

## The Law of Treaties

### What is a treaty?

**Vienna Convention 2(1):** 'Treaty' means an international agreement concluded between States in a 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.

### Elements

- An international agreement
- Between states (or between a state and an international organisation or between international organisations)
- In writing
- Governed by international law
- Once in force it is legally binding on the parties and any breach will be a violation of international law.
- A source of obligation rather than a source of law (*Fitzmaurice 'Some Problems Regarding the Formal Sources of International Law' 1958*).

### Applications of Vienna Convention on the Law of Treaties:

- Only applies to agreements between states (**art 2**) – mutual expression and consent (*Craven, 'Legal Differentiation and the Concept of Human Rights Treaty in International law' 2000*).
- Only applies to written treaties (**art 2**).
- Only applies to treaties concluded after the Vienna Convention entered into force (1980 or date the state became a party) (**art 4**).
- Many (but not all) provisions of Vienna Convention reflect customary international law (**Costa Rica v Nicaragua 2009**).
- For international organisations, refer to **Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986**. This has 42 parties from 30 states so it isn't yet in force because you need 35 states involved.

### Exclusions from the Vienna Convention:

- Treaties between states and international organisations or other subjects of international law.
- Treaties between other subjects of international law.
  - The fact the Convention doesn't apply to the above two does not affect:
    - the legal force of such agreements;
    - the application to them of any of the rules set forth in the Convention to which they would be subject to independently of the convention, or;
    - The application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties (**art 3**).
- Oral agreements – these can still be binding under international law, per **Legal Status of Eastern Greenland (Denmark v Norway) 1993**: Norway was bound by an oral undertaking to Denmark that it would not oppose its claim to sovereignty over Greenland.
- Unilateral statements (but these may still be binding – **Nuclear Test 1974**).
- Agreements intended to be governed by municipal law (e.g. contracts).
- Agreements not intended to be governed by international law (no intention to create legal obligations).
- Treaties concluded before 1980 (when Vienna Convention came into force).

### Breaches

- Ordinary breach: breach of a provision or obligation.
- Material breach: breach of a special kind, such as a provision of exceptional importance.

### Treaty Negotiation and Conclusion

- **Bilateral treaty:** a treaty strictly between two parties.
- **Multilateral treaty:** a treaty to which three or more sovereign states are parties.
- **Art 6:** every state has the capacity to conclude treaties.

- Who has capacity to conclude treaty → **Art 7**: representative of state needs full powers to adopt or authenticate text or consent to be bound unless:
  - State practice or circumstances shows representative is accepted.
  - Representative is generally head of state or a diplomatic mission, etc.
  - Representative is accredited to an international conference or international organisation or organ for the purpose of adopting text (**Art 7** is CIL: **Armed Activities Case Rwanda 2006**).

#### Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v Rwanda), ICJ Rep 2006

- Court required to consider effect of statement by Minister of Justice of Rwanda regarding the withdrawal of Rwandan reservations to various human rights treaties.
- With the increasing frequency in modern international relations of other persons representing a State in specific fields (i.e. various ministers), they may be authorised by the State to bind it by their statements in respect to matters falling within their purview.
- The existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties (**Art 3**) therefore the rules of IL shall be applied in the event of armed conflict (**Art 5**). If a treaty can be terminated in the event of armed conflict it will be specified under **Art 6**.
- **Art 8**: unauthorised representative can be confirmed by states afterwards, otherwise it is ineffective and the state is not bound.
- **Art 9**: Text 'adopted' by:
  - Consent of all negotiating states, unless at an international conference where 2/3 majority suffices;
  - International organisations can apply their own rules under **art 5**.
  - Want authentic text.

#### When does a treaty come into force?

- Fundamental principle: **consent**.
- A treaty enters into force on its own terms (**Art 24 and 25**). This is usually when a specified number of states have 'consented to be bound.'
- A state can express consent to be bound by:
  - Signature (**Art 11 and 12**) – a state who has signed a treaty is under an obligation to refrain from acts which would defeat the object and purpose of the treaty, even if a state has not ratified the treaty. This obligation is only lifted if the state declares it has no intention to ratify or be bound by the treaty (**Art 18**).
  - Exchange of instruments (**Art 11 and 13**) – most often used in bilateral agreements;
  - Ratification, acceptance or approval (**Art 2, 11, 14, 16**) – most treaties accepted this way;
  - Accession (**Art 2, 11, 15, 16**);
  - Or any other agreed method.
- Can be a gap between when a treaty has been signed and when it's actually enforced e.g. Australia dual system.
- For example, the **Vienna Convention** requires signature + ratification or signature + accession. It came into force after the 35<sup>th</sup> ratification or accession.
- If a state has consented to be bound before a treaty is in force, it is bound on entry into force of the treaty.
- If a state consents to be bound after the treaty has come into force, once it consents, the fact it is bound takes effect.

#### Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal), 83 ILR 1 (1992)

- GB & S agreed to submit a dispute over their maritime borders to int. arbitration by a treaty in 1985. Issue whether an agreement in 1960 b/w Portugal & France was binding on Gb & S as their successor states. Majority held it was valid and binding.
- A successor State can invoke before a tribunal all grounds of claim or objection which could have been invoked by the State to which it has succeeded.

#### Application of the Genocide Convention (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)), ICJ Rep 1993

- Issue whether each new State from former Yugoslavia could succeed to the Genocide Convention which the former Yugoslavia had ratified.

- Judge Weeramantry (Separate Opinion): New States ought not, in principle, to be burdened with treaty-based responsibilities without their express consent. Newly independent States shouldn't have to accept as a *fait accompli* the contracts of predecessor States, for it is self-evident that the new State must be free to make its own decisions on such matters. If there is to be a deviation from the clean slate principle, sufficiently cogent reasons should exist to demonstrate that the new State's sovereignty is not being thereby impaired.

#### **Legal Effect of a Treaty once Entry into Force**

- ***Pacta sunt servanda*** – agreements are binding upon parties to it.
- Obligation of **good faith (Art 26)**.
- Internal law cannot excuse non-performance (**Art 27**).
- It is not retroactive (**Art 28**), unless otherwise stated or agreed.
- Treaties must be registered with the UN (**UN Charter Art 102**) to encourage transparency, prevent secret diplomacy and promote availability of treaty texts.
  - Treaties not registered with the UN cannot be relied upon before UN organs.
  - **Prior to entry into force:** A state must refrain from acts which would defeat the object and purpose of treaty between signature and ratification//approval and between ratification and entry into force (**Art 18**), unless the state makes it clear that it will not be party to the treaty, such as a public statement.