PRINCIPLES OF PUBLIC INTERNATIONAL LAW

Seventh Edition

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THE LAW OF TREATIES

1. INTRODUCTION[1]

A great many international disputes are concerned with the validity and interpretation of international agreements, and the practical content of state relations is embodied in agreements. The great international organizations, including the United Nations, have their legal basis in multilateral agreements. Since it began its work the International Law Commission has concerned itself with the law of treaties, and in 1966 it adopted a set of 75 draft articles.[2]

These draft articles formed the basis for the Vienna Conference which in two sessions (1968 and 1969) completed work on the Vienna Convention on the Law of Treaties, consisting of 85 articles and an Annex. The Convention[3] entered into force on 27 January 1980 and not less than 105 states have become parties.[4]

[1] The principal items are: the Vienna Conv. on the Law of Treaties (see n. 3); the commentary of the International Law Commission on the Final Draft Articles, *Yrbk. ILC* (1966), ii. 172 at 187–274; Whiteman, xiv. 1–510; Rousseau, i. 61–305; Guggenheim, i. 113–273; McNair, *Law of Treaties* (1961); Harvard Research, 29 *AJ* (1935), Suppl.; O'Connell, i. 195–280; Sørensen, pp. 175–246; Jennings, 121 Hague *Recueil* (1967, II), 527–81; *Répertoire suisse*, i. 5–209; Elias, *The Modern Law of Treaties* (1974); Reuter, *Introduction au droit des traités* (2nd edn., 1985); id., *Introduction to the Law of Treaties* (1989). See further: Rousseau, *Principes généraux du droit international public*, i (1944); Basdevant, 15 Hague *Recueil* (1926, V), 539–642; Detter, *Essays on the Law of Treaties* (1967); Gotlieb, *Canadian Treaty-Making* (1968); various authors, 27 *Z.a.ö.R.u.V.* (1967), 408–561; ibid. 29 (1969), 1–70, 536–42, 654–710; Verzijl, *International Law in Historical Perspective*, vi (1973), 112–612; Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (1984); Thirlway, 62 *BY* (1991), 2–75; id., 63 *BY* (1992), 1–96; Oppenheim, ii. 1197–1333; Rosenne, *Developments in the Law of Treaties, 1945–1986* (1989); Aust, *Modern Treaty Law and Practice* (2000).

[2] The principal items are as follows: International Law Commission, Reports by Brierly, *Yrbk.* (1950), ii; (1951), ii; (1952), ii; Reports by Lauterpacht, *Yrbk.* (1953), ii; (1954), ii; Reports by Fitzmaurice, *Yrbk.* (1956), ii; (1957), ii; (1958), ii; (1960), ii; Reports by Waldock, *Yrbk.* (1962), ii; (1963), ii; (1964), ii; (1965), ii; (1966), ii; Draft articles adopted by the Commission, I, Conclusion, Entry into Force and Registration of Treaties, *Yrbk.* (1962), ii. 159; 57 *AJ* (1963), 190; *Yrbk.* (1965), ii. 159; 60 *AJ* (1966), 164; Draft Articles, II, Invalidity and Termination of Treaties, *Yrbk.* (1963), ii. 189; 58 *AJ* (1964), 241; Draft Articles, III, Application, Effects, Modification and Interpretation of Treaties, *Yrbk.* (1964), ii; 59 *AJ* (1965), 203, 434; Final Report and Draft, *Yrbk.* (1966), ii. 172; 61 *AJ* (1967), 263.

[3] Text: 63 *AJ* (1969), 875; 8 *ILM* (1969), 679; Brownlie, *Documents*, p. 270. For the preparatory materials see: items in n. 2; *United Nations Conference on the Law of Treaties, First Session, Official Records*, A/CONF. 39/11; *Second Session*, A/CONF.39/11; Add. 1; Rosenne, *The Law of Treaties* (1970). For comment see Reuter, *La Convention de Vienne sur le droit des traités* (1970); Elias, *The Modern Law of Treaties* (1974); Sinclair, *The Vienna Convention on the Law of Treaties*; (2nd edn., 1984); Kearney and Dalton, 64 *AJ* (1970), 495–561; Jennings, 121 Hague *Recueil* (1967, II), 527–81; Deleau, *Ann. français* (1969), 7–23; Nahlik, ibid. 24–53; Frankowska, 3 *Polish Yrbk.* (1970), 227–55.

[4] Art. 84.

The Convention is not as a whole declaratory of general international law: it does not express itself so to be (see the preamble). Various provisions clearly involve progressive development of the law; and the preamble affirms that questions not regulated by its provisions will continue to be governed by the rules of customary international law. Nonetheless, a good number of articles are essentially declaratory of existing law and certainly those provisions which are not constitute presumptive evidence of emergent rules of general international law.[5] The provisions of the Convention are normally regarded as a primary source: as, for example, in the oral proceedings before the International Court in the *Namibia* case. In its Advisory Opinion in that case the Court observed:[6] 'The rules laid down by the Vienna Convention ... concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject'.

The Convention was adopted by a very substantial majority at the Conference[7] and constitutes a comprehensive code of the main areas of the law of treaties. However, it does not deal with (*a*) treaties between states and organizations, or between two or more organizations;[8] (*b*) questions of state succession;[9] (*c*) the effect of war on treaties.[10] The Convention is not retroactive in effect.[11]

A provisional draft of the International Law Commission[12] defined a 'treaty' as:

> any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), concluded between two or more States or other subjects of international law and governed by international law.

The reference to 'other subjects' of the law was designed to provide for treaties concluded by international organizations, the Holy See, and other international entities such as insurgents.[13]

[5] Cf. *North Sea Continental Shelf Cases*, *supra*, p. 12.

[6] ICJ Reports (1971), 16 at 47. See also *Appeal relating to Jurisdiction of ICAO Council*, ICJ Reports (1972), 46 at 67; *Fisheries Jurisdiction Case*, ICJ Reports (1973), 3 at 18; *Case Concerning Sovereignty over Pulao Ligitan and Pulao Sipidan*, Judgment of 17 December 2002, para. 37; *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria*, Judgment of 10 October 2002, para. 263; *Iran–United States, Case No. A/18*; ILR 75, 176 at 187–8; *Lithgow*, ibid. 439 at 483–4; *Restrictions on the Death Penalty* (Adv. Op. of Inter-American Ct. of HR, 8 Sept. 1983), ILR 70, 449 at 465–71; *Asian Agricultural Products Ltd.* v. *Republic of Sri Lanka*, ILR 106, 416, 437–46; *Ethyl Corporation* v. *Government of Canada*, ILR 122, 250, 278–80; *Pope and Talbot* v. *Government of Canada*, ILR 22, 293 (Interim Award, 316, paras. 64–9).

[7] 79 votes in favour; 1 against; 19 abstentions.

[8] *Infra*, p. 679.

[9] *Infra*, p. 649.

[10] See *infra*, p. 620.

[11] See McDade, 35 *ICLQ* (1986), 499–511.

[12] *Yrbk. ILC* (1962), ii. 161.

[13] See ch. 3 on legal personality.

In the Vienna Convention, as in the Final Draft of the Commission, the provisions are confined to treaties between states (Art. 1).[14] Article 3 provides that the fact that the Convention is thus limited shall not affect the legal force of agreements between states and other subjects of international law or between such other subjects of international law or between such other subjects. Article 2(1)(a) defines a treaty 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[15] and whatever its particular designation'. The distinction between a transaction which is a definitive legal commitment between two states, and one which involves something less than that is difficult to draw but the form of the instrument, for example, a joint communiqué, is not decisive.[16] Article 2 stipulates that the agreements to which the Convention extends be 'governed by international law' and thus excludes the various commercial arrangements, such as purchase and lease, made between governments and operating only under one or more national laws.[17] The capacity of particular international organizations to make treaties depends on the constitution of the organization concerned.[18]

2. CONCLUSION OF TREATIES[19]

(a) Form[20]

The manner in which treaties are negotiated and brought into force is governed by the intention and consent of the parties. There are no substantive requirements of form, and thus, for example, an agreement may be recorded in an exchange of letters or the minutes of a conference.[21] In practice form is governed partly by usage, and thus form will vary according to whether the agreement is expressed to be between states, heads of states, governments (increasingly used), or particular ministers or departments.

[14] On the concept of a treaty see Widdows, 50 *BY* (1979), 117–49; Virally, in *Festschrift für Rudolf Bindschedler* (1980), 159–72; Thirlway, 62 *BY* (1991), 4–15; Malgosia Fitzmaurice, 73 *BY* (2002), 141–85.

[15] The conclusion of treaties in simplified form is increasingly common. Many treaties are made by an exchange of notes, the adoption of an agreed minute and so on. See: *Yrbk. ILC* (1966), ii. 188 (Commentary); Hamzeh, 43 *BY* (1968–9), 1779–89; Smets, *La Conclusion des accords en forme simplifée* (1969); Gotlieb, *Canadian Treaty-Making* (1968).

[16] See the *Aegean Sea Continental Shelf Case*, ICJ Reports (1978), 3 at 38–44; and the *Nicaragua* case (Merits), ibid. (1986), 14 at 130–2.

[17] See Mann, 33 *BY* (1957), 20–51; id., 35 *BY* (1959), 34–57; and cf. the *Diverted Cargoes* case, *RIAA* xii. 53 at 70. See also *British Practice* (1967), 147.

[18] On the capacity of members of federal states: *supra*, pp. 58–9, 74.

[19] The effect on the validity of treaties of non-compliance with internal law is considered in s. 5. On participation in multilateral treaties, see *infra*, p. 667.

[20] See generally Aust, 35 *ICLQ* (1986), 787–812. On 'gentleman's agreements' see E. Lauterpacht, *Festschrift für F. A. Mann* (1977), 381–98; Eisemann, *JDI* (1979), 326–48; Virally, *Annuaire de l'Inst.* 60 (1983), i. 166–374; ibid. 60, ii. 284 (Resol.); Thirlway, 63 *BY* (1991), 18–22.

[21] See *Case Concerning Maritime Delimitation and Territorial Questions (Qatar* v. *Bahrain)*, ICJ Reports, 1994, 112 at 120–2.

The Vienna Convention applies only to agreements 'in written form' but Article 3 stipulates that this limitation is without prejudice to the legal force of agreements 'not in written form'. Obviously substantial parts of the Convention are not relevant to oral agreements: the fact remains that important parts of the law, for example, relating to invalidity and termination, will apply to oral agreements.[22]

(b) Full powers and signature[23]

The era of absolute monarchs and slow communications produced a practice in which a sovereign's agent would be given a Full Power to negotiate and to bind his principal. In modern practice, subject to a different intention of the parties, a Full Power involves an authority to negotiate and to sign and seal a treaty. In the case of agreements between governments Full Powers, in the sense of the formal documents evidencing these and their reciprocal examinations by the negotiators, are often dispensed with.[24]

The successful outcome of negotiation is the adoption and authentication of the agreed text. Signature has, as one of its functions, that of authentication, but a text may be authenticated in other ways, for example by incorporating the text in the final act of a conference or by initialling. Apart from authentication, the legal effects of signature are as follows. Where the signature is subject to ratification, acceptance, or approval (see *infra*), signature does not establish consent to be bound. However, signature qualifies the signatory state to proceed to ratification, acceptance, or approval and creates an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty.[25] Where the treaty is not subject to ratification, acceptance, or approval, signature creates the same obligation of good faith and establishes consent to be bound. Signature does not create an obligation to ratify.[26] In recent times signature has not featured in the adoption of all important multilateral treaties: thus the text may be adopted or approved by the General Assembly of the United Nations by a resolution and submitted to member states for accession.[27]

(c) Ratification[28]

Ratification involves two distinct procedural acts: the first is the act of the appropriate organ of the state, which is the Crown in the United Kingdom, and may be called

[22] See Whiteman, xiv. 29–31; *Yrbk. ILC* (1966) ii. 190, Art. 3, commentary, para. 3.

[23] See Mervyn Jones, *Full Powers and Ratification* (1946); ILC draft, Art. 1(i)(d)(e), 4–7, 10–11; *Yrbk. ILC* (1962), ii. 164ff; Waldock, ibid. 38ff.; *Yrbk. ILC* (1966), ii. 189, 193–7; Whiteman, xiv. 35–45; Vienna Conv., Arts. 7–11.

[24] Other exceptions exist in modern practice. Thus heads of state, heads of government, and Foreign Ministers are not required to furnish evidence of their authority.

[25] See Vienna Conv. Art. 18; *Upper Silesia* case, PCIJ, Ser. A, no. 7, p. 30; McNair, *Law of Treaties*, pp. 199–205; Fauchille, *Traité*, i. pt. iii (1926), 320.

[26] *Yrbk. ILC* (1962), ii. 171. But see Lauterpacht, ibid. (1953), ii. 108–12; and Fitzmaurice, ibid. (1956), ii. 112–13, 121–2.

[27] See the Conv. on the Privileges and Immunities of the United Nations, *infra*, pp. 652–3.

[28] See Whiteman, xiv. 45–92; Mervyn Jones, *Full Powers*; Delhousse, *La Ratification des traités* (1935); Sette-Camara, *The Ratification of International Treaties* (1949); Fitzmaurice, 15 *BY* (1934), 113–37; id., 33 *BY* (1957), 255–69; Blix, 30 *BY* (1953), 352–80; Frankowska, 73 *RGDIP* (1969), 62–88.

ratification in the constitutional sense; the second is the international procedure which brings a treaty into force by a formal exchange or deposit of the instruments of ratification. Ratification in the latter sense is an important act involving consent to be bound. However, everything depends on the intention of the parties, where this is ascertainable, and modern practice contains many examples of less formal agreements not requiring ratification and intended to be binding by signature.[29] A problem which has provoked controversy concerns the small number of treaties which contain no express provision on the subject of ratification. The International Law Commission[30] at first considered that treaties in principle require ratification[31] and specified exceptional cases where the presumption was otherwise, for example if the treaty provides that it shall come into force upon signature. However, the Commission changed its view, partly by reason of the difficulty of applying the presumption to treaties in simplified form. Article 14 of the Vienna Convention regulates the matter by reference to the intention of the parties.

(d) Accession, acceptance, and approval[32]

'Accession', 'adherence', or 'adhesion' occurs when a state which did not sign a treaty, already signed by other states, formally accepts its provisions. Accession may occur before or after the treaty has entered into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. Accession may appear in a primary role as the only means of becoming a party to an instrument, as in the case of a convention approved by the General Assembly of the United Nations and proposed for accession by member states.[33] Recent practice has introduced the terms 'acceptance' and 'approval' to describe the substance of accession. Terminology is not fixed, however, and where a treaty is expressed to be open to signature 'subject to acceptance', this is equivalent to 'subject to ratification'.

(e) Expression of consent to be bound

Signature, ratification, accession, acceptance, and approval are not the only means by which consent to be bound may be expressed. Any other means may be used if so agreed, for example an exchange of instruments constituting a treaty.[34]

[29] See the *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria*, Judgment of 10 October 2002, para. 264.

[30] ILC draft, Arts. 1(1)(d), 12; *Yrbk. ILC* (1962), ii. 171; Waldock, ibid. 48–53. See the Final Draft, Arts. 2(1)(b), 10, 11 and 13; *Yrbk. ILC* (1966), ii. 197–8; and the Vienna Conv., Arts. 2(1)(b), 11, 14, 16.

[31] See McNair, *Law of Treaties*, p. 133; Detter, *Essays*, 15–17. Some members of the Commission were of opinion that no specific rule on the question existed. See also *British Practice* (1964), i. 81–2 and the *Ambatielos* case, ICJ Reports (1952), 43.

[32] ILC draft, Arts. 1(1)(d), 13–16. See the Final Draft, Arts. 2(1)(b), 11, 12, and 13; *Yrbk. ILC* (1966), ii. 197–201; Vienna Conv. Arts. 2(1)(b), 11, 14–16.

[33] As in the case of the Conv. on the Privileges and Immunities of the United Nations. See McNair, *Law of Treaties*, pp. 153–5.

[34] Vienna Conv., Arts. 11 and 13.

3. RESERVATIONS[35]

In the Vienna Convention, a reservation is defined as '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'. This definition begs the question of validity, which is determined on a contractual and not a unilateral basis. The formerly accepted rule for all kinds of treaty was that reservations were valid only if the treaty concerned permitted reservations and if all other parties accepted the reservation. On this basis a reservation constituted a counter-offer which required a new acceptance, failing which the state making the counter-offer would not become a party to the treaty. This view rests on a contractual conception of the absolute integrity of the treaty as adopted.[36]

In the period of the League of Nations (1920–46) the practice in regard to multilateral conventions showed a lack of consistency. The League Secretariat, and the later the Secretary-General of the United Nations, in his capacity as depositary of conventions concluded under the auspices of the League, followed the principle of absolute integrity. In contrast the members of the Pan-American Union, later the Organization of American States, adopted a flexible system which permitted a reserving state to become a party *vis-à-vis* non-objecting states. This system, dating from 1932, promotes universality at the expense of depth of obligation. Thus a state making sweeping reservations could become a party though bound only in regard to two or three non-objecting states and, even then, with large reservations.

Following the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide by the General Assembly of the United Nations in 1948, a

[35] ILC draft, Arts. 1(1)(f), 18–22; *Yrbk. ILC* (1962), ii. 175–82; Waldock, ibid. 60–8; Final Draft, Arts. 2(1)(d), 16–20; *Yrbk. ILC* (1966), ii. 189–90, 202–9; Vienna Conv., Arts. 19–23; Lauterpacht, *Yrbk. ILC* (1953), ii. 123–36; Fitzmaurice, 2 *ICLQ* (1953), 1–27; id., 33 *BY* (1957), 272–93; Holloway, *Les Réserves dans les traités internationaux* (1958); id., *Modern Trends* (1967), 473–542; McNair, *Law of Treaties*, ch. 4; Bishop, 103 Hague *Recueil* (1961), ii. 249–341; Anderson, 13 *ICLQ* (1964), 450–81; Whiteman, xiv. 137–93; Detter, *Essays*, pp. 47–70; Jennings, 121 Hague *Recueil* (1967, II), 534–41; Cassese, *Recueil d'études en hommage á Guggenheim* (1968), 266–304; Tomuschat, 27 *Z.a.ö.R.u.V.* (1967), 463–82; Kappeler, *Les Réserves dans les traités internationaux* (1958); Mendelson, 45 *BY* (1971), 137–71; Ruda, 146 Hague *Recueil* (1975, III), 95–218; Gaja, *Ital. Yrbk.* (1975), 52–68; id., *Essays in Honour of Roberto Ago*, i (1987), 307–30; 49 *BY* (1978), 378–80; Bowett, 48 *BY* (1976–7), 67–92; McRae, 49 *BY* (1978), 155–73; Imbert, *Les Réserves aux traités multilatéraux* (1979); Sinclair, *The Vienna Convention*, pp. 51–82; Gamble, 74 *AJ* (1980), 372–94; Horn, T.M.C. Asser Instituut, Swedish Institute, *Studies in International Law*, Vol. 5 (1988); Cameron and Horn, 33 *German Yrbk.* (1990), 62–129; Clark, 85 *AJ* (1991), 281–321; Redgwell, 64 *BY* (1993), 245–82; Sucharipa-Behrmann, 1 *Austrian Review of Int. and Europ. Law* (1996), 67–88; Greig, *Austral. Yrbk.*, 16 (1995), 21–172. See further Pellet, Second Report on Reservations to Treaties, UN Doc. A/CN. 4/477; Third Report, A/CN. 4/491; Add.1–6; Fourth Report, A/CN.4/499; Fifth Report, A/CN.4/508, Add.1–4; Sixth Report, A/CN.4/518, Add.1–3; Seventh Report, A/CN.4/526, Add.1–3; Eighth Report, A/CN.4/526, Add.1; Ninth Report, A/CN.4/544; Tenth Report, A/CN.4/558, Add.1–2; Eleventh Report, A/CN.4/574; Twelfth Report, A/CN.4/584. See also *Report of the International Law Commission, Fifty-ninth session*, G.A. Off. Recs., *Sixty-second session*, Suppl. No. 10 (A/62/10), 46–66.

[36] See *Reservations to Genocide Convention*, ICJ Reports (1951), 15 at 21, 24.

divergence of opinion arose on the admissibility of reservations to the Convention, which contained no provision on the subject. The International Court was asked for an advisory opinion, and in giving its opinion[37] stressed the divergence of practice and the special characteristics of the Convention, including the intention of the parties and the General Assembly that it should be universal in scope. The principal finding of the Court was that 'a State which has made ... 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 ...'. In 1951 the International Law Commission rejected the 'compatibility' criterion as too subjective and preferred a rule of unanimous consent. However, in 1952 the General Assembly requested the Secretary-General of the United Nations to conform his practice to the opinion of the Court in respect of the Genocide Convention; and, in respect of *future*[38] conventions concluded under the auspices of the United Nations of which he was depositary, to act as depositary without passing upon the legal effect of documents containing reservations and leaving it to each state to draw legal consequences when reservations were communicated to them. In its practice the Secretariat adopted the 'flexible' system for future conventions, and in 1959 the General Assembly reaffirmed its previous directive and extended it to cover *all* conventions concluded under the auspices of the United Nations, unless they contain contrary provisions. In 1962 the International Law Commission decided in favour of the 'compatibility' doctrine.[39] The Commission pointed out that the increase in the number of potential participants in multilateral treaties made the unanimity principle less practicable.

The Final Draft of the Commission was followed in most respects by the Vienna Convention. Article 19 of the Convention indicates the general liberty to formulate a reservation when signing, ratifying, accepting, approving or acceding to a treaty and then states three exceptions. The first two exceptions are reservations expressly prohibited and reservations not falling within provisions in a treaty permitting specified reservations and no others. The third class of impermissible reservations is cases falling outside the first mentioned classes in which the reservation is 'incompatible with the object and purpose of the treaty'.

Article 20 provides as follows for acceptance of and objection to reservations other than those expressly authorized by a treaty:[40]

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties

[37] Last note.

[38] Concluded after 12 Jan. 1952, when the resolution was adopted.

[39] Draft Art. 18(1)(d) and 20(2). The Commission rejected a 'collegiate' system which would require acceptance of the reservation by a given proportion of the other parties for the reserving state to become a party: cf. Anderson, 13 *ICLQ* (1964), 450–81. See also *British Practice* (1964), i. 83–4.

[40] Special provisions concerning the making of reservations may present difficult problems of interpretation: see the *Anglo-French Continental Shelf Arbitration*, ILR 54, 6 at 41–57 (paras. 34–74); and Bowett, 48 *BY* (1976–7), 67–92.

is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;[41]

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a re-servation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

The 'compatibility' test is the least objectionable solution but is by no means an ideal regime,[42] and many problems remain. The application of the criterion of compatibility with object and purpose is a matter of appreciation, but this is left to individual states. How is the test to apply to provisions for dispute settlement, or to specific issues in the Territorial Sea Convention of 1958,[43] such as the right of innocent passage? In practical terms the 'compatibility' test approximates to the Latin-American system and thus may not sufficiently maintain the balance between the integrity and the effectiveness of multilateral conventions in terms of a firm level of obligation.

The reason for the approximation to the Latin-American system[44] is that each state decides for itself whether reservations are incompatible and some states might adopt a liberal policy of accepting far-reaching reservations. The particular difficulty which international tribunals face in practice is the determination of the precise legal consequences of a decision that a particular reservation is incompatible. In the

[41] This provision reverses the presumption against entry into force contained in the proposals of the International Law Commission: see Zemanek, in *Essays in Honour of Manfred Lachs* (1984), 323–36.

[42] See Waldock, *Yrbk. ILC* (1962), ii. 65–6; *ILC*, 1966 Report, ibid. (1966), ii. 205–6; Sinclair, 19 *ICLQ* (1970), 53–60.

[43] *Supra*, pp. 173ff.

[44] For the Standards on Reservations adopted in 1973 by the OAS see *Digest of US Practice* (1973), 179–81. For the history: Ruda, 146 Hague *Recueil* (1975, II), 115–33.

Belilos[45] and *Loizidou*[46] cases the European Court of Human Rights treated the objectionable reservation as severable. The issue of severability in relation to human rights treaties is the subject of controversy.

In respect of the International Government on Civil and Political Rights, 1966, the United Nations Human Rights Committee has addressed the issue of reservations in this way:[47]

6. The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the First Optional Protocol is governed by international law. Article 19(3) of the Vienna Convention on the Law of Treaties provides relevant guidance. It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.

7. In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be.

[45] *European Court of Human Rights*, Series A, No. 132. See further Cameron and Horn, 33 *German Yrbk.* (1990), 69–129; Marks, 39 *ICLQ* (1990), 300–27; Chinkin and Others, *Human Rights as General Norms and a State's Right to Opt Out* (1997).

[46] Ibid., Series A, No. 310 (*Loizidou* v. *Turkey* (Preliminary Objections)).

[47] General Comment No. 24, 11 Nov. 1994; ILR 107, 65. The response of the U.K. Government was critical: see 66 *BY* (1995), 655–61. See also Hampson, Working Paper, E/CN.4/Sub.2/1999/28, 28 June 1999; Simma, *Liber Amicorum Professor Ignaz Seidl-Hohenveldern* (1998), 659–82; and Helfer, *Columbia LR*, 102 (2002), 1832–911.

4. ENTRY INTO FORCE, DEPOSIT, AND REGISTRATION[48]

The provisions of the treaty determine the manner in which and the date on which the treaty enters force. Where the treaty does not specify a date, there is a presumption that the treaty is intended to come into force as soon as all the negotiating states have consented to be bound by the treaty.[49]

After a treaty is concluded, the written instruments, which provide formal evidence of consent to be bound by ratification, accession, and so on, and also reservations and other declarations, are placed in the custody of a depositary, who may be one or more states, or an international organization. The depositary has functions of considerable importance relating to matters of form, including provision of information as to the time at which the treaty enters into force.[50] The United Nations Secretariat plays a significant role as depositary of multilateral treaties.

Article 102 of the Charter of the United Nations[51] provides as follows:

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

This provision is intended to discourage secret diplomacy and to promote the availability of texts of agreements. The *United Nations Treaty Series* includes agreements by non-members which are 'filed and recorded' with the Secretariat as well as those 'registered' by members. The Secretariat accepts agreements for registration without conferring any status on them, or the parties thereto, which they would not have otherwise. However, this is not the case where the regulations governing the article provides for *ex officio* registration. This involves initiatives by the Secretariat and extends to agreements to which the United Nations is a party, trusteeship agreements,

[48] ILC drafts, Arts. 23–5; *Yrbk. ILC* (1962), ii. 182–3; Waldock, ibid. 68–73; Final Draft, Arts. 21, 22, and 75; *Yrbk. ILC* (1966), ii. 209–10, 273–4; Vienna Conv., Arts. 24, 25, 80. On registration see Whiteman, xiv. 113–26; McNair, *Law of Treaties*, ch. 10; Brandon, 29 *BY* (1952), 186–204; id., 47 *AJ* (1953), 49–69; Boudet, 64 *RGDIP* (1960), 596–604; Broches and Boskey, 4 *Neths. Int. LR* (1957), 189–92, 277–300; Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), 328–36; Detter, *Essays*, pp. 28–46.

[49] Vienna Conv., Art. 24(2).

[50] Vienna Conv., Arts. 76, 77; Rosenne, 61 *AJ* (1967), 923–45; ibid. 64 (1970), 838–52; Whiteman, xiv. 68–92.

[51] A similar but not identical provision appeared in Art. 18 of the Covenant of the League of Nations: McNair, *Law of Treaties*, pp. 180–5.

and multilateral agreements of which the United Nations is a depositary. It is not yet clear in every respect how wide the phrase 'every international engagement' is, but it seems to have a very wide scope. Technical intergovernmental agreements, declarations accepting the optional clause in the Statute of the International Court, agreements between organizations and states, agreements between organizations, and unilateral engagements of an international character[52] are included.[53] Paragraph 2 is a sanction for the obligation in paragraph 1, and registration is not a condition precedent for the validity of instruments to which the article applies, although these may not be relied upon in proceedings before United Nations organs.[54] In relation to the similar provision in the Covenant of the League the view has been expressed that an agreement may be invoked, though not registered, if other appropriate means of publicity have been employed.[55]

5. INVALIDITY OF TREATIES[56]

(a) Provisions of internal law[57]

The extent to which constitutional limitations on the treaty-making power can be invoked on the international plane is a matter of controversy, and no single view can claim to be definitive. Three main views have received support from writers. According to the first, constitutional limitations determine validity on the international plane.[58] Criticism of this view emphasizes the insecurity in treaty-making that it would entail. The second view varies from the first in that only 'notorious' constitutional limitations are effective on the international plane. The third view is that a state is bound irrespective of internal limitations by consent given by an agent properly authorized according to international law. Some advocates of this view qualify the rule in cases where the other state is aware of the failure to comply

[52] McNair, *Law of Treaties*, p. 186, and see *infra*, p. 640.

[53] If an agreement is between international legal persons it is registrable even if it be governed by a particular municipal law; but cf. Higgins, *Development*, p. 329. It is not clear whether special agreements (*compromis*) referring disputes to the International Court are required to be registered.

[54] If the instrument is a part of the *jus cogens* (*supra*, p. 510), should non-registration have this effect?

[55] *South West Africa* cases (Prelim. Objections), ICJ Reports (1962), 319 at 359–60 (Sep. Op. of Judge Bustamante) and 420–2 (Sep. Op. of Judge Jessup). But cf. Joint Diss. Op. of Judges Spender and Fitzmaurice, ibid. 503.

[56] See also *infra*, p. 629, on conflict with prior treaties. See generally: Elias, 134 Hague *Recueil* (1971, III), 335–416.

[57] See *Yrbk. ILC* (1963), ii. 190–3; Waldock, ibid. 41–6; *ILC*, Final Report, *Yrbk. ILC* (1966), ii. 240–2; McNair, *Law of Treaties*, ch. 3; Blix, *Treaty-Making Power* (1960); Lauterpacht, *Yrbk. ILC* (1953), ii. 141–6; P. de Visscher, *De la conclusion des traités internationaux* (1943), 219–87; id., 136 Hague *Recueil* (1972, II), 94–8; Geck, 27 *Z.a.ö.R.u.V.* (1967), 429–50; *Digest of US Practice* (1974), 195–8; Meron, 49 *BY* (1978), 175–99.

[58] This was the position of the International Law Commission in 1951; *Yrbk.* (1951), ii. 73.

with internal law or where the irregularity is manifest. This position, which involves a presumption of competence and excepts manifest irregularity, was approved by the International Law Commission, in its draft Article 43, in 1966. The Commission stated that 'the decisions of international tribunals and State practice, if they are not conclusive, appear to support' this type of solution.[59]

At the Vienna Conference the draft provision was strengthened and the result appears in the Convention, Article 46:[60]

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

(b) Representative's lack of authority[61]

The Vienna Convention provides that if the authority of a representative to express the consent of his state to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe the restriction may not be invoked as a ground of invalidity unless the restriction was previously notified to the other negotiating states.

(c) Corruption of a state representative

The International Law Commission decided that corruption of representatives was not adequately dealt with as a case of fraud[62] and an appropriate provision appears in the Vienna Convention, Article 50.

(d) Error[63]

The Vienna Convention, Article 48,[64] contains two principal provisions which probably reproduce the existing law and are as follows:

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

[59] *Yrbk. ILC* (1966), ii. 240–2.

[60] See the *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria*, Judgment of 10 October 2002, para. 265.

[61] ILC draft, Art. 32; *Yrbk. ILC* (1963), ii. 193; Waldock, ibid. 46–7; Final Draft, Art. 44; *Yrbk. ILC* (1966), ii. 242; Vienna Conv., Art. 47.

[62] *Yrbk. ILC* (1966), ii. 245.

[63] See Lauterpacht, *Yrbk. ILC* (1953), ii. 153; Fitzmaurice, 2 *ILCQ* (1953), 25, 35–7; Waldock, *Yrbk. ILC* (1963), ii. 48–50; Oraison, *L'Erreur dans les traités* (1972); Thirlway, 63 *BY* (1992), 22–8.

[64] See also *Yrbk. ILC* (1966), ii. 243–4.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.[65]

(e) Fraud[66]

There are few helpful precedents on the effect of fraud. The Vienna Convention provides[67] that a state which has been induced to enter into a treaty by the fraud of another negotiating state may invoke the fraud as invalidating its consent to be bound by the treaty. Fraudulent misrepresentation of a material fact inducing an essential error is dealt with by the provision relating to error.

(f) Coercion of state representatives[68]

The Vienna Convention, Article 51, provides that 'the expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without legal effect'. The concept of coercion extends to blackmailing threats and threats against the representative's family.

(g) Coercion of a state[69]

The International Law Commission in its draft of 1963 considered that Article 2, paragraph 4, of the Charter of the United Nations, together with other developments, justified the conclusion that a treaty procured by the threat or use of force in violation of the Charter of the United Nations shall be void. Article 52 of the Vienna Convention so provides.[70] An amendment with the object of defining force to include any 'economic or political pressure' was withdrawn. A Declaration condemning such pressure appears in the Final Act of the Conference.

(h) Conflict with a peremptory norm of general international law (*jus cogens*)

See Chapter 23, section 5.

[65] See the *Temple* case, ICJ Reports (1962), 26. See also the Sep. Op. of Judge Fitzmaurice, ibid. p. 57.

[66] See Lauterpacht, ibid. (1953), ii. 152; Fitzmaurice, ibid. (1958), ii. 25, 37; Waldock, ibid. (1963), ii. 47–8; Oraison, 75 *RGDIP* (1971), 617–73.

[67] Art. 49. See also the Final Draft, *Yrbk. ILC* (1966). ii. 244–5.

[68] Fitzmaurice, ICJ Reports (1958), ii. 26, 38; Waldock, ibid. (1963), ii. 50; Final Draft, Art. 48; *Yrbk. ILC* (1966), ii. 245–6.

[69] ILC draft, Art. 36; *Yrbk. ILC* (1963), ii. 197; Waldock, ibid. 51–2; Lauterpacht, ICJ Reports (1953), ii. 147–52; McNair, *Law of Treaties*, pp. 206–11; Brownlie, *International Law and the Use of Force by States* (1963), 404–6; Fitzmaurice, *Yrbk ILC* (1957), ii. 32, 56–7; ibid. (1958), ii. 26, 38–9; Bothe, 27 *Z.a.ö.R.u.V.* (1967), 507–19; Jennings, 121 Hague *Recueil*, pp. 561–3; Ténékidès, *Ann. français* (1974), 79–102; De Jong, 15 *Neths. Yrbk.* (1984), 209–47. See also *Fisheries Jurisdiction* case (*United Kingdom* v. *Iceland*), ICJ Reports, (1973) 3 at 14; Briggs, 68 *AJ* (1974), 51 at 62–3; Thirlway, 63 *BY* (1992), 28–31.

[70] See also the Final Draft, Art. 49; *Yrbk. ILC* (1966), ii. 246–7; Whiteman, xiv. 268–70; Kearney and Dalton, 64 *AJ* (1970), 532–5.

6. WITHDRAWAL, TERMINATION AND SUSPENSION OF TREATIES[71]

(a) *Pacta sunt servanda*

The Vienna Convention prescribes a certain presumption as to the validity and con-tinuance in force of a treaty,[72] and such a presumption may be based upon *pacta sunt servanda* as a general principle of international law: a treaty in force is binding upon the parties and must be performed by them in good faith.[73]

(b) State succession[74]

Treaties may be affected when one state succeeds wholly or in part to the legal personality and territory of another. The conditions under which the treaties of the latter survive depend on many factors, including the precise form and origin of the 'succession' and the type of treaty concerned. Changes of this kind may of course terminate treaties apart from categories of state succession (section (*h*), *infra*).

(c) War and armed conflict[75]

Hostile relations do not automatically terminate treaties between the parties to a conflict. Many treaties, including the Charter of the United Nations, are intended to be no less binding in case of war, and multipartite law-making agreements such as the Geneva Conventions of 1949 survive war or armed conflict.[76] However, in state practice many types of treaty are regarded as at least suspended in time of war, and war conditions may lead to termination of treaties on grounds of impossibility or fundamental change of circumstances. In many respects the law on the subject is uncertain. Thus, it is not yet clear to what extent the illegality of the use or threat of force has had effects on the right (where it may be said to exist) to regard a treaty as suspended or

[71] See generally *Annuaire de l'Institut*, 49, i (1961); 52, i. ii (1967); Fitzmaurice, *Yrbk. ILC* (1957), ii. 16–70; McNair, *Law of Treaties*, chs. 30–35; Tobin, *Termination of Multipartite Treaties* (1933); Detter, *Essays*, pp. 83–99; Whiteman, xiv. 410–510; Capotorti, 134 Hague *Recueil* (1971, III), 419–587; Haraszti, *Some Fundamental Problems of the Law of Treaties* (1973), 229–425; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 59–85; Thirlway, 63 *BY* (1992), 63–96; Oppenheim, ii. 1296–1311.

[72] Art. 42. See also ILC draft, Art. 30; *Yrbk. ILC* (1963), ii. 189; Final Draft, Art. 39; ibid. (1966), ii. 236–7.

[73] See the Vienna Conv. Art. 26; the ILC Final Draft, Art. 23; *Yrbk. ILC* (1966), ii. 210–11; and McNair, *Law of Treaties*, ch. 30.

[74] See ch. 29, pp. 633–7. In its work on the law of treaties the International Law Commission put this question aside: Final Draft, Art. 69; *Yrbk.* (1966), ii. 267; and see the Vienna Conv., Art. 73.

[75] See McNair, *Law of Treaties*, ch. 43; Briggs, pp. 934–46; Scelle, 77 *JDI* (1950), 26–84; La Pradelle, 2 *ILQ* (1948–9), 555–76; Edwards, 44 *Grot. Soc.* (1958), 91–105; Whiteman, xiv. 490–510; Broms, *Annuaire de l'Inst.* 59 (1981), i. 201–84; ibid. ii. 175–244 (debate); Broms, ibid. 61 (1985), i. 1–27; ibid. 61, ii. 199–255 (debate); 278 (Resol.). The question was put aside by the International Law Commission: Final Draft, Art. 69; *Yrbk.* (1966), ii. 267; and see the Vienna Conv., Art. 73.

[76] See *Masinimport* v. *Scottish Mechanical Light Industries*, ILR 74, 559 at 564 (Scotland, Court of Session).

terminated.[77] The International Law Commission decided to include the topic 'effects of armed conflicts on treaties' on its agenda in 2004 and in the course of 2006 and 2007 the first three reports of the Special Rapporteur (the present writer) had been examined.[78]

(d) Operation of the provisions of a treaty

A treaty may of course specify the conditions of its termination, and a bilateral treaty may provide for denunciation by the parties.[79] Where a treaty contains no provisions regarding its termination the existence of a right of denunciation depends on the intention of the parties, which can be inferred from the terms of the treaty and its subject-matter, but, according to the Vienna Convention, the presumption is that the treaty is not subject to denunciation or withdrawal.[80] At least in certain circumstances denunciation is conditional upon a reasonable period of notice. Some important law-making treaties, including the Conventions on the Law of the Sea of 1958, contain no denunciation clause. Treaties of peace are presumably not open to unilateral denunciation.

(e) Termination by agreement

Termination or withdrawal may take place by consent of all the parties.[81] Such consent may be implied. In particular, a treaty may be considered as terminated if all the parties conclude a later treaty which is intended to supplant the earlier treaty or if the later treaty is incompatible with its provisions.[82] The topic of 'desuetude', which is probably not a term of art, is essentially concerned with discontinuance of use of a treaty and its implied termination by consent.[83] However, it could extend to the

[77] ILC draft Pt. II, commentary; *Yrbk. ILC* (1963), ii. 189, para. 14.

[78] See the Report of the Commission for 2006 (G.A. Off. Recs., Sixty-first session, Suppl. No. 10 (A/61/10)), 382–93; and the Report of the Commission for 2007, G.A. Off Recs., Sixty-second session, Suppl. No. 10 (A/62/10)), 154–77. See also Bannelier, *Mélanges Salmon* (2007), 125–59.

[79] Vienna Conv., Art. 54; ILC Final Draft, Art. 51; *Yrbk. ILC* (1966), ii. 249.

[80] Vienna Conv., Art. 56; ILC draft, Art. 39; *Yrbk.* ILC draft, Art. 39; *Yrbk. ILC* (1963), ii. 200–1; Waldock, ibid, 64–70; Fitzmaurice, ibid. (1957), ii. 22; McNair, *Law of Treaties*, pp. 502–5, 511–13; ILC, Final Draft, Art. 53; *Yrbk.* (1966), ii. 250–1; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 70–1; Widdows, 53 *BY* (1982), 83–114; Sinclair, *The Vienna Convention*, pp. 186–8; Plender, 57 *BY* (1986), 143–53. See also the Adv. op. on the Interpretation of the Agreement of 25 Mar. 1951 between the WHO and Egypt, ICJ Reports (1980), 73 at 94–6; 128–9 (Mosler, Sep. Op.); 159–62 (Ago, Sep. Op.); 176–7 (El-Erian, Sep. Op.); 184–9 (Sette-Camara); and the *Nicaragua* case (Jurisdiction), ICJ Reports (1984), 392 at 419–20 (para. 63).

[81] Vienna Conv., Art. 54; ILC draft Art. 40, *Yrbk.* (1963), ii. 203–4; ILC Final Draft, Art. 54, *Yrbk.* (1966), ii. 251–2. See also Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (1994).

[82] Vienna Conv., Art. 59; ILC draft, Art. 41, *Yrbk.* (1963), ii. 203–4; ILC Final Draft, Art. 56; *Yrbk.* (1966), ii. 252–3; Plender, 57 *BY* (1986), 153–7. See also the Sep. Op. of Judge Anzilotti, *Electricity Company of Sofia* case, *PCIJ*, Ser. A/B, no. 77, p. 92. See also *infra*, p. 600.

[83] See ILC Final Draft, Art. 39, Commentary, para. 5; *Yrbk.* (1966), ii. 237; Fitzmaurice, *Yrbk. ILC* (1957), ii. 28, 47–8, 52; McNair, *Law of Treaties*, pp. 516–18; Yuille, *Shortridge Arbitration*, Lapradelle and Politis, ii. 105; *Nuclear Tests* case (Australia v. France), ICJ Reports (1974) 253 at 337–8 (Joint Diss. Op.), 381 (De Castro, Diss.) 404, 415–16 (Barwick, Diss.); 55 *BY* (1984), 517 (UK); Sinclair, *The Vienna Convention*,

distinct situation of a unilateral renunciation of rights under a treaty. Moreover, irrespective of the agreement of the parties, an ancient treaty may become meaningless and incapable of practical application.[84]

(f) Material breach[85]

It is widely recognized that material breach by one party entitles the other party or parties to a treaty to invoke the breach as the ground of termination or suspension. This option by the wronged party is accepted as a sanction for securing the observance of treaties. However, considerable uncertainty has surrounded the precise circumstances in which such right of unilateral abrogation may be exercised, particularly in respect of multilateral treaties. Article 60 of the Vienna Convention[86] deals with the matter with as much precision as can be reasonably expected:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a multilateral treaty by one of the parties entitles:
   (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
      (i) in the relations between themselves and the defaulting State, or
      (ii) as between all the parties.
   (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
   (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
3. A material breach of a treaty, for the purposes of this article, consists in:[87]
   (a) a repudiation of the treaty not sanctioned by the present Convention; or
   (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

pp. 163–4; Plender, 57 *BY* (1986), 138–45; Kontou, op. cit. *supra*, 24–31; Thirlway, 63 *BY* (1992), 94–6. See also *Widjatmiko* v. *NV Geobroeders Zomer*, ILR 70, 439.

[84] See Parry, in Sørensen, p. 235.

[85] McNair, *Law of Treaties*, pp. 553–71; Sinha, *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party* (1966); Detter, *Essays*, pp. 89–93; Fitzmaurice, *Yrbk. ILC* (1957), ii. 31, 54–5; *Tacna–Arica Arbitration*, *RIAA*. ii. 929, 943–4; *Ann. Digest* (1925–6), no. 269; Whiteman, xiv. 468–78; Simma, *Öst. Z. für öff. R.* 20 (1970), 5–83; Briggs, 68 *AJ* (1974), 51–68; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 79–85; Sinclair, *The Vienna Convention* (2nd edn., 1984), pp. 188–90; Plender, 57 *BY* (1986), 157–66.

[86] See also ILC draft, Art. 42, *Yrbk. ILC* (1963), ii. 204; Waldock, ibid. 72–7; Final Draft, Art. 57; ibid. (1966), ii. 253–5.

[87] This definition was applied by the International Court in the *Namibia* Opinion, ICJ Reports (1971), 46–7, in respect of South African violations of the Mandate for South West Africa (Namibia) and the consequent termination of the Mandate by the UN General Assembly.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.
5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

A State may by its own conduct prejudice its right to terminate a treaty on the ground of material breach.[88]

(g) Supervening impossibility of performance[89]

The Vienna Convention provides[90] that a party 'may invoke the impossibility of performing a treaty as a ground for terminating it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty'. Situations envisaged include the submergence of an island, the drying up of a river, or destruction of a railway, by an earthquake or other disaster. The effect of impossibility is not automatic, and a party must invoke the ground for termination. Impossibility of performance may not be invoked by a party to the relevant treaty when it results from that party's own breach of an obligation flowing from the treaty.[91]

(h) Fundamental change of circumstances[92]

The principles have been expressed in Article 62 of the Vienna Convention as follows:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
   (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
   (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

[88] See the *Gabčikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, paras. 105–10.

[89] See generally McNair, *Law of Treaties*, pp. 685–8; Fitzmaurice, *Yrbk. ILC* (1957), ii. 50–1; Sinclair, *The Vienna Convention*, pp. 190–2.

[90] Art. 61(1); ILC draft, Art. 43, *Yrbk. ILC* (1963), ii. 206; Waldock, ibid. 77–9; Final Draft, Art. 58, ibid. (1966), ii. 255–6. Another example of impossibility arises from the total extinction of one of the parties to a bilateral treaty, apart from any rule of state succession which might allow devolution: see Waldock, ibid. (1963), ii. 77–9. and ibid., commentary at pp. 206–7.

[91] See the *Gabiikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, paras. 102–3.

[92] ILC draft, Art. 44, *Yrbk. ILC* (1963), ii. 207; Waldock, ibid. 79–85; Final Draft, Art. 59, ibid. (1966), ii. 256–60; Fitzmaurice, ibid. (1957), ii. 56–65; McNair, *Law of Treaties*, pp. 681–91; Rousseau, *Principles généraux*, i. 580–615; Chesney Hill, *The Doctrine of 'Rebus sic Stantibus'* (1934); Harvard Research, 29 *AJ* (1935), Suppl., pp. 1096–126; van Bogaert, 70 *RGDIP* (1966), 49–74; Whiteman, xiv. 478–90; Lissitzyn, 61 *AJ* (1967), 895–922; Poch de Caviedes, 118 Hague *Recueil* (1966), ii. 109–204; Schwelb, 29 *Z.a.ö.R.u.V.* (1969), 39–70; Note, 76 *Yale LJ* (1967), 1669–87; Pastor Ridruejo, 25 *Ann. suisse* (1968), 81–98; Verzijl, *Festschrift für Walter Schätzel*, pp. 515–29; Rousseau, i. 224–30; Haraszti, *Some Fundamental Problems of the Law of Treaties* (1973), 327–420; id.; 146 Hague *Recueil* (1975, III), 1–94; Toth, *Juridical Review* (Edinburgh) (1974), 56–82, 147–78, 263–81; Jasudowicz, 8 *Polish Yrbk.* (1976), 155–81; *Répertoire suisse*, i. 178–86; Jiménez de Aréchaga, 159 Hague *Recueil* (1978, I), 71–9; Sinclair, *The Vienna Convention*, pp. 192–6; Cahier, in *Essays in Honour of Roberto Ago*, i. (1987), 163–86; Thirlway, 63 *BY* (1992), 75–82.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

An example of a fundamental change would be the case where a party to a military and political alliance, involving exchange of military and intelligence information, has a change of government incompatible with the basis of alliance. The majority of modern writers accept the doctrine of *rebus sic stantibus* which is reflected in this provision. The doctrine involves the implication of a term that the obligations of an agreement would end if there has been a change of circumstances. As in municipal systems, so in international law it is recognized that changes frustrating the object of an agreement and apart from actual impossibility may justify its termination. Some jurists dislike the doctrine, regarding it as a primary source of insecurity of obligations, more especially in the absence of a system of compulsory jurisdiction. The Permanent Court in the *Free Zones* case[93] assumed that the principle existed while reserving its position on its extent and the precise mode of its application. State practice and decisions of municipal courts[94] support the principle, for which three juridical bases have been proposed. According to one theory the principle rests on a supposed implied term of the treaty, a basis which involves a fiction and, where it does not, leaves the matter as one of interpretation. A second view is to import a 'clausula' *rebus sic stantibus* into a treaty by operation of law, the clause operating automatically. The third view, which represents the modern law, is that the principle is an objective rule of law, applying when certain events exist, yet not terminating the treaty automatically, since one of the parties must invoke it. The International Law Commission and the Convention exclude treaties fixing boundaries from the operation of the principle in order to avoid an obvious source of threats to the peace.

In the *Fisheries Jurisdiction* case (*United Kingdom* v. *Iceland*)[95] the International Court accepted Article 62 of the Vienna Convention as a statement of the customary law but decided that the dangers to Icelandic interests resulting from new fishing techniques 'cannot constitute a fundamental change with respect to the lapse or subsistence' of the jurisdictional clause in a bilateral agreement. In the *Hungary/Slovakia* case the Court rejected the Hungarian argument in these terms:[96]

> Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law ...
>
> The Court recalls that, in the *Fisheries Jurisdiction* case (*I.C.J. Reports 1973*, p. 63, para. 36), it stated that,
>
> Article 62 of the Vienna Convention on the Law of Treaties, ... may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.
>
> The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.
>
> The Court does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.
>
> The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

[93] (1932), *PCIJ*, Ser. A/B, no. 46, pp. 156–8; *Ann. Digest* (1931–2), 362 at 364. The Court observed that the facts did not justify the applications of the doctrine, which had been invoked by France.

[94] e.g. *Bremen* v. *Prussia*, *Ann. Digest* 3 (1925–6), no. 266; *In re Lepeschkin*, ibid. 2 (1923–4), no. 189; *Sransky* v. *Zivnostenska Bank*, ILR 22 (1955), 424–7.

[95] ICJ Reports (1973), 3 at 20–1. See also ibid, 49 (*Fed. Rep. of Germany* v. *Iceland*); and Briggs, 68 *AJ* (1974), 51–68.

[96] ICJ Reports (1997), 7 at 64–5, para. 104.

(i) New peremptory norm

A treaty becomes void if it conflicts with a peremptory norm of general international law (*jus cogens*) established after the treaty comes into force.[97] This does not have retroactive effects on the validity of a treaty.

7. INVALIDITY, TERMINATION, AND SUSPENSION: GENERAL RULES[98]

The application of the regime of the Vienna Convention concerning the invalidity, termination, and suspension of the operation of treaties is governed by certain general provisions. The validity and continuance in force of a treaty and of consent to be bound is presumed (Art. 42).[99] Certain grounds of invalidity must be invoked by a party[100] and so the treaties concerned are not void but *voidable*. These grounds are: incompetence under internal law, restrictions on authority of representative, error, fraud, and corruption of a representative. The same is true of certain grounds of termination, namely, material breach, impossibility, and fundamental change of circumstances. On the other hand a treaty is *void* in case of coercion of a state (invalidity), and conflict with an existing or emergent peremptory norm (*jus cogens*) (invalidity or termination). Consent to be bound by a treaty procured by coercion of the representative of a state 'shall be without any legal effect' (Art. 51, invalidity). The rules governing separability of treaty provisions (Art. 44), that is, the severance of particular clauses affected by grounds for invalidating or terminating a treaty, do not apply to the cases of coercion of a representative, coercion of a state, or conflict with an *existing* peremptory norm (*jus cogens*). Provisions in conflict with a *new* peremptory norm may be severable, however.[101]

8. APPLICATION AND EFFECTS OF TREATIES[102]

(a) Justification for non-performance or suspension of performance

The grounds for termination have been considered in section 6, and the requirements of essential validity in section 5. However, the content of those categories does not exhaust the matters relevant to justification for non-performance of

[97] Vienna Conv., Art. 64; ILC draft, Art. 45; *Yrbk. ILC* (1963), ii. 211; Waldock, ibid. 77, 79 (para. 8); Final Draft, Art. 61; ibid. (1966), ii. 261; Fitzmaurice, ibid. (1957), ii. 29–30, 51. See also *supra*, p. 584. Generally on *jus cogens* see ch. 23, s. 5.

[98] See further the Vienna Conv., Arts. 69–72 and 75; and Cahier, 76 *RGDIP* (1972), 672–89.

[99] See also Art. 26 and *supra*.

[100] On the procedure see Arts. 65–8. See further Briggs, 61 *AJ* (1967), 976–89; Thirlway, 63 *BY* (1992), 85–94.

[101] See *Yrbk. ILC* (1966), ii. 238–9. 261. For comment on this distinction see Sinclair, 19 *ILCQ* (1970), 67–8.

[102] Vienna Conv., Arts. 28–30, 34–9; ILC draft, Arts. 55–64; 59 *AJ* (1965), 210ff.; Final Draft, Arts. 24–6, 30–4.

obligations, an issue which can arise irrespective of validity or termination of the *source* of obligation, the treaty itself. The topic of justification belongs to the rubric of state responsibility (Chapter 21, section 13). Clearly a state may plead necessity, or *force majeure*, for example, the effects of natural catastrophe or foreign invasion.[103] In the same connection legitimate military self-defence in case of armed conflict and civil strife provides a more particular justification.[104] Non-performance by way of legitimate reprisals raises highly controversial issues of the scope of reprisals in the modern law.[105] The Vienna Convention does not prejudge any question of state responsibility (Art. 73).

(b) Obligations and rights for third states[106]

The maxim *pacta tertiis nec nocent nec prosunt* expresses the fundamental principle that a treaty applies only between the parties to it. The final draft of the International Law Commission and the Vienna Convention refer to this as the 'general rule', and it is a corollary of the principle of consent and of the sovereignty and independence of states. Article 34 of the Convention provides that 'a treaty does not create either obligations or rights for a third State without its consent'.

The existence and extent of exceptions to the general rule have been matters of acute controversy. The Commission was unanimous in the view that a treaty cannot by its own force create obligations for non-parties. The Commission did not accept the view that treaties creating 'objective regimes', as, for example, the demilitarization of a territory by treaty or a legal regime for a major waterway, had a specific place in the existing law.[107] Article 35 of the Vienna Convention provides that 'an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing'.

However, two apparent exceptions to the principle in respect of obligations exist. Thus a rule in a treaty may become binding on non-parties if it becomes a part of international custom.[108] The Hague Convention concerning rules of land warfare and, perhaps, certain treaties governing international waterways fall within this category. Further, a treaty may provide for lawful sanctions for violations of the law which are

[103] See UN Secretariat Study, ST/LEG/13, 27 June 1977.

[104] See Fitzmaurice, *Yrbk. ILC* (1959), ii. 44–5, 64–6.

[105] Fitzmaurice, ibid. 45–6, 66–70; McNair, *Law of Treaties*, p. 573; Schwarzenberger, *International Law*, i. 537. Cf. Art. 2(3) of the UN Charter.

[106] Vienna Conv. Arts. 34–8; ILC draft, Arts. 58–62; 59 *AJ* (1965), 217–27; Final Draft, Arts. 30–4; *Yrbk. ILC* (1960), ii. 69–107; Jiménez de Aréchaga, 50 *AJ* (1956), 338–57; McNair, *Law of Treaties*, pp. 309–21; Lauterpacht, *The Development of International Law of the International Court* (1958), 306–13; Guggenheim (2nd edn.), i. 197–204; Lachs, 92 Hague *Recueil* (1957, II), 313–19; Detter, *Essays*, 100–18; Whiteman, xiv. 331–53; Jennings, 20 *ICLQ* (1971), 433–50; Rousseau, i. 182–93; Cahier, 143 Hague *Recueil* (1974, III), 589–736; Rozakis, 35 *Z.a.ö.R.u.V.* (1975), 1–40; *Répertoire suisse*, i. 139–48; Napoletano, *Ital. Yrbk.* (1977), 75–91; Sinclair, *The Vienna Convention* (2nd edn., 1984), pp. 98–106; Thirlway, 60 *BY* (1989), 63–71; Chinkin, *Third Parties in International Law* (1993), 25–114; Oppenheim, ii. 1260–6.

[107] See McNair, *Law of Treaties*, p. 310, and see further *supra*, pp. 276, 377.

[108] Vienna Conv., Art. 38; ILC Final Draft, Art. 34; *Yrbk. ILC* (1966), ii. 230.

to be imposed on an aggressor state.[109] The Vienna Convention contains a reservation in regard to any obligation in relation to a treaty which arises for an aggressor state 'in consequence of measures taken in conformity with the Charter of the United Nations with reference to the aggression' (Art. 75). The precise status of Article 2, paragraph 6, of the United Nations Charter is a matter of some interest. Kelsen,[110] among others, holds the view that the provision creates duties, and liabilities to sanctions under the enforcement provisions of the Charter, for non-members. Assuming that this was the intention of the draftsmen, the provision can only be reconciled with general principles by reference to the status of the principles in Article 2 as general or customary international law.

More controversial is the conferment of rights on third parties, the *stipulation pour autrui*. Not infrequently treaties make provisions in favour of specified third states or for other states generally, as in the case, it would seem, of treaties concerning certain of the major international waterways, including, on one view, the Panama Canal.[111] The problem is to discover when, if at all, the right conferred becomes perfect and enforceable by the third state. The rule is that the third state only benefits in this sense if it expressly or implicitly assents to the creation of the right, a proposition accepted by the leading authorities.[112] Another view, supported by some members of the International Law Commission, was that the right which it was intended to create in favour of the third state was not conditional upon any specific act of acceptance by the latter.[113] Some authority for this view exists in the Judgment in the *Free Zones* case.[114] In that case the rights contended for by Switzerland, viz., the benefit of a free customs zone in French territory under multipartite treaties to which France was a party, but Switzerland was not, rested in fact on agreements of 1815 and 1816 to which Switzerland was a party.[115] However, the statement by the Court appears to accept[116] the principle that the creation of rights for third states is a matter only of the intention of the grantor states.

In its Final Report the Commission took the view that the two opposing views, referred to above, did not differ substantially in their practical effects. Article 36 of the Vienna Convention creates a presumption as to the existence of the assent of the third state:

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States

[109] *Yrbk. ILC* (1966), ii. 227, Art. 31, commentary, para. 3; ibid., Art. 70, p. 268.

[110] *The Law of the United Nations* (1951), 106–10. *Contra*, Bindschedler, 108 Hague *Recueil* (1963, I), 403–7. Cf. McNair, *Law of Treaties*, pp. 216–18.

[111] *Supra*, pp. 264–5.

[112] Rousseau and McNair *ut supra* n. 97. See the Final Draft, 1966, Art. 32.

[113] See Lauterpacht, Fitzmaurice, Jiménez de Aréchaga, *ut supra*, n. 105.

[114] (1932), PCIJ, Ser. A/B, no. 46, pp. 147–8. See also the Committee of Jurists on the Aaland Islands question; 29 *AJ* (1935), Suppl., Pt. III, pp. 927–8; and *Jews Deported from Hungary* case, ILR 44, 301 at 314–15. The point was not really in issue in the *River Oder Commission* case, PCIJ, Ser. A, no. 23, 19–22.

[115] See McNair, *Law of Treaties*, pp. 311–12.

[116] See the comment by Cahier, 143 Hague *Recueil* (1974, III), 629–30, who refers to the ambiguity in the reference by the Ct. to acceptance of the right 'as such' by the third state.

to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

The third state may, of course, disclaim any already inhering right expressly or tacitly through failure to exercise the right. The right of a third state may not be revoked or modified by the parties if it is established that it was intended that this could only occur with the consent of the third state: Article 37(2).

(c) Treaties having incompatible provisions[117]

The relation of treaties between the same parties and with overlapping provisions is primarily a matter of interpretation, aided by presumptions. Thus it is to be presumed that a later treaty prevails over an earlier treaty concerning the same subject-matter. A treaty may provide expressly that it is to prevail over subsequent incompatible treaties, as in the case of Article 103 of the Charter of the United Nations. Further, it is clear that a particular treaty may override others if it represents a norm of *jus cogens*.[118]

9. AMENDMENT AND MODIFICATION OF TREATIES[119]

The amendment[120] of treaties depends on the consent of the parties, and the issue is primarily one of politics. However, the lawyer may concern himself with procedures for amendment, as a facet of the large problem of peaceful change in international relations. Many treaties, including the Charter of the United Nations (Arts. 108 and 109), provide for the procedure of amendment. In their rules and constituent instruments, international organizations create amendment procedures which in some cases show considerable sophistication. In the League Covenant (Art. 19) and, less explicitly, in the Charter of the United Nations (Art. 14) provision for peaceful change was made as a part of a scheme to avoid threats to the peace.

[117] Vienna Conv., Arts. 30, 59; ILC draft, Art. 63; 59 *AJ* (1965), 227–40; Final Draft, Arts. 26, 56; *Yrbk. ILC* (1966), ii. 214–17, 252–3; Lauterpacht, ibid. (1953), ii. 156; ibid. (1954), ii. 133; Fitzmaurice, ibid. (1958), ii. 27, 41–5; Waldock, ibid. (1963), ii. 53–61; McNair, *Law of Treaties*, pp. 215–24; Rousseau, *Principes généraux*, i. 765–814; Jenks, 30 *BY* (1953), 401–53; Cahier, 76 *RGDIP* (1972), 670–2; Sciso, 38 *Öst. Z. für öff. R.* (1987), 161–79.

[118] *Supra*, p. 510.

[119] Vienna Conv., Arts. 39–41; ILC draft, Arts. 65–8; 59 *AJ* (1965), 434–45; Final Draft, Arts. 35–8; *Yrbk. ILC* (1966), ii. 231–6; *Annuaire de l'Inst.* 49 (1961), i. 229–91; 52 (1967), i. 5–401; Handbook of Final Clauses, ST/LEG/6, pp. 130–52; Hoyt, *The Unanimity Rule in the Revision of Treaties* (1959); Blix, 5 *ICLQ* (1956), 447–65, 581–96; Whiteman, xiv. 436–42; Detter, *Essays*, pp. 71–82; Sinclair, *The Vienna Convention*, pp. 106–9.

[120] There is no distinction of quality between 'amendment' of particular provisions and 'revision' of the treaty as a whole.

Apart from amendment, a treaty may undergo 'modification' when some of the parties conclude an '*inter se* agreement' altering the application of the treaty between themselves alone.[121]

Modification may also result from the conclusion of a subsequent treaty or the emergence of a new peremptory norm of general international law.[122] The Final Draft of the International Law Commission[123] provided that 'a treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions'. This article was rejected at the Vienna Conference on the ground that such a rule would create instability.[124] This result is unsatisfactory. In the first place Article 39 of the Convention provides that a treaty may be amended by agreement without requiring any formality for the expression of agreement. Secondly, a consistent practice may provide cogent evidence of *common* consent to a change. Thirdly, modification of this type occurs in practice: witness the inclusion in practice of fishing zones as a form of contiguous zone for the purposes of the Territorial Sea Convention.[125] The process of interpretation through subsequent practice (section 10(*f*)) is legally distinct from modification, although the distinction is often rather fine.

10. INTERPRETATION OF TREATIES[126]

(a) Competence to interpret

Obviously the parties have competence to interpret a treaty, but this is subject to the operation of other rules of the law. The treaty itself may confer competence on an *ad hoc* tribunal or the International Court. The Charter of the United Nations is interpreted by its organs, which may seek advisory opinions from the Court of the Organization.[127]

[121] Vienna Conv., Art. 41.

[122] See pp. 510–12.

[123] Art. 38, *Yrbk. ILC* (1966), ii. 236.

[124] *Official Records, First Session*, pp. 207–15. See also Kearney and Dalton, 64 *AJ* (1970), 525.

[125] See also US and France, *Air Transport Services Agreement Arbitration*, 1963, ILR, 38, 182; *RIAA* xvi. 5; Award, P.IV, s. 5.

[126] Rousseau, *Droit international public*, i. 241–305; Guggenheim (2nd edn.), i. 245–68; Whiteman, xiv. 353–410; McNair, *Law of Treaties*, chs. 20–29; Fitzmaurice, 28 *BY* (1951), 1–28; id., 33 *BY* (1957), 203–38; Lauterpacht, *Development*, esp. pp. 116–41; id., 26 *BY* (1949), 48–85; *Annuaire de l'Inst.* 43 (1950), i. 366–460; 44 (1952), ii. 359–401; 46 (1956), 317–49; de Visscher, *Problèmes d'interprétation judiciaire en droit international public* (1963); Sinclair, 12 *ICLQ* (1963), 508–51; Degan, *L'Interprétation des accords en droit international* (1963); Berlia, 114 Hague *Recueil* (1965, I), 287–332; Jacobs, 18 *ICLQ* (1969), 318–46; Rosenne, 5 *Columbia Journ. Trans. Law* (1966), 205–30; Yasseen, 151 Hague *Recueil* (1976, III), 1–114; Haraszti, *Some Fundamental Problems of the Law of Treaties*, pp. 13–228; Sinclair, *The Vienna Convention* (2nd edn., 1984), pp. 114–58; Thirlway, 62 *BY* (1991), 16–75; and 77 *BY* (2007), 1–82; Oppenheim, ii. 1266–84.

[127] See further, *infra*, p. 694.

(b) The status of 'rules of interpretation'

Jurists are in general cautious about formulating a code of 'rules of interpretation', since the 'rules' may become unwieldy instruments instead of the flexible aids which are required.[128] Many of the 'rules' and 'principles' offered are general, question-begging, and contradictory. As with statutory interpretation, a choice of a 'rule', for example of 'effectiveness' or 'restrictive interpretation', may in a given case involve a preliminary choice of meaning rather than a guide to interpretation. The International Law Commission in its work confined itself to isolating 'the comparatively few general principles which appear to constitute general rules for the interpretation of treaties'.

(c) The text and the intentions of the parties

The Commission and the Institute of International Law[129] have taken the view that what matters is the intention of the parties *as expressed in the text*, which is the best guide to the more recent common intention of the parties. The alternative approach regards the intentions of the parties as an independent basis of interpretation. The jurisprudence of the International Court supports the textual approach,[130] and it is adopted in substance in the relevant provisions of the Vienna Convention:[131]

ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

[128] For the case in favour of having rules: Beckett, *Annuaire de l'Inst.* 43 (1950), i. 435–40.

[129] *Ut supra*, p. 607. The first rapporteur of the Institute, Lauterpacht, preferred more direct investigation of intention.

[130] See Fitzmaurice, 28 *BY* (1951), 1–28; id. 33 *BY* (1957), 203–38.

[131] On interpretation of treaties authenticated in two or more languages see Art. 33; Hardy, 37 *BY* (1961), 72–155; *James Buchanan and Co. Ltd.* v. *Babco (U.K.) Ltd.* [1977] AC 141; ILR 74, 574; *Young Loan Arbitration*, ILR 59, 495; Ago (Sep. Op.), *Nicaragua* case (Jurisdiction), ICJ Reports (1984), 522–3; Jennings (Sep. Op.), ibid. 537–9; Schwebel (Diss. Op.), ibid. 575–6.

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

ARTICLE 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

This economical code of principles follows exactly the Final Draft of the International Law Commission.[132] At the Vienna Conference the United States proposed an amendment with the object of removing the apparent hierarchy of sources by combining the two Articles, and thus giving more scope to preparatory work and the circumstances in which the treaty was concluded. This proposal received little support. In its Commentary[133] the Commission emphasized that the application of the means of interpretation in the first article would be a single combined operation: hence the heading 'General rule' in the singular. The various elements present in any given case would interact. The Commission pointed out that the two articles should operate in conjunction, and would not have the effect of drawing a rigid line between 'supplementary' and other means of interpretation. At the same time the distinction itself was justified since the elements of interpretation in the first article all relate to the agreement between the parties 'at the time when or after it received authentic expression in the text'. Preparatory work did not have the same authentic character 'however valuable it may sometimes be in throwing light on the expression of agreement in the text'.

(d) Textual approach: natural and ordinary meaning[134]

The first principle stated in Article 31 of the Vienna Convention is that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty . . . '.[135] In the Advisory Opinion on the *Polish Postal Service in Danzig*[136] the Permanent Court observed that the postal service which Poland was entitled to establish in Danzig under treaty was not confined to operation inside the postal

[132] Arts. 27, 28.

[133] *Yrbk. ILC* (1966), ii. 219–20.

[134] There seems to be no real difference between the principle of actuality (or textuality) and the principle of natural and ordinary meaning in the scheme of Fitzmaurice.

[135] See the *Admissions* case, ICJ Reports (1950), 8.

[136] (1925), PCIJ, Ser. B, no. 11 at p. 37. See also the *Eastern Greenland* case (1933), PCIJ, Ser. A/B, no. 53 at p. 49; US-Italy Arbitration, *Interpretation of Air Transport Services Agreement*, *RIAA*, xvi. 75 at 91.

building, as 'postal service' must be interpreted 'in its ordinary sense so as to include the normal functions of a postal service'. A corollary of the principle of ordinary meaning is the principle of integration: the meaning must emerge in the context of the treaty as a whole[137] and in the light of its objects and purposes.[138] Another corollary is the principle of contemporaneity: the language of the treaty must be interpreted in the light of the rules of general international law in force at the time of its conclusion,[139] and also in the light of the contemporaneous meaning of terms.[140] In the *Bankovic*[141] case the European Court of Human Rights referred to the relevant rules of international law and state practice when determining that the 'jurisdiction' of States, for the purposes of Article 1 of the European Convention, did not extend to military missions involving Contracting States acting extraterritorially. The applicants were relatives and injured survivors of a NATO air attack on a television station in Belgrade, during the military operations of 1999. The doctrine of ordinary meaning involves only a presumption: a meaning other than the ordinary meaning may be established, but the proponent of the special meaning has a burden of proof.[142] The fact remains that in complex cases the tribunal will be prepared to make a careful inquiry into the precise object and purpose of a treaty.[143]

(e) Context to be used

The context of a treaty for purposes of interpretation comprises, in addition to the treaty, including its preamble[144] and annexes, any agreement or instrument related to the treaty and drawn up in connection with its conclusion.[145]

(f) Subsequent practice

The parties may make an agreement regarding interpretation of the treaty. It follows also that reference may be made to 'subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its

[137] See the Vienna Conv., Art. 31(1); *Competence of the I.L.O. to Regulate Agricultural Labour* (1922), PCIJ., Ser. B, nos. 2 and 3, p. 23; *Free Zones* case (1932), Ser. A/B, no. 46, p. 140; US-France Arbitration, *Case Concerning the Air Services Agreement of 27 March 1946*, RIAA xviii. 417 at 435; ILR 54, 304 at 328–9.

[138] See the Vienna Conv., Art. 31(1); *U.S. Nationals in Morocco*, ICJ Reports (1952), 183–4, 197–8; *Case Concerning Sovereignty over Pulao Ligitan and Pulao Sipadan*, Judgment of 17 December 2002, paras. 37, 49–52.

[139] See the *Grisbadarna* case, *RIAA* xi. 159–60. Generally on inter-temporal law *supra*, p. 126.

[140] *U.S. Nationals in Morocco*, *supra*, p. 132. See also Fitzmaurice, 33 *BY* 225–7.

[141] ILR 123, 94, 108–13.

[142] For critical comment on the concept of natural or plain meaning see Lauterpacht, *Development*, pp. 52–60.

[143] See the *Case Concerning the Gabcikovo-Nagymaros Project*, ICJ Reports (1997), 7 at 35–46, paras. 39–59; and see also the Award of the Arbitral Tribunal in *Fraport* v. *Philippines*, dated 16 August 2007, paras. 334–56.

[144] See Fitzmaurice, 33 *BY* 227–8.

[145] See the Vienna Conv., Art. 31(2); and *Young Loan Arbitration*, ILR 59, 495 at 534–40 (Decision), 556–8 (Diss. Op.).

interpretation'.[146] Subsequent practice by individual parties also has some probative value.

(g) Practice of organizations[147]

In a series of important advisory opinions the International Court has made considerable use of the subsequent practice of organizations in deciding highly controversial issues of interpretation.[148] Two points arise. The first is that constitutionally members who were outvoted in the organs concerned may not be bound by the practice.[149] Secondly, the practice of political organs involves elements of politics and opportunism, and what should be referred to, subject to the constitutional issue, is the reasoning *behind* the practice, which can reveal its legal relevance, if any.[150]

(h) Preparatory work

When the textual approach, on the principles referred to already, either leaves the meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, recourse may be had to further means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.[151] Moreover, such recourse may be had to verify or confirm a meaning that emerges as a result of the textual approach.[152] In general the International Court, and the Permanent Court before it, have refused to resort to preparatory work if the text is sufficiently clear in itself.[153] On a number of occasions the Court has used preparatory work to confirm a conclusion reached by other means.[154] Preparatory work is an aid to be employed with discretion, since its use may detract from the textual approach, and, particularly in the case of multilateral agreements, the records of conference proceedings, treaty drafts, and so on may be confused or inconclusive. The International Law Commission has taken the

[146] See the Vienna Conv., Art. 31(3)(b); *Yrbk ILC* (1966), ii. 221, para. 15; *Air Transport Services Agreement Arbitration* (1963), ILR 38, 182 at 245–8, 256–8; *Air Transport Services Agreement Arbitration* (1965), *RIAA* xvi. 75 at 99–101; *Young Loan Arbitration*, ILR 59, 495 at 541–3 (Decision), 573–4 (Diss. Op.). See also Fitzmaurice, 28 *BY* 20–1; 33 *BY* 223–5, where subsequent practice is commended for its 'superior *reliability*' as an indication of meaning.

[147] See Engel, 16 *ICLQ* (1967), 865–910; Judge Spender, *Expenses* case, ICJ Reports (1962), 187ff.; Judge Fitzmaurice, ibid. 201–3.

[148] *Competence of the General Assembly*, ICJ Reports (1950), 9; *IMCO* case, ibid. (1960), 167ff.; and the *Expenses* case ibid. (1962), 157ff.

[149] See further *infra*, pp. 691ff.

[150] See the Sep. Op. of Judge Spender in the *Expenses* case, pp. 187ff. The ILC did not deal with the problem in the present draft: 59 *AJ* (1965), 456 (para. 14).

[151] See the Vienna Conv., Art. 32, *supra*; *Yrbk. ILC* (1966), ii. 222–3, paras. 18–20; Jennings, 121 Hague *Recueil*, pp. 550–2; *Young Loan Arbitration*, ILR 59, 495 at 543–8 (Decision), 562–7 (Diss. Op.); *Fothergill* v. *Monarch Airlines Ltd.* [1981] AC 251; ILR 74, 627; *Commonwealth of Australia* v. *State of Tasmania* (1983) 46 ALR 625; ILR 68, 266.

[152] See further Lauterpacht, *Development*, pp. 116–41; 48 *Harv. LR* (1935), 549–91; McNair, *Law of Treaties*, ch. 23.

[153] *Admissions* case, ICJ Reports (1948), 63; *Competence of the General Assembly*, ibid. (1950), 8. See Fitzmaurice, 28 *BY* 10–3; 33 *BY* 215–20.

[154] e.g. *Convention of 1919 concerning the Work of Women at Night* (1932), PCIJ, Ser. A/B, no. 50, p. 380. See also *Bankovic* v. *Belgium and Others*, ILR 123, 94, 110–11 (paras. 63–5); Europ. Ct. of Human Rights.

view that states acceding to a treaty and not taking part in its drafting cannot claim for themselves the inadmissibility of the preparatory work, which could have been examined before accession.[155]

(i) Restrictive interpretation[156]

In a number of cases the Permanent Court committed itself to the principle that provisions implying a limitation of state sovereignty should receive restrictive interpretation.[157] As a general principle of interpretation this is question-begging and should not be allowed to overshadow the textual approach: in recent years tribunals have given less scope to the principle.[158] However, in cases which give rise to issues concerning regulation of rights and territorial privileges the principle may operate:[159] in these instances it is not an 'aid to interpretation' but an independent principle. The principle did not find a place in the provisions of the Vienna Convention.

(j) Effective interpretation[160]

The principle of effective interpretation is often invoked, and suffers from the same organic defects as the principle of restrictive interpretation. The International Law Commission did not give a separate formulation of the principle, considering that, as a matter of the existing law, it was reflected sufficiently in the doctrines of interpretation in good faith in accordance with the ordinary meaning of the text (paragraph (*d*) above).[161] The International Court has generally subordinated the principle to the textual approach.[162] In the *Peace Treaties* case[163] the Court made this clear and avoided revision of the treaties by refusing to remedy a fault in the machinery for settlement of disputes not curable by reference to the texts themselves.

(k) The teleological approach[164]

The International Law Commission and the Vienna Convention gave a cautious qualification to the textual approach by permitting recourse to further means of interpretation when the latter 'leads to a result which is manifestly absurd or unreasonable

[155] Differing thus from the *River Oder Commission* case (1929), PCIJ, Ser. A, no. 23. See further Sinclair, 12 *ICLQ* (1963), at 512–17; *Arbitral Comm. on Property, etc., in Germany*, ILR 29, 442 at 460–8.

[156] See Lauterpacht, 26 *BY* (1949), 48–85; id., *Development*, pp. 300–6; McNair, *Law of Treaties*, pp. 765–6.

[157] e.g. *River Oder Commission* case, *ut supra*, p. 261.

[158] See, however, *De Pascale Case*, *RIAA* xvi. 227; *De Leon Case*, ibid. 239. Cf. *Droutzkoy Case*, ibid. 273 at 292.

[159] *Supra*, pp. 369ff.

[160] See *Annuaire de l'Inst.* 43 (1950), i. 402–23; McNair, *Law of Treaties*, ch. 21.

[161] *Yrbk. ILC* (1966), ii. 219, para. 6.

[162] Fitzmaurice, 28 *BY* 19–20; 33 *BY*, 211, 220–3.

[163] ICJ Reports (1950), 229. See also the *South West Africa* cases (Prelim. Objections), ibid. (1962), 511–13 (Diss. Op. of Judges Spender and Fitzmaurice); *South West Africa* cases (Second Phase), ibid. (1966), 36, 47–8.

[164] See Fitzmaurice, 28 *BY* 7–8, 13–14; 33 *BY* 207–9; Waldock, *Mélanges offerts à Paul Reuter* (1981), 535–47.

in the light of the objects and purposes of the treaty'.[165] Somewhat distinct from this procedure is the more radical teleological approach according to which a court determines what the objects and purposes are and then resolves any ambiguity of meaning by importing the substance 'necessary' to give effect to the purposes of the treaty. This may involve a judicial implementation of purposes in a fashion not contemplated in fact by the parties. At the same time the textual approach in practice often leaves the decision-maker with a choice of possible meanings and in exercising that choice it is impossible to keep considerations of policy out of account. Many issues of interpretation are by no means narrow technical inquiries.

In advisory opinions concerning powers of organs of the United Nations, the International Court has adopted a principle of institutional effectiveness and has freely implied the existence of powers which in its view were consistent with the purposes of the Charter.[166] This tendency reached its apogee in the opinion given in the *Expenses* case, and the problems raised by this decision are considered elsewhere.[167] The work of the European Court of Human Rights has involved a tendency to an effective and 'evolutionary' approach in applying the European Convention on Human Rights.[168]

The teleological approach has many pitfalls. However, in a small specialized organization, with supranational elements and efficient procedures for amendment of constituent treaties and rules and regulations, the teleological approach, with its aspect of judicial legislation, may be thought to have a constructive role to play. Yet the practice of the Court of the European Communities has not shown any special attraction to this approach, and it would seem that the delicate treaty structure with its supranational element dictates a generally textual and relatively conservative approach to texts.

11. CLASSIFICATION OF TREATIES

A number of distinguished writers have developed or supported classifications of treaties. Lord McNair long ago pointed to the variety of functions which the treaty performs and the need to free ourselves from the traditional notion that the treaty is governed by a single undifferentiated set of rules.[169] As he suggests, some treaties, dispositive of territory and rights in relation to territory, are like conveyances in private

[165] ILC, Final Draft, Art. 28; Vienna Conv., Art. 32.

[166] The cases are cited *infra*, pp. 686–8. See further the *International Status of South West Africa*, ICJ Reports (1950), 128, the *South West Africa* cases, ibid. (1962), 319, and the *Namibia* Opinion, ibid. (1971), 16 at 47–50. See also the opinions of Fitzmaurice, in the *Expenses* case, ICJ Reports (1962), 198ff. See further Gordon, 59 *AJ* (1965), 794–833. Cf., however, the Joint Dissent of Fitzmaurice and Spender in the *South West Africa* cases, ICJ Reports (1962), at 511–22; and the view of the Court in the *South West Africa* cases (Second Phase), ICJ Reports (1966), 36, 47–8.

[167] *Infra*, pp. 694ff.

[168] See Waldock, *Mélanges offerts à Paul Reuter*.

[169] 11 *BY* (1930), 100–18; also in *The Law of Treaties*, pp. 739–54. See also Rousseau, *Principes généraux*, i. 132–41, 677, 728–64; Vitta, *Ann. français* (1960), 225–38. On the special role of multilateral treaties see Lachs, 92 Hague *Recueil* (1957, II), 233–341.

law. Treaties involving bargains between a few states are like contracts; whereas the multilateral treaty creating either a set of rules, such as the Hague Conventions on the Law of War, or an institution, such as the Copyright Union, is 'law-making'. Moreover, the treaty constituting an institution is akin to a charter of incorporation. It is certainly fruitful to contemplate the unique features of parts of the large terrain to which the law of treaties applies and to expect the development of specialized rules. Thus it is the case that the effect of war between parties varies according to the type of treaty involved. However, Lord McNair and others have tended to support the position that the genus of treaty (the contents of the genus may themselves be a matter of dispute) produces fairly *general* effects on the applicable rules. Thus the law-making character of a treaty is said (1) to rule out recourse to preparatory work as an aid to interpretation; (2) to avoid recognition by one party of other parties as states or governments; and (3) to render the doctrine of *rebus sic stantibus* inapplicable.[170] More especially, Lord McNair,[171] Sir Gerald Fitzmaurice,[172] and Sir Humphrey Waldock,[173] among others, have regarded certain treaties as creating an 'objective regime' creating rights and duties for third states. Examples given include the treaty regimes for international waterways,[174] regimes for demilitarization,[175] and treaties creating organizations.[176] Significantly the International Law Commission deliberately avoided any classification of treaties along broad lines and rejected the concept of the 'objective regime' in relation to the effects of treaties on non-parties.[177] The Commission has accepted specialized rules in a few instances,[178] but has been, correctly it would seem, empirical in its approach. In formulating the general rules of interpretation the Commission did not consider it necessary to make a distinction between 'law-making' and other treaties.[179] The drafts of the Commission and the Vienna Convention treat the law of treaties as essentially a unity.[180] The evidence is that jurists are today less willing to accept the more doctrinal versions of the distinction between treaty-contract (*vertrag*) and treaty-law (*vereinbarung*),[181] the latter category representing multilateral treaties making rules for future conduct and framing a generally agreed legislative policy. The contrast intended is thus between the bilateral political bargain and the 'legislative act' produced by a broad international conference. But in fact the distinction is less

[170] See McNair, *Law of Treaties*.

[171] *Law of Treaties*, ch. 14.

[172] *Yrbk. ILC* (1960), ii. 96ff. (with considerable caution).

[173] 106 Hague *Recueil* (1962, II), 78–81 (with some caution).

[174] *Supra*, pp. 260–4.

[175] See the Committee of Jurists on the Aaland Islands question, 29 *AJ* (1935), Suppl., Pt. III, pp. 927–8.

[176] Cf. the *Reparation* case, *infra*, p. 676.

[177] *Supra*, s. 8(b); *infra*, s. 12. See also, in the context of aids to interpretation, 59 *AJ* (1965), 449–50 (commentary on the draft).

[178] See the Vienna Conv., Art. 62(2), *supra*, p. 623. Cf. the provisions on reservations, *supra*, pp. 612–15.

[179] *Yrbk. ILC* (1966), ii. 219, para. 6. But note the view of Berlia, 114 Hague *Recueil*, 287 at 331.

[180] See Dehaussy, *Recueil d'études en hommage à Guggenheim*, pp. 305–26; and Reuter, *Introduction au droit des traités*, pp. 37–9.

[181] For the history see Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), para. 70.

clear: for example, it is known that political issues and cautious bargaining lie behind law-making efforts like the Geneva Conventions on the Law of the Sea. Further, the distinction obscures the real differences between treaty-making and legislation in a municipal system.[182]

12. PARTICIPATION IN GENERAL MULTILATERAL TREATIES

In an early draft (Article 1(1)(c)) the International Law Commission defines a 'general multilateral treaty' as 'a multilateral treaty which concerns general norms of international law and deals with matters of general interest to States as a whole'. Such a treaty has been described as 'the nearest thing we yet have to a general statute in international law'.[183] United Nations practice in convening a conference to draw up a treaty is to leave the question of composition to a political organ, the General Assembly, and a number of Communist states[184] were excluded as a result. In the Commission it was proposed that states should have a right to become parties to this type of treaty. This solution was adopted in a provisional draft in the insubstantial form that the right existed except where the treaty or the rules of an international organization provide otherwise.[185] The Final Draft of the Commission contained no provision on the subject and amendments intended to give 'all States a right to participate in multilateral treaties' were defeated at the Vienna Conference.[186]

[182] Waldock, 106 Hague *Recueil* (1962, ii), 74–6.

[183] ibid., 81. See also Lachs, 92 Hague *Recueil* (1957, II), 233–41.

[184] For a long time Mongolia; also China, East Germany, North Vietnam, and North Korea. These states were not represented at the Law of the Sea Conference in 1958.

[185] ILC draft, Art. 8; *Yrbk. ILC* (1962), ii. 167–9; Waldock, ibid. 53–8.

[186] *Yrbk. ILC* (1966), ii. 200; UN Secretariat Working Paper, A/CN. 4/245, 23 Apr. 1971, pp. 131–4. See also Lukashuk, 135 Hague *Recueil* (1972, I), 231–328.

28

OTHER TRANSACTIONS INCLUDING AGENCY AND REPRESENTATION

1. INFORMAL AGREEMENTS

The law of treaties does not contain mandatory requirements of form, and the rapporteurs on the subject of the International Law Commission have admitted the validity of unwritten agreements.[1] In the *Railway Traffic Between Lithuania and Poland* case[2] the Permanent Court accepted the view that participation by two states, parties to a dispute, in the adoption of a resolution by the Council of the League of Nations constituted a binding 'engagement'. Again, in the *Eastern Greenland* case[3] the Court placed reliance in part on an oral statement by the Norwegian Minister of Foreign Affairs, Mr Ihlen, to the Danish Minister accredited to Norway, relating to Norwegian accept-ance of the Danish claim to the whole of Greenland. Though apparently unilateral, the Court regarded this statement, and a Danish disclaimer of interests in Spitzbergen, as interdependent.

2. QUASI-LEGISLATIVE ACTS

The nature of a mandate agreement was in issue in the *South West Africa* cases (Preliminary Objections).[4] The applicant states founded jurisdiction on its nature as 'a treaty or convention in force' providing for reference of disputes to the Permanent Court and kept alive in this respect by Article 37 of the Statute of the present Court.[5]

[1] See the Sep. Op. of Judge Jessup, *South West Africa* cases (Prelim. Objections), ICJ Reports (1962), 402–5.

[2] (1931), PCIJ, Ser. A/B, no. 42, pp. 115, 116. See also McNair, *Law of Treaties* (1961), 14.

[3] (1933), PCIJ, Ser. A/B, no. 53 at pp. 71–3. See also McNair, *Law of Treaties*, pp. 9–10; Hambro, *Festschrift für Jean Spiropoulos* (1957), 227–36; Aust, 35 *ICLQ* (1986), 807–11.

[4] ICJ Reports (1962), 319. Cf. *South West Africa* cases (Second Phase), ICJ Reports (1966), 6; *Namibia* Opinion, ibid. (1971), 16.

[5] See *infra*, p. 714.