7

THE PRACTICAL WORKING OF THE LAW OF TREATIES

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SUMMARY

This chapter considers key structural questions and fundamental problems relating to the law of treaties. The structural matters considered include: the concept of a treaty; the anatomy of treaties (including the making of treaties; authority to conclude treaties; expression of consent to be bound; invalidity of treaties (non-absolute grounds for invalidity of treaties, absolute grounds for invalidity of treaties, amendment and modification); suspension and termination.

The key issues addressed include the scope of legal obligation (the principle *pacta sunt servanda*, treaties, and third States); interpretation and reservation to treaties (including interpretative declarations); and finally, problems concerning the grounds for termination (supervening impossibility and material breach). The chapter takes into consideration the theory and practice of the law of treaties, with broad analysis of the case law of various international courts and tribunals, with special emphasis on jurisprudence of the International Court of Justice.

I. INTRODUCTION

Treaties are one of the means through which States deal with each other and a precise method of regulating relations between States. Treaties almost exclusively regulate some areas of international law, such as environmental law, whilst they are of the utmost importance in others, such as international economic relations, and play a decisive role in the field of human rights. International trade and international investments as well as international communication are unimaginable without treaties. Thus knowledge of the law of treaties is essential to an understanding of how international relations and international law work. That law is codified in the 1969 Vienna Convention on the Law of Treaties (the VCLT), the provisions of which will be presented and analysed in this chapter.

II. BASIC CONCEPTS AND STRUCTURES

A. WHAT IS A TREATY?

VCLT Article 2(2) defines a treaty as '[a]n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

The term 'treaty' is used generically (Aust, 2007, p 17) and a treaty may be described in a multitude of ways. The International Law Commission (ILC) said:

> In addition to a 'treaty', 'convention', and 'protocol,' one not infrequently finds titles such as 'declaration,' 'charter,' 'covenant,' 'pact,' 'act,' '*statute*,' 'agreement,' 'concordat,' whilst names like 'declaration,' 'agreement', and '*modus vivendi*' may well be found given both to formal and less formal types of agreements. As to the latter, their nomenclature is almost illimitable, even if some names such as 'agreement,' 'exchange of notes,' 'exchange of letters, memorandum of agreement,' or 'agreed minute', may be more common than others... there is no exclusive or systematic use of nomenclature for particular types of transaction.[1]

The Vienna Convention does not require that a treaty be in any particular form or comprise any particular elements so if there is a dispute concerning the status of a document—eg, a joint communiqué—as a treaty, an objective test is used to determine the question, taking into account its actual terms and the particular circumstances in which it was made. For example, minutes of a meeting can comprise a treaty. In the *Qatar* v *Bahrain* case the International Court of Justice (ICJ) said:

> The Court does not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter those of the Foreign Minister of Qatar. The two ministers signed a text recording commitment accepted by their Governments, some of which were to be given an immediate application. Having signed such a text, the Foreign Minister of Bahrain, is not in the position subsequently to say that he intended to subscribe only to a 'statement recording political understanding', and not to an 'international agreement'.[2]

Since a treaty is a method of creating binding legal obligations, there must be an intention to create legal relations. The Rapporteur of the ILC stated that the element is implicitly present in the phrase 'governed by international law'.[3] There are some international acts that may assume the form of international agreements but which were never intended

[1] *YBILC* (1966), vol II (part two), p 188.

[2] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, ICJ Reports 1994*, p 112, para 27. See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v *Nigeria; Equatorial Guinea Intervening), Judgment, ICJ Reports 2002*, p 303 in which the Court analysed two documents: 1975 Maroua Declaration and the 1971 Youndé II Declaration. On the basis of the manner in which these Declarations were concluded (signed by the Heads Cameroon and Nigeria), the Court stated as follows: '[t]he Court considers that the Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty in the sense of the Vienna Convention on the Law of Treaties... and which in any case reflects customary international law in this respect' (para 263).

[3] Fourth Report on the Law Treaties, *YBILC* (1965), vol II, p 12.

to create legal obligations, such as the 1975 Final Act of the Conference on Security and Cooperation in Europe.[4]

Such Acts are sometimes called 'soft law'[5] and their legal status is not clear. However, as they are not legally binding, they are not enforceable in courts. However, they cannot be ignored since soft law may 'harden' into a treaty[6] or become a norm of international customary law. Some authors see 'soft law' as a more flexible alternative to treaty-making (Boyle, 2000) though others consider the whole concept misconceived, both in that if it is not binding, it is not law, and that it creates an expectation of compliance whilst simultaneously undermining the authority of law (Weil, 1983).

Finally, in the *Nuclear Test* cases,[7] the ICJ made it clear that unilateral statements of States can have binding effect if the intention that they be legally binding is clear; that there is clear evidence regarding the circumstances in which they are made; and that the question is approached with due caution. However, it has been argued that there is little evidence to support the Court's view and, in any case, there was insufficient evidence of intent on the facts of the case.

B. THE VIENNA CONVENTIONS

The 1969 Vienna Convention on the Law of Treaties was opened for signature on 23 April 1969 and entered into force on 27 January 1980. It was the product of the International Law Commission[8] and the UN Conference on the Law of Treaties that met at Vienna from 26 March to 24 May 1968, and from 9 April to 22 May 1969. The subsequent 1986 Vienna Convention between States and International Organizations or Between Organizations adapts these rules to its subject matter and although not in force is considered to be applicable as law. Finally, the 1978 Vienna Convention on Succession of States in Respect of Treaties is in force but not all of its rules are considered to represent customary international law. The present chapter is based mainly on the provisions of the 1969 Vienna Convention.

1. The scope of the Vienna Convention

The Vienna Convention regulates treaties concluded between States (Article 1) and in written form (Article 2(1)(a)). This does not mean that oral agreements have no effect under international law or that principles found in the VCLT do not apply to such agreements, merely that they are not governed by the VCLT itself. Questions of succession of treaties, State responsibility, and the effect of the outbreak of hostilities on treaties are also excluded from its scope (Article 73). Furthermore, the Convention is not retroactive and

[4] The Act stated that it was not eligible for registration under UN Charter Article 102 and was generally understood not to have binding force. The failure to register a treaty under UN Charter Article 102 does not mean that the instrument in question is not a treaty, whilst the act of registration does not mean that it is. For example, the 1957 Declaration by Egypt concerning the nationalization of the Suez Canal was registered by the Egyptian Government but was not a treaty.

[5] Other examples include the 1972 Stockholm Declaration on Human Environment and the 1992 Rio Declaration on Environment and Development. On soft law generally, see Ch 5, above.

[6] Eg, the 1988 Baltic Sea Ministerial Declaration and the 1992 Baltic Sea Declaration hardened into the 1992 Convention on the Protection of the Baltic Sea and the Baltic Sea Area ('The Helsinki Convention').

[7] *Nuclear Tests (Australia* v *France), Judgment, ICJ Reports 1974*, p 253, paras 42–43. The need for intention was reiterated by the Court in *Frontier Dispute, Judgment, ICJ Reports 1986*, p 554, para 39.

[8] The Special Rapporteurs of the Commission were Professors Briely and Lauterpacht, Sir G Fitzmaurice and Sir H Waldock.

only applies to treaties concluded after its entry into force (Article 4). It acts as a residual rule, ie, it is applicable unless a particular treaty provides otherwise; or unless the parties agree otherwise; or if a different intention is otherwise established. Although the VCLT does not apply to treaties between States and international organizations *per se*, those of its provisions that reflect rules of international customary law do apply to such treaties (Article 3(b)). Moreover, the provisions of the VCLT apply as between States parties to the VCLT as regards treaties to which other forms of subjects of international law (such as international organizations) are also parties (Article 3(c)).

2. The Vienna Convention and customary law

There are two problems concerning the relationship between the Vienna Convention and international customary law: (i) which provisions of the Vienna Convention codified customary law and which constituted progressive development and (ii) how does customary law relating to treaties operate?

It is difficult, if not impossible, to answer the first of these questions. Certain provisions of the Convention that represented progressive development at the time of its signing—such as reservations and modification of treaties—were probably already within the body of international customary law by the time of its entry into force (Sinclair, 1984, pp 10–21). In the *Gabčíkovo-Nagymaros Project* case the ICJ identified the rules concerning termination and suspension of treaties as codificatory[9] and in the *Kasikili/Sedudu Island* case said that the rules of interpretation reflected customary international law.[10]

As to the second problem, Articles 3(b), 4, 38, and 43 combine to provide that when the provisions of the Convention are inapplicable the rules of international customary law (or in some instances general principles of law) with the same legal content may be applicable. The most significant is Article 4 concerning the non-retroactive effect of provisions of the VCLT that were not reflective of customary law.

III. THE ANATOMY OF A TREATY

A. THE MAKING OF TREATIES

Treaties are by far the most important tools of regulating international relations. They may be concluded between States, States and international organizations, and between international organizations. International organizations, in particular the United Nations, play a most important role in international law-making as initiators of treaties and as a source of expertise.

B. AUTHORITY TO CONCLUDE TREATIES

VCLT Articles 7 and 8 concern the making of treaties. A most important issue is that of full powers,[11] the holder of which is authorized to adopt and authenticate the text of a treaty and

[9] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, para 46.

[10] *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, ICJ Reports 1999*, p 1045, para 18.

[11] Defined in Article 2(1)(c) as a 'Document emanating from the competent authority of a State designating a person or persons to represent a State for negotiating, adopting or authenticating the text of a treaty, for expressing consent of the State by a treaty, or for accomplishing any other acts with respect to a treaty'.

to express the consent of the State to be bound by a treaty, although there are a growing number of treaties, particularly bilateral treaties, which are concluded in a simplified form that does not require the production of full powers (for example exchange of notes). The general rule expressed in the VCLT (Article 7 paragraph 1(a) and (b)) is that a person is considered as representing a State for the purpose of expressing the consent of the State to be bound by it if he or she produces appropriate full powers or it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers. There is, however, a group of persons who by virtue of their functions and without having to produce full powers, are considered to have such authority, these being: Heads of State, Heads of Government, and Ministers for Foreign Affairs; heads of diplomatic missions, for the purpose of adoption of the text of a treaty between the accrediting State and the State to which they are accredited; representatives accredited by States to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization, or organ (Article 7(2)). The ICJ in the *Cameroon* v *Nigeria* case confirmed this rule.[12] In 2006 in the *Democratic Republic of Congo* v *Rwanda* the Court examined the powers of the 'Big Three' (The Head of State, Head of Government and Minister for Foreign Affairs) to bind the States and, after having again confirmed the 'well established rule', went on to say that: 'The Court notes, however, that with increasing frequency in modern international relations other persons representing a State in specific fields may be authorised by that State to bind it by their statements in respect to matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolio exercising powers in their field of competence in the area of foreign relations, and even of certain officials.'[13]

Full powers have to be distinguished from credentials, which are submitted to an international organization or a government hosting an international conference by a delegate attending to negotiate a multilateral treaty. Credentials only authorize the delegate to adopt the text of a treaty and to sign a Final Act. Signing the treaty itself requires full powers or specific instructions from government. Full powers and credentials may be combined in one document.

Where an unauthorized person purports to conclude a treaty Article 8 provides that the action is without legal effect, unless subsequently confirmed by the State. On the other hand, Article 47 provides that where an authorized representative of a State expresses consent to be bound although instructed by their State not to do so, this does not invalidate that consent, unless the limitation on their authority was notified to other negotiating States beforehand.

C. EXPRESSION OF CONSENT TO BE BOUND

The role of the expression of consent by States to be bound by a treaty is to constitute a mechanism by which the treaty becomes a juridical act. According to Article 11, 'The consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed'. Article 11 lists a number of particular means of expressing consent to be bound, whilst also allowing parties to adopt any other means on which they agree. The precise method is, therefore, for the parties to a treaty to decide amongst themselves.

The legal effect of signature of a treaty depends upon whether or not it is subject to ratification, acceptance, or approval. If it is, then signature constitutes an intermediate step, indicating that the delegates have agreed upon the text and are willing to accept it. Signature under these circumstances does not express the final consent to be bound and the signing of a treaty does not impose any obligation on a State to ratify it or even, in the absence of an express term to this effect, to submit it to the national legislator for consideration. However, the initial signature also constitutes a juridical act in the sense that by its signature each State accepts certain legal consequences, for example under VCLT Articles 18, 24(4), and 25. The intermediate stage between signature and ratification enables States to promulgate necessary legislation or obtain necessary parliamentary approval. Ratification conforms to the democratic principle that the government should consult public opinion either in parliament or elsewhere before finally approving a treaty (Shearer, 1994, p 414).

1. Signature

Signature only expresses consent to be bound when it constitutes the final stage of a treaty-making process. Article 12 lists a variety of possible means to express consent to be bound by signature, including signature *ad referendum*. This commonly indicates either that the signatory State is currently unable to accept the terms of the treaty, or that the plenipotentiary concerned had no definitive instructions in the matter. Signature *ad referendum* becomes a full signature if subsequently confirmed by the State concerned. Article 12 also provides that initialling a treaty constitutes signature when it is established that the negotiating State so agreed.

2. Ratification

Ratification is understood as a formal, solemn act on the part of a Head of State through which approval is given and a commitment to fulfil its obligations is undertaken, although the significance of the act at the international level has changed over time. As Judge Moore said in 1924, the older view that treaties might be regarded as binding before they had been ratified was now 'obsolete, and lingers only as an echo from the past'.[14]

VCLT Article 2(1)(b) provides that: '"ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty'. Despite the use of the word 'means', this does not define ratification, but indicates its effect. Article 14 provides that consent to be bound is expressed by ratification if (a) the treaty expressly so provides; (b) the negotiating States otherwise agree that ratification is necessary; (c) the treaty has been signed subject to ratification; or (d) an intention to sign subject to ratification appears from the full powers or was expressed during negotiations.

See also *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v *Nigeria; Equatorial Guinea Intervening), Judgment, ICJ Reports 2002*, p 303.

[12] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v *Nigeria; Equatorial Guinea Intervening), Judgment, ICJ Reports 2002*, p 303, para 265.

[13] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo* v *Rwanda) Jurisdiction of the Court and Admissibility of the Application, ICJ Reports 2006*, p 6, para 47.

[14] *Mavrommatis Palestine Concessions, Judgment No 2, 1924, PCIJ, Ser A, No 2*, at p 57.

Ratification is unconditional and, unless the treaty in question provides otherwise, is not dependent on the receipt or deposit of instruments of ratification by other States. Some support for a relatively relaxed approach to the formalities of ratification can be gleaned from the attitude of the ICJ in the *Nicaragua* case where Nicaragua's failure to ratify the Statute of the former Permanent Court of International Justice and convert 'potential commitment to effective commitment' was seen as being rectified by its ratification of the ICJ Statute.[15]

3. Accession

This means of consent to be bound is regulated by VCLT Article 15 and refers to the means by which a State expresses its consent to become a party to a treaty that it was not in a position to sign.[16] A State can only accede to a treaty if the treaty so provides or the parties agree. Treaties setting up regional regimes may often permit accession by invitation.[17]

Can a State accede to a treaty that is not yet in force? The International Law Commission has pointed out that:

> An examination of the most recent treaty practice shows that in practically all modern treaties which contain accession clauses the right to accede is made independent of the entry into force of a treaty, either expressly, by allowing accession to take place before the date fixed for the entry into force of the treaty, or impliedly, by making the entry into force of the treaty conditional on the deposit, *inter alia*, of instruments of Accession.[18]

4. Acceptance and approval

These are recognized and widely used methods of expressing consent to be bound and are regulated by VCLT Article 14(2). There are no great differences between signature subject to acceptance or approval and signature subject to ratification. The use of these methods of consent to be bound was intended to simplify procedures by, for example, avoiding constitutional conditions that might require obtaining Parliamentary authority prior to ratification. The rules applicable to ratification apply to acceptance and approval (Aust, 2007, p 110) and, unless provided otherwise, acceptance and approval have the same legal effect as ratification. Expressing consent to be bound by acceptance or approval without prior signature is analogous to accession. In many of the more recent conventions concluded under the auspices of the United Nations, such as the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses,[19] all means of consent to be bound are listed as available options.

D. INVALIDITY OF TREATIES

The grounds for invalidity of treaties within the VCLT can be divided into two groups: relative grounds in Articles 46–50 and absolute grounds in Articles 51–53.[20] The main

[15] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984*, p 392.

[16] Very rarely it can be the principal means of expressing consent to be bound, as in the often cited yet isolated example of the 1928 General Act for the Pacific Settlement of International Disputes.

[17] Eg, 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area.

[18] *YBILC* (1966), vol II (part two), p 199.

[19] (1997) 36 ILM 700.

[20] Sinclair divides cases of invalidity into three groups, concerning: the capacity of the parties (Articles 46–47); the validity of consent to be bound (Articles 48–50); and the lawfulness of the object of the treaty (Articles 51–53) (Sinclair, 1984, p 160).

difference between these grounds is that the relative grounds render a treaty voidable at the insistence of an affected State whereas the absolute grounds means that the treaty is rendered void *ab initio* and without legal effect. The Vienna Convention does not differentiate between bilateral and multilateral treaties. However, in the case of bilateral treaties the legal effect of establishing a relative ground of invalidity has the same legal effect as establishing absolute invalidity: the treaty falls (Sinclair, 1984). In the case of multilateral treaties, however, establishing an absolute ground means that the treaty has no legal force at all whereas establishing a relative ground—meaning that the consent of a particular State to a multilateral treaty is vitiated—does not affect the validity of the treaty as a whole as between the other remaining parties (Article 69(4)).

Article 46 concerns the failure to comply with internal law regarding competence to conclude a treaty, and provides that this may only be a ground for invalidating consent to be bound if that failure was 'manifest'. In the *Cameroon* v *Nigeria* case, Nigeria argued that '... it should have been 'objectively evident' to Cameroon, within the meaning of Article 46, paragraph 2 of the VCLT that the Nigerian Head of State did not have unlimited powers'[21] but the Court, whilst accepting that '[t]he rules concerning the authority to sign treaties are constitutional rules of fundamental importance', took the view that '... a limitation of a Head of State's capacity in this respect is not manifest in the sense of Article 46, paragraph 2, unless at least properly publicized. This is particularly so because Heads of States belong to the group of persons who, in accordance with Article 7, paragraph 2, of the Convention ... are considered as representing the State'.[22]

Article 47 is similar, concerning cases in which the representatives purporting to conclude a treaty were acting beyond the scope of their instructions.[23] Article 48 concerns error as a vitiating ground, and follows the approach of the ICJ in the *Temple* case. In that case, Thailand argued that the boundary line indicated on a map annexed to a treaty was in error since it did not follow the watershed line that was prescribed by the treaty text. The Court rejected this argument, saying:

> It is an established rule of law that the plea of error cannot be allowed as a vitiating consent if the party advancing it contributed by its conduct or error, or could have avoided it, or the circumstances were such as to put party on notice of a possible error. The Court considers that the character and qualifications of persons who saw Annex I map on the Siamese side would alone made it difficult for Thailand to plead error in law ...[24]

Articles 49 and 50 concern fraud and corruption. There is a paucity of materials relating to these Articles, though as far as corruption is concerned, the ILC observed that only an act calculated to exercise a substantial influence on the disposition of a representative to conclude a treaty could be invoked as a reason to invalidate an expression of consent that had subsequently been given.[25]

[21] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v *Nigeria; Equatorial Guinea Intervening), Judgment, ICJ Reports 2002*, p 303, para 258.

[22] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v *Nigeria; Equatorial Guinea Intervening), Judgment, ICJ Reports 2002*, p 303, para 265.

[23] *YBILC* (1966), vol II (part two), p 243.

[24] *Temple of Preah Vihear, Merits, Judgment, ICJ Reports 1962*, p 6 at p 26.

[25] *YBILC* (1966), vol II (part two), p 244.

Turning from the relative to the absolute grounds for invalidity, Article 51 deals with the coercion of a representative, Article 52 the coercion of a State, and Article 53 the conflict with norms of *jus cogens*. In all these cases a treaty is void *ab initio*, in the latter case by virtue of its conflicting with international public policy (the consequences of which are addressed in Article 71). Practice in relation to all these Articles is limited. The classic example relating to Article 51, the coercion of a representative, concerns the pressure exerted by Göring and Ribbentrop upon President Hacha of Czechoslovakia to sign a treaty with Germany establishing a German protectorate over Bohemia and Moravia in 1939. There is a clear link between Article 52—the coercion of a State—and the prohibition of the use of force under international law. Iceland advanced a claim of this nature in the 1973 *Fisheries Jurisdiction* case and the ICJ stated that:

> There can be little doubt, as implied in the Charter of the United Nations and recognised in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void...[26]

E. AMENDMENT AND MODIFICATION

The growth in number of multilateral treaties resulted in the necessity of devising amendment procedures and, in order to make amendment procedures more flexible, modification procedures. These are addressed in VCLT Articles 39–41. The ILC explained that amendment is a formal matter introducing changes into the treaty text whereas modification is a less formal procedure which affects only certain parties to a treaty.[27] However, in practice it is often difficult to distinguish between these two procedures (Sinclair, 1984, p 107).

Amendments to treaties should be distinguished from the revision of a treaty. Revision is a more comprehensive process resulting in changes to a treaty. However, a diplomatic conference is often needed both to revise and to amend a treaty, as, for example, in the case of the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea (the '1992 Helsinki Convention').[28] Amendments are subject to approval by the parties to the treaty. However, some treaties—such as the Helsinki Convention—contain technical annexes, which may, if the treaty so provides, be amended by a simplified system whereby an amendment to an annex is deemed to have been accepted at the end of a specified period unless in the meanwhile any State party has submitted a written objection to the Depositary.

F. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

The general provisions on suspension and termination of treaties are set out in VCLT Articles 54–59. Termination of a treaty may result from the grounds of termination that

[26] *Fisheries Jurisdiction (United Kingdom v Iceland), Jurisdiction of the Court, Judgment, ICJ Reports 1973*, p 3, para 24. However, on the facts of the case the Court concluded that 'The history of negotiations which led up to the 1961 Exchange of Notes reveals that these instruments were freely negotiated by the interested parties on the basis of the perfect equality and freedom of decision on both sides'.

[27] *YBILC* (1966), vol II (part two), p 232.

[28] 'A conference for the purpose of a general revision of or an amendment to this Convention may be convened with the consent of the Contracting Parties or the request of the Commission' (Article 30).

are internal to the treaty as well as from grounds external to the treaty. The 'internal' grounds will be considered here. The 'external grounds', concerning breach of obligations, will be considered later. As regards the 'internal' grounds for termination or suspension, the general rule in Article 54 is that a treaty may be terminated or a party may withdraw from a treaty in accordance with the provisions of the treaty itself or at any time by consent of all parties following consultations. Article 57 provides that the operation of a treaty with regard to all parties or to a particular party may be suspended in accordance with the provisions of the treaty in question.

Some treaties provide that they will remain in force only for a specific period of time whereas others provide for termination by a resolution of the contracting parties. As to withdrawal from a treaty, some treaties provide for a period of notice whilst others do not. For example, the 1992 Helsinki Convention provides that at any time after the expiry of five years from the date of its entry into force any party may, by giving written notification to the depositary, withdraw from the Convention. Withdrawal takes effect on the thirtieth day of June of the year following the year in which the depositary was notified of the withdrawal.

VCLT Article 58 provides for suspension of the operation of a multilateral treaty by agreement between certain parties only. This Article must be read in conjunction with Article 41 which provides for the modification of treaty provisions between certain parties only. Article 59 covers the case of tacit termination of a treaty. There is a particular problem concerning the relationship between tacit termination in accordance with Article 59 and Article 30, which concerns the effect of successive treaties relating to the same subject matter and which relates to cases in which the parties clearly intended the earlier treaty to be abrogated or its operation wholly suspended by the conclusion of the subsequent treaty.

IV. THE SCOPE OF LEGAL OBLIGATIONS

A. THE PRINCIPLE *PACTA SUNT SERVANDA*

The principle *pacta sunt servanda* is enshrined in Article 26 of the VCLT which provides that '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. Good faith is itself a legal principle and forms an integral part of the *pacta sunt servanda* principle.[29]

The fundamental importance of *pacta sunt servanda* was confirmed by the ICJ in the 1997 *Gabčíkovo-Nagymaros* case, which, generally speaking, advocated its strict observance. The case concerned the implementation of a 1977 treaty providing for the construction of a hydro-electric scheme along stretches of the Danube in Hungary and Slovakia. Hungary argued that the conduct of both parties indicated that they had repudiated this bilateral treaty, which, therefore, had come to an end. The Court, however, took the view that the reciprocal wrongful conduct of both parties 'did not bring the Treaty to an end nor justify its termination'.[30] The effect of breaching treaty obligations will be considered later, but at this point it should be noted that, despite both parties being in fundamental

[29] *YBILC* (1966), vol II (part two), p 211.

[30] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997*, p 7, para 114.

breach of important elements of their treaty obligations, the Court though the 1977 Treaty 'cannot be treated as voided by unlawful conduct'.[31]

The Court made a direct reference to the principle *pacta sunt servanda*, saying that 'What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of Vienna Convention of 1969 on the Law of Treaties, is that the parties find solution within the co-operative context of the Treaty'.[32] The Court observed that the two elements in Article 26—the binding force of treaties and the performance of them in good faith—were of equal importance and that good faith implied that, 'in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges parties to apply it in a reasonable way in such a manner that its purpose can be realised'.[33]

These are far-reaching statements and, whilst they may have been particularly suited to the issues in the *Gabčíkovo-Nagymaros* case itself, it is still impossible to determine the extent to which they bear upon the application of the principle *pacta sunt servanda* in the law of treaties in general.

B. TREATIES AND THIRD STATES

The issue of treaties and non-State parties—third States—are addressed in VCLT Articles 34–38. The fundamental rule concerning the relationship between treaties and third States is expressed by the maxim *pacta tertiis nec nocent nec prosunt*, enshrined in Article 34. The Convention then deals with an obligation (Article 35) and a right (Article 36—often referred to as stipulations *in favorem tertii*) arising from a treaty for a third State. As to the obligation, the requirements are so strict that, when fulfilled, they in fact amount to the existence of a collateral agreement between the parties to the treaty and the third State and it is this collateral agreement, rather than the original treaty, which is the legal basis for the third State's obligation.

There are procedural differences in the establishment of an obligation and of a right. The third State must accept an obligation in writing, whereas in a case of the right, the assent of the third State(s) is presumed, unless the treaty provides otherwise or there are indications to the contrary. Any obligation arising for a third State can be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they agreed otherwise. Any right arising for a third State can be revoked or modified only by the parties if it is established that the right was intended to be revocable or subject to modification without the consent of the third State. Caution is usually recommended when considering whether a treaty has given rise to stipulations *in favorem tertii*. As the PCIJ said:

> It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of the third State meant to create for that State an actual right which the latter has accepted as such.[34]

[31] Ibid, para 133. [32] Ibid, para 142. [33] Idem.

[34] *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, PCIJ, Ser A/B, No 46*, p 96 at pp 147–148.

Nothing in the VCLT prevents a rule set out in a treaty from becoming binding upon third States as a customary rule of international law if recognized as such (Article 37). However, the VCLT does not deal specifically with the question of whether the objective regimes created by treaties are binding only on States parties to those instruments or whether they are valid as against the entire international community—are valid *erga omnes*. Examples of such treaties would include those providing for the neutrality or demilitarization of a certain territory or area, or establishing freedom of navigation in international waterways such as the Suez Canal, Kiel Canal, and the Turkish Straits.[35]

V. GENERAL PRINCIPLES OF INTERPRETATION

A. GENERAL ISSUES

'There is no part of the law of treaties which the text writer approaches with more trepidation than the question of interpretation' (McNair, 1961). The complex issue of treaty interpretation will be discussed in the light of the work of the ILC during its codification of the law of treaties, the principles of interpretation included in the Vienna Convention, and the jurisprudence of the international and national courts and tribunals, with special regard to the case law of the ICJ. The purpose of interpretation is to establish the meaning of the text that the parties intended it to have 'in relation to circumstances with reference to which the question of interpretation has arisen' (*Oppenheim's International Law*, 1992).

Basing himself on the jurisprudence of the World Court,[36] the ILC's Rapporteur, Fitzmaurice (Fitzmaurice, 1951) drew up the following comprehensive set of principles of interpretation:

Principle I: actuality of textuality—that treaties are to be interpreted as they stand, on the basis of their actual texts.

Principle II: the natural and ordinary meaning—that, subject to principle of contemporaneity (where applicable), particular words and phrases are to be given their normal, natural, and unstrained meaning in the context in which they occur. This principle can only be displaced by direct evidence that the terms used are to be understood in manner different to their natural and ordinary meaning, or if such an interpretation would lead to an unreasonable or absurd result.

Principle III: integration—that treaties are to be interpreted as a whole. This principle is of fundamental importance and means that individual parts, chapters or sections of a treaty are not to be interpreted out of their overall context.

The remaining principles take effect subject to the three principles outlined above. There are:

Principle IV: effectiveness (ut magis valeat quam pereat)—that treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular

[35] The ILC took the view that Article 36(1) provided sufficient basis for rights to be accorded to all States and Article 38 a sufficient basis for the establishment of treaty rights and obligations *erga omnes*. For criticism see Chinkin, 1993.

[36] *YBILC* (1966), vol II (part two), p 220.