maritime Organization (IMO), Food and Agriculture Organization of the United Nations (FAO), ILO, or United Nations Educational, Scientific and Cultural Organization (UNESCO). Many international treaties have been prepared by the ILC (such as the VCLT).

33 Conferences have their own rules of procedure (Conferences and Congresses, International). Art. 9 (2) VCLT gives a default rule according to which a convention may be normally adopted at an international conference by a two-thirds majority. The classical rule was that of unanimity, which proved to be a stumbling block in the adoption of multilateral treaties. The two-thirds majority rule, however, may lead to not taking into account minority interests. An alternative practice has developed according to which the text of a treaty can be adopted by consensus, ie without resorting to a vote, and in the absence of a formal objection to follow this course of action. This has a significant impact upon the format of conference deliberations.

34 The formal document summarizing the proceedings of a diplomatic conference and recording its results is called a final act. It usually mentions the purpose of the conference, lists the participating States, and includes the text of the adopted treaty as an attachment.

35 The negotiation of treaties at conferences involves great organizational and administrative tasks which frequently are exercised by the secretariat of the organization sponsoring the conference (International Organizations or Institutions, Secretariats). This includes enabling a smooth running of the negotiations by providing for instant translation and interpretation services, and the distribution of relevant documents. This may also include more substantial tasks such as the preparation of background studies, or participation in drafting an initial negotiation text. It may also take the form of influencing the topics on the agenda of meetings, advising on how to negotiate difficult issues or facilitating the brokering of compromises and agreements. Sometimes, secretariats, de facto, exercise a significant influence on the content of an international treaty.

(b) Adoption and Authentication of the Text

36 The processes of adoption and authentication of the text of a treaty may take any form agreed by the parties (Arts 9, 10 VCLT). In the case of the text of a multilateral treaty adopted at a formal diplomatic conference, this will generally be by way of the inclusion of the text in the final act of the conference (see para. 35 above).

37 The adoption and authentication of a text, whether by way of its incorporation in the final act of a conference or by other means, may involve the signature, or initialling, either of the final act, or of the text (see Arts 9, 10 VCLT). But such a signature is not to be confused with what may be a second signature of the treaty for the purposes of signifying a State’s consent to be bound by it, which is part of the second stage in the formation of a treaty covered in paras 52–55 below (and governed by Art. 12 VCLT). Such a signature for
authentication does not amount to an expression of consent to be bound, nor does it commit a State to consider signing and/or ratifying the treaty. In the interim period between the signature of an international treaty, a State is under the obligation not to defeat the object and purpose of a treaty it has signed (see para. 48 below).

3. Competence to Bind a State

One important issue in the conclusion of treaties, is the question of so-called ‘full powers’, defined in Art. 2(1)(c) VCLT as a:

document emanating from the competent authority of a State designating a person or persons to represent a State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with a respect to a treaty.

The holder of full powers is authorized to adopt and authenticate the text of a treaty and express consent of the State to be bound by a treaty (→ Treaty-Making Power). There are a growing number of treaties, in particular bilateral treaties, which do not require the production of full powers (eg exchange of notes).

The general rule in Art. 7(1)(a) and (b) VCLT, is that a person is considered as representing a State if he or she produces appropriate full powers or if 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 and to dispense with full powers. There is, however, a group of persons who by virtue of their functions are considered to have such authority, these being: Heads of States, Heads of Governments, and Ministers of Foreign Affairs, Heads of Diplomatic Missions (for the purpose of the adoption of the text of a treaty between the accrediting State and the State to which they are accredited); and 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 conference, organization, or organ) (Art. 7(2) VCLT). Full powers have to be distinguished from credentials, which are submitted to an international organization or a government hosting a conference by a delegate attending to negotiate a multilateral treaty and to sign a Final Act. Signing a treaty itself requires full powers or specific instructions from government.

When an unauthorized person purports to conclude a treaty, Art. 8 VCLT provides that the action is without legal effect, unless subsequently confirmed by the State in question. On the other hand, Art. 47 VCLT provides that where an authorized representative of a State expresses consent to be bound, although instructed by a State not to do so, such a conduct does not invalidate this consent, unless the limitation in his or her authority was notified to other negotiating States.

4. Expression of Consent to be Bound

(a) What is Meant by Consent to be Bound

A State’s ‘consent’ or ‘intention’ to be bound by a treaty cannot bring about the formation of a legally binding agreement unless it is, ‘expressed’ in some external form.

(b) The Means of Expression of Consent to be Bound

According to Art. 11 VCLT, 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’. There are no strict rules on the manner in which consent to be bound may be expressed; parties to a treaty
may decide this between themselves, the matter generally being specified in the treaty itself.

43 Art. 2(1)(b) VCLT provides that “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’. In the case of ratification, it needs to be borne in mind this is not the internal process of ratification (in States with democratic constitutions, generally by way of act of the legislature), but an international act of the State, usually by way of signature by the Head of State or Government, or by a Foreign Minister, of a document in the form of an act of ratification.

44 There was a debate concerning the theoretical supremacy, in the absence of an agreement by the parties, of signature or ratification as the decisive means of expressing consent to be bound. This is not entirely settled, yet. In support of a requirement for ratification, in the absence of agreement to the contrary, it may be noted that in 1924, Judge Moore stated in Mavrommatis Palestine Concessions (Greece v Great Britain) (Jurisdiction) (→ Mavrommatis Concessions Cases) that the view that treaties might be regarded as binding before they had been ratified was obsolete (at 57).

45 Acceptance or approval of a treaty following signature, unless the treaty otherwise provides, fulfil the same function as ratification following signature, and follow similar rules (Art. 14(2) VCLT). The modes of expressing consent to be bound by acceptance and approval following signature were introduced into treaty practice in order to accommodate different internal or constitutional law procedures relating to the treaty-making process.

46 Accession (which is the act whereby a State accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other States) is regulated by Art. 15 VCLT according to which a State may accede to a treaty if it so provides, or if the parties agree.

(c) The Interim Stage between Signing and Ratification of a Treaty

47 The interim stage between the signing of a treaty and its ratification enables States to obtain any necessary parliamentary approval and/or to enact required legislation. Signature of a treaty in itself only expresses consent to be bound when it constitutes the final stage in the process of making a particular treaty.

48 With regard to the interim obligation not to defeat a treaty’s object and purpose prior to its entry into force (→ Treaties, Object and Purpose; → Treaties, Provisional Application), codified in Art. 18 VCLT, reference may be made to what has been termed the US’s ‘unsigning’ of the Rome Statute of the International Criminal Court ([adopted 17 July 1998, entered into force 1 July 2002] 2187 UNTS 90 [‘Rome Statute’]) in 2002. This refers to the US’s letter informing the depository of the Rome Statute of the US’s intention not to become a party to the treaty. While no withdrawal of signature actually occurred, the interim obligation, to the extent that it exists under the customary international law of treaties, was terminated with regard to the US, who are not a party to the VCLT.

(d) Entry into Force

49 Entry into force means that the treaty becomes binding upon the parties to it and acquires full legal force as a legal act (→ Treaties, Conclusion and Entry into Force). Prior to the treaty’s entry into force, some of its → final clauses are already applicable (those referred to in Art. 24(4) VCLT). Regarding multilateral treaties, a distinction can be made between the treaty’s general entry into force and its entry into force for a particular State. The treaty’s general entry into force occurs upon fulfilling the conditions prescribed in the
treaty itself. After this general entry into force, the treaty may enter into force for a particular State once such a State has expressed its consent to be bound by the treaty.

Entry into force may be distinguished from entry into operation. Entry into force involves the commencement of the legal obligation of the parties to perform in accordance with the provisions of the treaty; entry into operation relates to the actual commencement of that performance.

Entry into force of a treaty may have legal effects within the domestic legal system of the States party to it. States Parties may be under an obligation to modify the national legal system so as to implement the international obligation. In principle, States have several options on how to achieve this objective. They may do so either by altering the national law or by incorporating the international agreement in question into their legal system. Occasionally international agreements prescribe which actions on the national level are to be undertaken. For example, Art. 4 International Convention on the Elimination of all Forms of Racial Discrimination (opened for signature 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 requires parties to suppress and punish the incitement to racial hatred by declaring such acts as criminal offences. Most multilateral environmental agreements require implementing national legislation or administrative actions. Instances of such action include the setting up of systems to implement at domestic level the emissions reductions required of developed States under the Kyoto Protocol, and the creation of civil liability regimes, for instance in relation to oil pollution and nuclear accidents.

5. Consent to be Bound through ‘Conferences’, or ‘Meetings’, of the Parties (COPs/MOPs)

A legally interesting phenomenon in recent years in relation to the question of consent to be bound is the growing ‘legislative’ powers of conferences of the parties or meetings of the parties (‘COPs’ or ‘MOPs’; → Conference [Meeting] of States Parties) established by a number of modern multilateral treaties, including matters of the → law of the sea, in the human rights field, treaties in the economic and health fields such as the WHO Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166, and some of the MEAs.

Some of these agreements set up organs such as the COPs/MOPs which are mandated to carry out certain functions in relation to the implementation and operation of the treaty regime. This may, but does not always, involve the use of so-called ‘enabling clauses’ which give a specific mandate to such organs to elaborate in more detail rules in particular areas without providing for specific amendment procedures.

One of the first examples of such provisions is the procedure for ‘adjustments and reductions of production or consumption of the controlled substances’ provided in Art. 2(9) 1987 Montreal Protocol. Another well-known example is the enabling clauses of the Kyoto Protocol (Arts 6, 12, 17) whereby the COP/MOP is mandated to elaborate the rules and procedures of the extremely important ‘flexible mechanisms’, including in particular the emissions trading system, which are only covered in a very general sense in the Kyoto Protocol itself.

Thus, States Parties to certain multilateral treaties, by comparison to the traditional expression of consent ex post facto (in relation to the content of the agreement) express their consent to be bound ‘in advance’ and without prior full knowledge the content of the agreement. It may be said that the precursor of such powers of the organs of international organizations can be found in the system of the tacit agreement or in other words, the opting out system (→ Tacit Consent/Opting Out Procedure). States have developed different
mechanisms to nationally implement such ‘secondary rules’ developed by meetings of States Parties.

6. Treaties, Reservations

(a) Nature of Reservations

56 The VCLT provides the following definition in Art. 2(1)(d):

‘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.

57 Broadly, reservations are a means whereby the parties to a treaty may, individually, modify the extent of their consent to the terms of the treaty. Generally, the issue of reservations is only relevant in the context of multilateral treaties (→ Treaties, Multilateral, Reservations to). The right to make reservations is part and parcel of a State’s expression of consent to be bound by the treaty, in the sense that it should only be bound by precisely that to which it has consented. The corollary of this is that other States cannot be obliged, against their will, to accept the reservation. It follows that in relation to a multilateral treaty, where one or more parties make a reservation which some parties accept and others do not, the effect of the reservations system is to give rise to a series of differentiated obligations as between pairs of parties. In other words, reservations to a certain extent ‘bilateralize’ the relations under a multilateral treaty.

(b) The Regime of the Vienna Convention

58 The modern approach which became the foundation of the reservations regime of the VCLT was introduced by the ICJ in its 1951 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) (→ Genocide Convention, Reservations [Advisory Opinion]). The principal feature of this system was 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 this Convention. (At 29)

59 The VCLT reservations regime is characterized by its attempt to strike a balance between ‘integrity’ and ‘universality’, by which is meant the integrity (of the content) of a treaty and the widest possible participation. Art. 19(c) VCLT aims at preserving the integrity of the core of the treaty’s content in providing that a State may not submit a reservation, which is ‘incompatible with the object and purpose of the treaty’. Art. 20(4)(b) VCLT tips the balance towards widening participation by providing for treaty relations even between a reserving and an objecting State, unless a contrary intention is expressed by the objecting State. Art. 20(5) VCLT provides that, in general, a reservation is considered to have been accepted if it is not objected to within 12 months of its notification. Finally, while reservations to treaty provisions which codify customary international law are possible, reservations to provisions reflecting norms of → ius cogens are not.

60 There are several unresolved issues in respect to reservations. First, the method for determining the object and purpose of a treaty is far from uncontroversial. Secondly, the legal consequences of a reservation being ‘impermissible’ due to its incompatibility with the treaty’s object and purpose are contested. DW Bowett coined the terminology for the two schools of thought which have emerged with regard to this problem: according to the school of ‘opposability’ (famous proponent eg JM Ruda), the permissibility of a reservation
depends exclusively on its acceptance by another State (it is suggested that its compatibility with the treaty’s object and purpose could serve as a guideline for the State’s decision on whether or not to accept it); according to the school of ‘impermissibility’ (famous proponent eg DW Bowett), a reservation is invalid from its inception if it is impermissible due to its incompatibility with the treaty’s object and purpose, and the acceptance by other parties will not repair it. In other words, only permissible reservations can, in a second step, be accepted or, for other reasons than incompatibility with the treaty’s object and purpose, be objected to. The question of so-called impermissible reservations resulted in a discussion on the severability of such reservations from the State’s expression of consent. This problem is particularly pertinent in relation to reservations to human rights treaties (see eg the jurisprudence of the → European Court of Human Rights [ECtHR] in relation to reservations to the European Convention for the Protection of Human Rights and Fundamental Freedoms [(signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221]).

(c) Further Developments

61 In 1993 the unresolved issues in the reservations regime of the VCLT prompted the ILC to undertake a topic entitled ‘The Law and Practice Relating to Reservations to Treaties’, on which Professor A Pellet was appointed as Special Rapporteur. Six major problems of substance predominated in the discussion within the ILC that followed Pellet’s first report: the definition of reservations; the distinction between them and interpretative declarations (see para. 62 below), and the differences of their legal regime which characterize the two legal institutions; the doctrinal dispute between the ‘permissibility’ and ‘opposability’ schools; the settlement of disputes; the effects of succession of States on reservations; and the question of the unity or diversity of the legal regime applicable to reservations.

(d) Interpretative Declarations

62 States may also append ‘interpretative declarations’ to treaties when expressing their consent to be bound (→ Treaties, Declarations of Interpretation). Such declarations are not addressed in the VCLT. As opposed to reservations, mere interpretative declarations are explanatory in character and set out how a State perceives its treaty obligations. In practice it may be difficult to draw the line between ‘mere interpretative declarations’ and ‘reservations’. In the event that so-called interpretative declarations aim at changing the scope of the obligation, they cease to be declarations and become reservations, as a result of which States may treat them as reservations (so-called ‘qualified interpretative reservations’) (see eg Belilos v Switzerland [ECtHR] Series A No 132).

7. Invalidity of Treaties

(a) The Right to Impeach the Validity of a Treaty

63 According to Art. 42(1) VCLT 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 VCLT (→ Treaties, Validity). The invalidity or termination in whatever form of a treaty under the VCLT itself does not impair the duty of any State to fulfil any obligations embodied in the treaty to which it would be subject under international law independently of the treaty (Art. 43 VCLT; → Treaties, Termination). A State may lose a right to invoke a ground for invalidating or terminating a treaty if, after becoming aware of the facts, it asserts or acquiesces in the treaty’s validity either by express agreement or through its conduct (Art. 45 VCLT).
(b) Grounds for Invalidity

Generally, the grounds for invalidity of treaties within the VCLT can be divided into two groups: relative grounds in Arts 46 to 50; and absolute grounds in Arts 51 to 53. The main difference between these grounds is that the establishment of an absolute ground means that the treaty has no legal force, whilst the establishment of a relative ground means that the consent of a particular State to a multilateral treaty is invalidated (Art. 69(4) VCLT). This will not cause the treaty as a whole to be void and the treaty will remain valid as between the remaining parties. However, the treaty relations between the State whose consent has been invalidated and the other States are void. With regard to bilateral treaties, the establishment of relative and absolute grounds have an identical effect, they both render the treaty void.

Art. 46 VCLT deals with the failure to comply with internal law regarding competence to conclude a treaty, and provides that this may be a ground for invalidating the treaty, if that failure was ‘manifest’. Art. 47 VCLT concerns the situation in which the representative purporting to conclude the treaty were acting ultra vires. Art. 48 VCLT addresses the effect of error in relation to consent to be bound by a treaty (see the 1962 → Temple of Preah Vihear Case). Arts 49 and 50 VCLT deal with fraud and corruption. The coercion of a representative (Art. 51 VCLT) and coercion of a State (Art. 52 VCLT) and conflict with the norm ius cogens (Art. 53 VCLT) are absolute grounds for invalidity of a treaty. The consequences of such invalidity are regulated by Art. 71 VCLT.

(c) International Law’s Tendency in Favour of Stability and Validity

As a general proposition, it can be said that international law favours the stability of treaty relations, for instance see Art. 62 VCLT. Thus the ICJ in the 1997 → Gabčíkovo-Nagymaros Case (Hungary/Slovakia) observed that the stability of treaty relations implies that the plea of fundamental change of circumstances should be applied only in exceptional circumstances (at 65; → Treaties, Fundamental Change of Circumstances).

In the same case the ICJ took the view that the violation of treaty rules or of rules of general international law may justify the adoption of certain measures, including → countermeasures by an injured State but it does not constitute a ground for termination under the law of treaties (ibid 65).

8. Treaties, Revision, Amendment, and Modification

In the VCLT, the term ‘amendment’ refers to changes to the treaty as between all the parties, whereas ‘modification’ relates to changes between certain of the parties only (inter se), a distinction which is only relevant in the context of multilateral treaties (Arts. 39–41; → Treaties, Amendment and Revision). The VCLT does not use the term ‘revision’ of treaties, based on the ILC’s perception that certain ‘nuances’ had become attached to it in the period preceding World War II (Commentary to Art. 35, UN ILC ‘Draft Articles on the Law of Treaties with Commentaries’ [1966] GAOR 21st Session Supp 9, 20). Nevertheless, the term is still used in practice, and the distinction between the procedures of ‘amendment’ and ‘revision’ is not clear-cut. Broadly, two views can be distinguished in the practice of the law of treaties. According to one, revision basically means amendment. According to the other, revision is a more comprehensive process resulting in changes to the treaty as a whole, as opposed to changes to specific provisions of a treaty. Support for this view can be found in treaties which regulate both their amendment as well as their revision, such as the UN Charter (Arts 108, 109 respectively), or the 1974 Convention on
the Protection of the Marine Environment of the Baltic Sea (Arts 23, 22 respectively), but, as indicated above, this use of terms is not consistent in State practice.

69 The default rule in the VCLT provides that a treaty can be amended by agreement between the ‘parties’. Art. 2(1)(g) VCLT implies that the treaty, which is to be amended, has already entered into force. In practice, however, there are examples of treaties which have been amended prior to their entry into force. The most famous example of these is probably the United Nations Convention on the Law of the Sea ((concluded 10 December 1982, entered into force 16 November 1994] 1833 UNTS 397), Part XI of which was not only ‘implemented’ but in effect amended by the so-called ‘1994 Implementation Agreement’ (Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 [done 28 July 1994, entered into force 28 July 1996] 1836 UNTS 41; → Implementation Agreements).

70 Furthermore, a treaty may be amended through the subsequent and uniform practice of all its parties. A well-known example of this relates to Art. 27(3) UN Charter, which concerns voting in the UN Security Council. Despite the terminology of an ‘affirmative vote of nine members including the concurring votes of the permanent members’, a subsequent practice has developed according to which the abstention of a permanent member, which must be distinguished from a negative vote (→ Veto), does not prevent the adoption of a resolution. In the ICJ advisory opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) (‘Legal Consequences of South Africa in Namibia’)*, the ICJ noted that this practice had been generally accepted by the Member States of the UN.

E. Treaties, Termination

1. Limitations on the Right to Denounce or Terminate Treaties

71 Most, if not all, rules of the VCLT on termination codify customary international law. In the interests of stability of treaty relations and the preservation of the principle → *pacta sunt servanda*, Art. 42(2) VCLT provides: ‘[t]he 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’. Arts 54 and 56 VCLT provide for the possibility of termination according to the VCLT and by consent of the parties, which are commonly adopted practices in modern treaty practice. More controversial is Art. 56(1) VCLT, which covers the treaties without provisions on termination, denunciation, or withdrawal. The main rule is that such a treaty cannot be denounced or withdrawn from 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’. It is uncertain whether this article reflects customary international law.

72 The VCLT distinguishes between denunciation of and withdrawal from a treaty without providing a definition of the terms in Art. 2(1) or specifying the rationale of this distinction. Both relate to the unilateral act of a State wishing to terminate a treaty in relation to itself. However, while denunciation relates to both bilateral and multilateral treaties, withdrawal relates only to multilateral treaties. The denunciation of a bilateral treaty puts an end to it, whereas denunciation of or withdrawal from a multilateral treaty only means that the multilateral agreement is no more applicable from the date of its withdrawal to the State in question.
2. Grounds for Termination

(a) Material Breach of Treaty

73 Art. 60 VCLT regulates the termination of a treaty for its alleged material breach. As a general rule the breach of a treaty, however serious, does not ipso facto terminate the existence of a treaty. But within certain limits, and subject to certain safeguards, the right of a party to invoke a breach as a ground for terminating or suspending a treaty is recognized. Such rules were referred to by the ICJ in Legal Consequences of South Africa in Namibia as being ‘in many respects’ considered to represent customary international law (at 47). The ICJ has generally supported a restrictive view on the right to terminate a treaty on the grounds of material breach (see Gabčikovo-Nagymaros Case).

74 The relationship between material breach and the law of State responsibility is problematic, in particular in relation to the law concerning countermeasures. It appears that these two regimes coexist independently. It is the general view that non-material breaches of a treaty may activate the right to have recourse to countermeasures. However, as evidenced by the case-law, States do not draw a clear line between the termination of a treaty on the grounds of material breach or as a consequence of countermeasures (see The Air Services Agreement of March 27 1946 [United States v France] arbitration and the Rainbow Warrior [New Zealand v France] arbitration; → Rainbow Warrior, The).

(b) Fundamental Change of Circumstances

75 Art. 62 VCLT regulates the impact of a fundamental change of circumstances on an international agreement. The provision is drafted in a very narrow way in order to safeguard the stability of treaties. Whether Art. 62 VCLT reflects customary international law is questioned. The use of the clausula rebus sic stantibus clause, in particular invoking that the political system of the State in question has changed, was perceived as posing a threat to the stability of international treaty relations. In contemporary treaty relations, the rule of fundamental change of circumstances is applied only in exceptional circumstances, which was confirmed by the ICJ in the 1997 Gabčikovo-Nagymaros Case. There is little jurisprudential guidance as to what constitutes a fundamental change of circumstances. In academic writing it is agreed that a mere change of governmental policy generally would not suffice to invoke the plea, nor would a change of political regime, government, or administration. The plea of fundamental change of circumstances does not terminate the treaty automatically but has to be invoked according to the procedures set out in Art. 65 VCLT.

(c) Supervening Impossibility of Performance

76 The supervening impossibility of performance is a well-established and uncontested ground for the termination of a treaty, which was codified in Art. 61 VCLT. Art. 61 VCLT limits the ground to the ‘permanent disappearance or destruction of an object indispensable for the execution of the treaty’ and cannot be invoked by a party that was itself instrumental in causing the change of circumstance by breach of an obligation under the treaty or of any other international obligation owed to any other party to the treaty. It was upon the basis of this limitation that the ICJ in the Gabčikovo-Nagymaros Case once again adopted a strict approach to the termination of treaty obligations, denying Hungary’s right to invoke the impossibility of performance brought about by its own failure to perform its obligations.
(d) Emergence of a New Peremptory Norm

77 A norm of *ius cogens* is, according to Art. 53 VCLT, a peremptory norm of general international law which is accepted and recognized by the international community of States as a whole. Its essential characteristic is that no derogation from it is permitted and that it can only be modified by another subsequent norm of *ius cogens*. Accordingly, Art. 64 VCLT provides that a treaty which is in conflict with a new norm of *ius cogens* becomes void and terminates. Art. 71 clarifies that such a treaty does not become void retroactively. Examples of *ius cogens* are the prohibition of the use of force in Art. 2(4) UN Charter, as well as the prohibition of the slave trade, genocide, piracy, and torture; the principle of self-determination has also been suggested.

78 The theoretically opposite concept is that of *ius dispositivum*, i.e., law which is at the disposal of States and can be modified by them at will: for instance, treaties concluded in order to deviate from rules of customary international law, or reservations made to treaty provisions imply underlying *ius dispositivum*. Also, the concept of *ius cogens* needs to be distinguished from that of obligations *erga omnes*, especially so because some norms of international law are suggested to belong to both categories. According to the ICJ in *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* ([1970] ICJ Rep 3; → *Barcelona Traction Case*), obligations *erga omnes* are, ‘[b]y their very nature the concern of all States’ and therefore are owed to ‘the international community as a whole’ (at 32). The *erga omnes* quality of a norm becomes relevant in the field of State responsibility, and concerns the question of legal standing in case of their violation. Art. 48 UN ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts ([2001] GAOR 56th Session Supp 10, 43; ‘Draft Articles on State Responsibility’) deals with this matter, and certain aspects of the article can be seen as involving a measure of progressive development of international law. More precisely, Art. 48 Draft Articles on State Responsibility provides that in case of breach of an obligation *erga omnes* any State is entitled to invoke the responsibility of the apparently breaching State, and to claim from the responsible State not only the cessation of the internationally wrongful act, but also the performance of any obligation of reparation, in the interest of the injured State or the beneficiaries of the obligation breached.

(e) The Effects of Armed Conflict on Treaties

79 The VCLT does not deal with the effects of armed conflict on treaties (→ *Armed Conflict, Effect on Treaties*). Traditionally, the view was expressed that the legal status of bilateral and multilateral treaties during the armed conflict should be distinguished. As a principle, peace treaties provide for the solution in relation to the pre-war treaties. The ILC at its 52nd session took up the topic ‘Effects of Armed Conflicts on Treaties’ for future work and appointed Professor I Brownlie as Special Rapporteur. In 2005, Brownlie presented a set of Draft Articles (UN ILC Special Rapporteur I Brownlie ‘First Report on the Effects of Armed Conflicts on Treaties’ [21 April 2005] UN Doc A/CN.4/552). The ILC supported the views of the Special Rapporteur encouraging the continuity of treaty obligations in the event of armed conflict, provided there was no necessity for suspension or termination. The ILC took the view that the somewhat outdated doctrine from the past, which tended to impair such continuity, should not be rigidly relied on. The ILC also endorsed the view that it is better to review the problem of the effect of the armed conflict on treaties from the point of view of particular provisions and circumstances than to rely on any general rules, holding it more useful to identify the considerations which a State should take into account in the circumstances, rather than attempting to establish definite inflexible rules that States must always follow. The Special Rapporteur held the view that there was no good reason for establishing special criteria for bilateral and multilateral treaties. According to his view, the
intention of the parties should be decisive (First Report on the Effects of Armed Conflicts on Treaties at para. 5).

(f) Extinction of a Party

80 The extinction of a party as a ground for the termination of a treaty is not mentioned in the VCLT. It will be of importance in practice only in relation to bilateral treaties.

(g) Desuetude

81 Desuetude as a way of terminating a treaty is not regulated by the VCLT (→ Desuetudo). This means that the termination of a treaty may be implied if it is clear from the conduct of the parties that they no longer consider the treaty as binding.

3. Other General Issues Relating to the Termination of Treaties

(a) Loss of Right to Invoke a Ground for Invalidating, Terminating, Withdrawing from, or Suspending the Operation of a Treaty

82 Art. 45 VCLT sets out the conditions under which the right to invoke a ground for invalidating, terminating, withdrawing from, or suspending the operation of a treaty can no longer be exercised. There are very few cases relating to the application of the principle underlying Art. 45 VCLT, however; those cases do not strictly relate to treaties but to, for example, the validity of arbitral awards (Arbitral Award Made by the King of Spain on 23 December 1906 [Honduras v Nicaragua] [1960] ICJ Rep 192), of maps attached to treaties (Temple of Preah Vihear Case), or commercial contracts between States and non-State entities (Textron Inc and Bell Operations Corporation v Islamic Republic of Iran [Arbitral Award] [12 February 1981] [1984] 6 Iran-US CTR 328, vol II).

(b) Consequences of the Termination of a Treaty

83 Art. 70 VCLT regulates the consequences of the termination of a treaty. This article should be read together with the general provisions of Sec. 1, Part V VCLT (especially Arts 42(2)–44 VCLT). There is no case-law directly addressing Art. 70 VCLT. However, in the 1990 award in the Rainbow Warrior (New Zealand v France), Art. 70 VCLT was referred to as customary international law.

(c) Procedure to be Followed with Respect to Invalidity, Termination, Withdrawal from, or Suspension of the Operation of a Treaty

84 Arts 65–8 VCLT (Sec. 4, Part V VCLT) set out the procedure to be followed with respect to invalidity, termination, withdrawing from, or suspension of the operation of a treaty (→ Treaties, Suspension). The ICJ in the 1997 Gabčíkovo-Nagymaros Case considered these provisions as not constituting customary international law. Art. 65 VCLT is a chapeau to the rest of Sec. 4 and lays down the general procedure to be followed in this respect. In case no agreement is reached under Art. 65 VCLT, Art. 66 VCLT sets out specific procedures for judicial settlement, arbitration (only for disputes relating to o ius cogens), and conciliation (all remaining disputes). Art. 67 VCLT sets out instruments for declaring invalid, terminating, withdrawing from, or suspending the operation of a treaty. Finally, according to Art. 68 VCLT, a notification or instrument mentioned in Arts 65 or 67 VCLT may be revoked at any time before it takes effect.

F. Treaties, Interpretation
1. General Principles

Treaty interpretation is to some extent regulated by the VCLT, nevertheless, many problems remain controversial.

A fundamental set of principles of interpretation of treaties was proposed by Sir G Fitzmaurice, who based it on the practice of the ICJ. These are as follows: Principle I: of actuality—that treaties have to be interpreted as they stand, on the basis of their actual text. Principle II: the natural and ordinary meaning—that subject to the principle of contemporaneity (where applicable), particular words and phrases are to be given their normal, natural, and unrestrained meaning in the context in which they occur. This principle can only be displaced by direct evidence that the terms used are to be understood in a manner different to their natural and ordinary meaning, or if such an interpretation would lead to an unreasonable or absurd result. Principle III: integration—that treaties are to be interpreted as a whole. This principle is of fundamental importance and means that individual parts, chapters, or sections of a treaty are not to be interpreted out of their overall context. The remaining principles take effect subject to the three principles outlined above. These are: Principle IV: effectiveness (ut magis valeat quam pereat)—that treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them the fullest effect consistent with the normal sense of the words and with the text in such a way that a reason and meaning can be attributed to every part of the text. Principle V: subsequent practice—that recourse may be had to subsequent practice of parties relating to the treaty. Principle VI: contemporaneity—that the terms of a treaty must be interpreted in the light of linguistic usage current at the time when the treaty was concluded.

2. Three Schools

In general there may be said to exist three general schools of, or approaches to, interpretation: the subjective (the ‘intention’ of the parties) approach; the objective (the ‘textual’) approach; and the teleological (the ‘object and purpose’) approach. These three schools of interpretation are not mutually exclusive and the VCLT draws on all three. However, it is debatable whether the VCLT successfully combined the objective and subjective approaches, which in the view of many appear to be effectively irreconcilable. The ILC adopted the ‘textual’, rather than the ‘intention of the parties’ approach, on the basis that it is to be presumed that the text represents the real expression of what the parties in fact intended.

The ICJ has consistently adhered to the textual interpretation as being the most important, as in the → Territorial Dispute Case (Libyan Arab Jamahiriya/Chad), where it stated as follows: ‘Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work’ (at 22). The determination of the ordinary meaning of the term is undertaken in the context of the treaty as a whole and in the light of its object and purpose (see eg Interpretation of the Convention of 1919 Concerning Employment of Women during the Night [Advisory Opinion] PCIJ Series A/B No 50).

In many cases, the ICJ has stated that, ‘in accordance with customary international law, reflected in Article 31 of the VCLT, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose’ (see eg the 1994 [Territorial Dispute Case [Libyan Arab Jamahiriya/
Chad at 19–20; → Good Faith [Bona fide]). The underlying principle is that the treaty is to be interpreted in good faith, which is the embodiment of the principle pacta sunt servanda.

3. Object and Purpose

According to the general rule on interpretation in Art. 31(1), a treaty shall also be interpreted in the light of its object and purpose. As already mentioned in the context of reservations, considerable uncertainty surrounds the determination of a treaty’s object and purpose. Despite frequent references to the criterion, the jurisprudence of several international courts and tribunals (including the → Permanent Court of International Justice [PCIJ], the ICJ, and others) has not clarified the existing ambiguities. In academic writing, it is contested whether the terms ‘object and purpose’ are synonymous (English and German writers) or not (French writers). According to the latter view, ‘object’ refers to the content of the treaty, while ‘purpose’ designates the overall aim to be achieved by means of the treaty. Furthermore, the methodology for establishing a treaty’s object and purpose is far from clear. In the jurisprudence, recourse has been had, inter alia, to the following criteria, individually or cumulatively: the title of the treaty; its preamble; an article of the treaty with apparent relevance for the treaty’s object and purpose; and the travaux préparatoires; etc.

4. Place of Subsequent Practice

Another problem concerns what is to count as constituting subsequent practice for the purposes of interpretation, the use of which is sanctioned as forming part of the context of the treaty by Art. 31(3) VCLT. In the 1999 → Kasikili/Sedudu Island Case (Botswana/Namibia), the ICJ adhered to the view that the subsequent practice of parties to a treaty constitutes an element to be taken into account when determining its meaning, but it adopted a restrictive approach to what comprises subsequent practice and did not take into account unilateral acts of the previous authorities of Botswana on the grounds that these were for internal purposes only and unknown to the Namibian authorities.

5. Place of Travaux Préparatoires

One of the most controversial issues in treaty interpretation is the use of travaux préparatoires (preparatory work). The VCLT gives very specific conditions under which travaux préparatoires may be used: either to confirm the meaning of the treaty or as an aid to interpretation where, following the application of Art. 31 VCLT, the meaning is obscure or leads to a result which is manifestly absurd or unreasonable. The ICJ has always made very restrictive use of travaux préparatoires. This approach, however, has given rise to the view that the ICJ has not always established sufficiently the requisite common intention of the parties (see the 1995 Maritime Delimitation and Territorial Questions between Qatar and Bahrain [Qatar v Bahrain] [Dissenting Opinion of Vice-President Schwebel]; Case between Qatar and Bahrain [1995]).

6. Principle of Effectiveness

The principle of effectiveness in treaty interpretation is closely related to the notion of the ‘object and purpose’ of the treaty. This is, however, a very ill-defined term, making it an unreliable tool for interpretation. The principle of effectiveness is enshrined in the maxim: magis valeat quam pereat. Although this principle can operate as an element within the object and purpose principle, it is not limited to this role. The ICJ has used it to ascertain the intention underlying a treaty and as a broader point for discussion.
7. Principle of Systematic Integration

This principle derives from Art. 31(3)(c) VCLT and requires the interpretation of the treaty in the light of ‘any relevant rules of international law applicable in the relations between the parties’. This principle was one of the most neglected issues of treaty interpretation. However, it gained importance in relation to the → fragmentation of international law, its diversification, and expansion.


8. Inter-temporal Law

Art. 31 (3) (c) VCLT is also concerned with inter-temporality (→ Intertemporal Law), a theory which originated in M Huber’s reasoning in the → Palmas Island Arbitration (Island of Palmas Case [Netherlands v United States of America]), and which may be defined in the words of Judge Huber where he says: ‘a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or fails to be settled’; and he says further:

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act 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 (at 845).

G. Effect of Treaties on Third Parties

1. The General Rule

The fundamental principle relating to the effect of treaties on third States is contained in the maxim pacta tertiis nec nocent nec prosunt, which means that treaties have no legal effect on third States (→ Treaties, Third-Party Effect). Treaties are res inter alios acta for these States. This main rule is embodied in Art. 34 VCLT: ‘[a] treaty does not create either obligations or rights for a third State without its consent’.

2. Treaties Providing for Rights and Obligations for Third States, and Treaty Rules Becoming Binding on Third States through International Custom

Art. 35 VCLT codifies the rule on treaties providing for obligations for third States. An obligation may arise from a treaty for third States if two conditions are fulfilled: the parties to the treaty intended the provision to be the means of establishing the obligation and the third State expressly accepts the obligation in writing. However, the possibility of concluding a treaty imposing obligations on third States, even on the basis of the above-mentioned conditions, is not without controversy.
Rights derive from a provision of a treaty for a third State, if the parties so intended and the third State assents thereto (Art. 36 VCLT). Assent may be presumed ‘so long as the contrary is not indicated, unless the treaty otherwise provides’ (Art. 36 VCLT). Possibly, one of the examples of such a situation would be the → most-favoured-nation clause.

Finally, a rule set out in a treaty may be (or become) binding on third States as a rule of customary international law (Art. 38 VCLT). In the 1969 North Sea Continental Shelf Cases, the ICJ described different ways in which treaties and customary international law may interact, and recognized the possibility of the existence of identical rules in international treaty law and customary international law. (On this last point, see also the Nicaragua Case 95–6).

3. Objective Regimes

One of the unresolved and controversial issues, which is not included in the VCLT, remains the problem of treaties establishing so-called → objective regime[s], ie regimes which are opposable to all States. Examples of such treaties are those establishing the demilitarized zones (→ Demilitarization). There is also the view that the legal regime on → Antarctica is an objective regime (see eg E Klein Statusverträge im Völkerrecht: Rechtsfragen Territorialer Sonderregime [Springer Berlin 1980]).

H. Miscellaneous Matters

1. Treaties, Territorial Application

Territorial application of treaties is governed by Art. 29 VCLT: ‘[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory’ (→ Treaties, Territorial Application). This rule appears to codify existing international law. The question may arise of whether the expression ‘its entire territory’ only refers to areas fully under a State’s → sovereignty or also to territories with respect to which that State has a certain international responsibility including treaty-making power (eg → protectorates and protected States). Mention must be made of the so-called ‘colonial clause’, which is largely of historical relevance, by virtue of which the territorial application of treaties is regulated in respect to territories for which parties are responsible. Territorial application of treaties may change with a change in the status of the territory.

2. Treaties, Registration, Publication, and Depositary

(a) Registration

The obligation of States with regard to registration of treaties is regulated by Art. 102 UN Charter (→ Treaties, Registration and Publication). It is the responsibility of the States Parties to a treaty to register it. Despite the prohibition contained in Art. 102 UN Charter of relying on any unregistered treaties before any organ of the UN, the ICJ has not adopted a strict and uniform policy towards non-registered treaties. Art. 80 VCLT does not provide any sanctions for non-registration.

It is sometimes suggested that the registration of an instrument in accordance with Art. 102 UN Charter is an indication of it being an international treaty. However, it is not a reliable indicator, as on one hand the UN Secretariat registers almost all documents submitted to it, including unilateral declarations, and on the other hand not all treaties are registered. This is also a view expressed by the ICJ in the Case between Qatar and Bahrain:
1994, in which the fact of non-registration was held not to be decisive as to the character of the document in question (at 122).

(b) Publication

While the obligation to register treaties under Art. 102(1) UN Charter is primarily on the UN Member States, the publication of such registered treaties is the responsibility of the UN Secretariat. It is questionable whether Art. 102 UN Charter had a direct effect on the reduction of the number of secret treaties (→ Treaties, Secret). To the extent there has been such a reduction, it is rather a result of the changed political climate, and greater transparency in relations between States and modern diplomacy.

(c) Depositaries

A depositary is the custodian of the original text of the treaty and mainly acts as an administrator of the treaty. States or international organizations can act as the depositary of treaties. The UN Secretary-General often acts in this capacity in relation to multilateral treaties. Art. 71(1) VCLT lists the principal functions of a depositary. Among these is the receipt of notifications and communications of the parties to the treaty (Art. 78 VCLT), which may include notifications on the ratification, on reservations, or the withdrawal of a party from the treaty. The depositary may also notify the parties of errors and of proposals to correct them.

(d) Treaty Series

Prior to the commencement of the UN Treaty Series, the most important publication of treaties and treaty material was the ‘Martens Recueil de Traites’ which was published from 1791 until 1934 (from 1881, renamed ‘Martens Nouveau Recueil des Traites’). The League of Nations Treaty Series was published from 1919 until it was superseded by the UN Series in 1947.

3. Treaties, Conflicts Between

(a) General Rules

A conflict between treaties arises when those treaties include incompatible provisions for parties to both of them (→ Treaties, Conflicts between). For this situation to arise, it is possible but not necessary that those treaties relate to the same subject-matter. The question of incompatibility of, or conflict between, treaties is first a matter of interpretation. Relevant in this context is Art. 31(3)(c) VCLT according to which, for the interpretation of a treaty, the relevant rules of international law applicable between the parties shall be taken into account.

Conflicts between treaties is one of the most difficult areas of the law of treaties, which historically received little attention and still involves many unresolved issues. However, certain rules have evolved. There are several maxims relating to conflict of treaties: lex posterior derogat legi proiri; lex specialis derogat legi generali; prior in tempore, potior in jure. These were widely used in the jurisprudence of the ICJ.

The VCLT deals with the conflict of treaties in several provisions. The rules relating to the application of successive treaties contained in Art. 30 VCLT relate only to the conflict of successive treaties relating to the same subject-matter. In itself, Art. 30 VCLT leaves many issues unresolved. The following questions remain. How strictly is the ‘same subject-matter’ requirement to be interpreted? What is the practical application of Art. 30 VCLT in relation to Art. 41 VCLT (agreements to modify multilateral treaties between certain parties only) and Art. 59 VCLT (termination or suspension of the operation of a treaty implied by conclusion of a later treaty)? Arts 53 and 64 VCLT regulate the special case of the conflict of a treaty with a norm of ius cogens, which links the problem to the invalidity of treaties.
However, the VCLT does not address the question of conflict between treaties relating to different subject-matters.

111 Art. 103 UN Charter sets out a hierarchical principle according to which in case of conflict between obligations of parties under the UN Charter and their obligations under any other international agreements, the former prevails. The drafting of Art. 103 leads to several uncertainties, such as the legal effects of treaty provisions incompatible with the UN Charter (whether suspended, unenforceable, voidable, or void) or whether the UN Charter prevails over incompatible obligations derived from customary international law or undertaken by way of unilateral act. It is also unclear to which UN Charter obligations Art. 103 refers, whether only to those within the UN Charter itself, or also to those resulting from binding decisions of UN organs (such as UN Security Council Chapter VII resolutions).

112 It is also unclear whether Art. 103 UN Charter is intended to affect obligations from treaty relations which involve non-Member as well as Member States.

113 There is little ICJ jurisprudence on Art. 103 UN Charter, and the ICJ’s first reference to Art. 103 was made only in passing in the *Nicaragua Case*. However, when indicating provisional measures in the *Lockerbie Cases (Libyan Arab Jamahiriya v United Kingdom and United States of America)*, the ICJ clarified one of the above-mentioned uncertainties, namely that those obligations ‘under the UN Charter’ which prevail according to Art. 103 UN Charter indeed encompass obligations arising from binding decisions adopted by UN organs, as in this instance a UN Security Council Chapter VII resolution (*Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie [Libyan Arab Jamahiriya v United Kingdom] [Preliminary Objections]* [1998] ICJ Rep 9; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie [Libyan Arab Jamahiriya v United States of America] [Preliminary Objections]* [1998] ICJ Rep 115).

(b) Conflict Clauses or Savings Clauses

114 It is now relatively common in multilateral treaties to insert so-called ‘conflict clauses’ which are intended to make express provisions to resolve problems arising from a conflict between treaties (→ *Treaties, Conflict Clauses*). They are also referred to as ‘savings’ or ‘compatibility’ clauses. Examples of such clauses can be found in the preamble of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity ([done 29 January 2000, entered into force 11 September 2003] [2000] 39 ILM 1027), which states that ‘this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements’; Art. 311(1) UN Convention on the Law of the Sea; Art. 73 Vienna Convention on Diplomatic Relations ([done 18 April 1961, entered into force 24 April 1961] 500 UNTS 95); Art. 137 Charter of the Organization of American States ([signed 30 April 1948, entered into force 13 December 1951] 119 UNTS 3); and Art. 8 North Atlantic Treaty ([signed 4 April 1949, entered into force 24 August 1949] 34 UNTS 243) among others. The possibilities relating to these conflict clauses are quite complex, and in certain of the possible situations, their effect is not entirely clear: In the first place, the conflict clause may be included in either an earlier or a later treaty, or indeed in both. And whichever treaty the clause is included in, it may be aimed either a) at ensuring the priority of the later treaty (in which case it may in fact do no more than give expression to the general *lex posterior* rule; b) at preserving the effect of the earlier treaty; or c) if actually included in the earlier treaty, at preventing States Parties from entering into agreements in the future which conflict with the earlier treaty. It has to be said that not all
potential conflicts can be solved by the application of the relevant principles, in the case of mutually exclusive obligations.

4. Treaties, Unequal

115 The concept of ‘unequal treaties’ is really a historical phenomenon, having arisen in practice in the colonial context, although in principle it might arise in a wider context (→ Treaties, Unequal). In general it may be said that a common feature of such treaties is a deviation from the principle of the sovereign equality of States (→ States, Sovereign Equality). It may also mean that the principle of reciprocity is not observed. The VCLT does not cover this topic expressly, however, the principle of the ‘unequal treaty’ may be invoked as a ground of invalidity, on the basis of Art. 52 VCLT (coercion of a State by threat or use of force), Art. 53 VCLT (conflict with a peremptory norm of international law, ius cogens), or as a ground for termination, on the basis of Art. 62 VCLT (fundamental change of circumstances).

5. Treaties, Succession

(a) Background

116 The succession of States to treaties is one of the uncertain areas in contemporary international law (→ State Succession in Treaties). First, it is a complex subject, due to the widely varying circumstances in which a succession of States may occur, the numerous different forms of treaties which may be involved, and the varying stages, in terms of coming into force (eg not in force or awaiting ratification) which they may have reached. Secondly, as was recognized by the ILC throughout its work on the subject, there was little, if any, relevant State practice in the field, let alone existing rules of customary international law. Thus the VCSS-T involves a significant amount of progressive development. While the VCSS-T had widespread support in the ILC and UN General Assembly (and is in force), it has received comparatively few ratifications. Thus instances of succession of States will continue to occur to which rules of customary international law will apply. Indeed, this was largely the case in relation to succession of States arising out of the break up of the Union of Soviet Socialist Republics (‘Soviet Union’) and the former Socialist Federal Republic of Yugoslavia (‘Yugoslavia’; → Yugoslavia, Dissolution of). In this respect, the progressive development solutions of the VCSS-T do accord to some extent with modern views on international law, in particular the weight now given to the sanctity of treaties by comparison to the sovereign independence of States. But while trends in State practice can be discerned, it is still too early to say that rules of customary international law have yet emerged.

117 In relation to succession to treaties, one may distinguish several categories of treaties which are governed by different rules of succession. For instance in relation to territorial treaties, different rules will govern succession in the case of transfer of territory and different rules apply in relation to so-called objective territorial regimes and boundary regimes, which are excluded from the normal rules of State succession (Arts 11, 12 VCSS-T). Some provisions of the VCSS-T also make a distinction between multilateral and bilateral treaties, and there are also some special rules relating to treaties constituting international organizations and treaties adopted within international organizations.

(b) The 1978 Vienna Convention on Succession of States in Respect to Treaties (‘VCSS-T’)
(i) Transfers of Territory (Part II, Art. 15 VCSS-T)

118 Territorial changes may affect treaty regime (→ Territorial Change, Effects of). The rules of State succession apply if territorial change results in a change of identity of a State or accords treaty rights and obligations to other new or old subjects of international law.

119 The fundamental principle in the area of treaties and territorial changes is the so-called ‘moving treaty frontiers rule’, which means that a treaty moves together with the territory to the successor State, thus leaving the territory of the predecessor State. This may be said to be a rule of customary international law and is adopted as well in Art. 15 VCSS-T. This principle served as the general rule for all international treaties of Germany and was set out in Art. 11 Treaty on the Final Settlement with Respect to Germany ([signed 12 September 1990, entered into force 15 March 1991] 1696 UNTS 115; → Germany, Unification of). Art. 11 Treaty on the Final Settlement with Respect to Germany roughly provided that those international treaties not only retained their validity but that their application was extended to the territories of the former German Democratic Republic. In general, although widely accepted, the application of this rule is not without difficulties and some problems may arise, such as the implementation of certain localized treaties.

120 The automatic operation of this rule is excluded with respect to dependent territories such as colonies, protectorates, → mandates, or trust territories (→ United Nations Trusteeship System) and in the event of the dismemberment of a State, such as in the cases of the former Yugoslavia and the Soviet Union.

(ii) The Uniting of States, the Dissolution of a State, and the Separation of Part of a State (Part IV, Arts 31–38 VCSS-T)

121 With respect to the uniting of States, the dissolution of a State, and the separation of a part of a State, the VCSS-T applies broadly a principle of automatic continuity of treaties—i.e., treaties which were in force with respect to the territory to which the succession applies remain in force with respect to that territory, with the successor State becoming a party to the treaty. This provision did not reflect any rule of customary international law, nor even State practice. It did, however, reflect a growing emphasis being placed on the sanctity of treaties.

122 It has to be noted that these positive provisions were subject to a number of important exceptions (e.g., generally they do not apply if their operation would be incompatible with the object and purpose of the treaty in question or would radically change the conditions for its operation). There are also special provisions, in each case, relating to bilateral treaties and to treaties not yet fully in force. The VCSS-T also generally does not apply to certain types of situations (e.g., arising as a result of the outbreak of hostilities or military occupation [Art. 39 VCSS-T]); nor do the provisions of the VCSS-T apply, in general, in a way which would affect any boundary or other territorial regime (Arts 11, 12 VCSS-T).

(iii) Newly Independent States (Part III, Arts 16–30 VCSS-T)

123 At the outset of the ILC’s work on the subject, emphasis was laid on the issue of treaty succession in relation to the independence of former colonial (or otherwise dependent) territories; and the VCSS-T as concluded contains special provisions in this respect, notwithstanding that it was recognized that the period of → decolonization was virtually over and that the provisions would apply to few instances in the future. The basic position adopted here was the so-called tabula rasa (‘clean slate’) principle, according to which treaties that had been in force with respect to a predecessor State would not automatically become applicable to the successor State, which would come into existence free of all treaty rights and obligations applicable to the predecessor State (Art. 16 VCSS-T). The VCSS-T further provided that the newly independent State would, nevertheless have a right, by
notification of succession, to establish its status as a party to any multilateral treaty in force in relation to the territory concerned.

124 These provisions are considered as reflecting at least a widespread State practice, if not actually an established rule of customary international law.

(c) The Current Status of the International Law in Relation to Treaty Succession

125 As referred to above, the small number of ratifications of the VCSS-T means that rules of customary international law, independently of the VCSS-T, will still be applicable in cases of treaty succession which may arise. In fact, the question of the succession of bilateral treaties in the case of the disappearance of one of the State Parties was raised in the Gabčíkovo-Nagymaros Case, in which the status of Art. 34 VCSS-T (a rule of continuity of treaties) and Art. 12 VCSS-T (other territorial regimes) in relation to contemporary customary international law was discussed. The ICJ did not make a pronouncement on the legal status of Art. 34 VCSS-T; but considered that Art. 12 VCSS-T does reflect international customary international law. A similar situation arose in the 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; – Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case [Bosnia and Herzegovina v Serbia and Montenegro] in 1993, in relation to a multilateral convention. Again, the ICJ did not pronounce on the legal status of Art. 34 VCSS-T, though in this case support was given for the concept of continuity of treaties in a number of dissenting or separate opinions.

I. Assessment

126 The law of treaties constitutes one of the three pillars of international law together with sources of international law and the law of State responsibility. Treaties are the most commonly used means of creating binding norms between sovereign States. Some of the areas of international law are almost exclusively regulated by treaties, such as international environmental law, in which customary international law plays a minor role. The relationship between treaties and customary international law is of fundamental importance, in particular in cases of multilateral treaties, which are intended to give rise to a norm of customary international law, a process which has to be treated with great caution.

127 The basic principle of the law of treaties, pacta sunt servanda, remains the fundament on which the whole of the system of treaty obligations is built. The most authoritative source of the rules concerning the law of treaties is the VCLT, in most parts representing existing customary international law. However, some issues remain unresolved, such as the question of reservations, in particular reservations to human rights treaties, a problem which is at present on the agenda of the ILC. Some questions are not within the remit of the VCLT, such as unequal treaties or the effect of armed conflict on the law of treaties, which remains one of the unresolved issues and therefore currently also under the consideration of the ILC. There are other problems which present difficulties, such as the relationship between the material breach of a treaty and the international law of countermeasures, as well as the role of travaux préparatoires in the interpretation of treaties. The question of the succession to treaties is not fully resolved either, and it is common ground between States that the VCSS-T only in part codifies existing customary international law.
Many points of the law of treaties are still being clarified and crystallized by international courts and arbitral tribunals, in particular the ICJ, as well as by the monitoring bodies established on the basis of multilateral human rights agreements, in areas such as the reservation to treaties, the rule of treaty interpretation, the termination and invalidity of treaties, and the relationship between the rules of the law of treaties and those of State responsibility. Some treaties are living instruments and therefore their application by courts and tribunals, as well as States’ practice, contributes to their further development and a better understanding of how they work. Further, the contribution of international organizations to the development of treaties must be noted, as well as that of the European Union, specifically the unique way in which it created a particular system of treaties (European Community, Mixed Agreements). The EU applies the law of treaties and the VCLT, and therefore participates in its interpretation and elaboration.

It also must be observed that the work of the ILC in other areas than the law of treaties also contributes to its development and crystallization, for instance in relation to the topic of 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', in which the ILC analyses Arts 31(3)(c), 30 (application of successive treaties relating to the same subject-matter), and 41 VCLT.

International treaties now fulfil a very wide range of purposes, in particular providing at the international level many of the functions fulfilled by acts of parliament or other legislation at the municipal level. Treaties and binding decisions of international organizations are the vehicle whereby States can deliberately make rules or dispositions among themselves which are binding in international law. Contemporary international relations are characterized by the expansion of treaties, in particular in areas such as international environmental law, international economic law, international law of the sea, and international criminal law.

Moreover, there are several features of the treaty-making process which may put in doubt the appropriateness of treaties as the main tool for regulating international relations. The conclusion and entry into force of international treaties may be a lengthy procedure making it difficult to respond quickly to new challenges. Striving for the universality of a treaty may result in allowing reservations which in turn further weaken the effectiveness of the treaty. Considering the increase of international treaties and their growing impact on national law, their legitimacy has been called into doubt. One may wonder whether the cure—if a cure is needed at all—may rest in national rather than international law. The law of treaties itself addresses the problem of the possibly lengthy treaty-making procedure by providing for the provisional application of treaties under Art. 25 VCLT.

Since treaties only bind the participating parties, it is difficult to effectively regulate issues considered to be of global concern, such as climate change.

States have tried to overcome the inherent deficiencies of the treaty-making procedure or treaties themselves by devising ways to make treaties reflect more accurately the political, economic, and social realities, and to respond to scientific progress or other changes in general. Examples of such devices may be found, for example, in international environmental law, where States developed new mechanisms of expressing consent to be bound, thereby making those treaties more flexible. This, however, in turn may lead to questions regarding the legitimacy of norm-making power by organs created by multilateral environmental treaties. Framework agreements reflect the phenomenon that sometimes only an agreement on general principles was reached. Such framework agreements may
later be supplemented by additional protocols or implementation agreements negotiated sometimes in conferences reflecting a particular expertise.

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