

# LAWS5005: PUBLIC INTERNATIONAL LAW

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# TREATIES

## Definition of Treaties

### Summary

- Treaties are an agreement between States (or international organisations) binding on the parties and governed by international law
  - Also defined in [VCLT Article 2\(1\)\(a\)](#)
  - These instruments are regarded as the most important source of contemporary international law
  - Primary reason for determining whether certain agreements, statements or other actions constitutes a treaty, is that rights and obligations may then arise to which the law of treaties is applicable
- **Function of Treaties**
  - Some, dispositive of territory and rights in relation to territory, are like conveyances
  - Treaties involving bargains are like contracts
  - Multilateral treaties are 'law making'
- **ILC does not find it necessary to make a distinction between 'law making' and other treaties**
- **Conclusion of Treaties**
  - There are no overriding requirements of form, it depends on parties negotiation
  - In practice form is governed partly by usage, and will vary
  - VCLT 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'
  - Where parties want to record mutual understandings but do not intend to create legally binding obligations, they often conclude MOU's
- Most treaties are concluded once the express consent of all of the parties has been reached and usually there is little doubt that a treaty has been concluded
- However, on occasion it is not clear whether the contact between States has given rise to a treaty and in some circumstances, it seems even unilateral statements by State Representatives may be regarded as being binding on that State in its dealings with other States
- **ILC has concerned itself with treaties since 1949**
  - In 1966 it adopted 75 draft articles, forming the basis of the [1969 Vienna Convention \(VCLT\)](#)
  - The VCLT is not declaratory of international law, but has a very strong influence and a number of articles are now essentially declaratory, and those that are not constitute presumptive evidence of emergent rules
  - WTO and ECJ have emphasis customary international law of treaties from VCLT are significant

### Difference Between Signature and Ratification

- **Signature**
  - Where treaty is not subject to ratification, acceptance or approval, signature establishes consent to be bound
- **Ratification**

- Where signature is subject to ratification, acceptance or approval, signature does not establish consent to be bound or create an obligation to ratify
- What it does is to qualify the signatory to proceed to ratification, acceptance or approval
- Creates an interim obligation of good faith to refrain from acts that would frustrate the treaty

### Vienna Convention on the Law of Treaties 1969 (VCLT)

- Adopted by a very substantial majority and covers the main area of the law of treaties  
Does not deal with private actors (ie, organisations), state succession to treaties or effect of armed conflict on treaties
- **Article 2(1)(a)** → 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation
  - 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
  - 'Governed by international law' → excludes commercial arrangements under national law
- **Article 3** → this definition does not affect agreements between states and other subjects of international law or between those other subjects
  - This definition does not affect legal force of agreements not in written form
  - It is possible to have unwritten agreements → *Legal Status of Eastern Greenland (Den v Norway)* (1933)
- **Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)** ICJ Reports 1971 p 16, 47
  - 'The rules laid down by the Vienna Convention... concerning the 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'

### Rome Statute of the International Criminal Court 1998

### Elements and Registration of Treaties

- **May be embodied in one or several instruments** (eg, an exchange of notes) and there is not particular requirement as to form → *Maritime Delimitation and Territorial Questions (Qatar v Bahrain)* (1994) ICJ
  - What matters is **intention of parties**
  - In the above case, an exchange of notes was deemed legally binding
- **Unilateral declarations can also be binding**
  - 'An undertaking... if given publicly with an intent to be bound, even though not made within the context of international negotiations, is binding' → *Nuclear Tests Cases (Australia v France; New Zealand v France)* (1974) ICJ



- **No requirement a treaty involves ‘consideration’**, ie, a promise, price, detriment or forbearance given as value for the promise.
  - Treaties can be one sided → *Nuclear Tests Cases (Australia v France; New Zealand v France)* (1974) ICJ
- **Only states, international organisations and other international entities** with capacity to enter into treaties may be parties
- **UN Charter, Article 102 (see also Article 80 of VCLT)**: provides that after a treaty enters into force, the treaty must be registered with the Secretariat of the UN
  - An unregistered treaty remains legally binding between the parties and is fully operative in international law, but by virtue of **Article 102** of the UN, an unregistered treaty may not be invoked before the ICJ or any UN Organ
- **VCLT Article 26** → every treaty in force is binding upon the parties to it and must be performed by them in good faith → *pacta sunt servanda*
- **VCLT Article 28** → treaties do not apply retrospectively (unless there is an intention to apply retroactively)

## Formation and Application of Treaties

### Application of the VCLT

- **Article 1** → only applies to treaties between states
- **Article 2** → only applies to written treaties
- **Article 4** → the VCLT only applies to treaties concluded after the date of entry into force of the VCLT (1980, or later date if the State parties to the treaty became bound by the VCLT after that date) (without prejudice to the convention of rules in the Convention which apply independently of the Convention)
  - BUT many treaty provisions reflect customary international law
- **Article 6** → every state has the capacity to conclude treaties

### A. Aust, *Modern Treaty Law and Practice* (3rd edn, 2013)

- Important to note that when law of treaty questions arise during negotiations, whether for a new treaty or about one concluded before the entry into force of the Vienna Convention, the rules set forth in the Convention are invariably relied upon even when the states are not parties to it

### Formation

- **Article 7** → a person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing consent of the State to be bound by the treaty if:
  - a) He produces appropriate full powers [defined in Article 2(1)(c) ‘full powers’ means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty...
  - b) It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to

dispense with full powers

- See *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* ICJ Rep 2006 6, International Court of Justice (Jurisdiction and Admissibility)

### Entry Into Force

- Difficulties arise when state has signed a treaty but not ratified
- Signing of the treaty is a display of intention to ratify in the near future, but it is not binding in a practical sense
- Legally binding consent to the treaty is usually conditional upon subsequent **ratification or accession** (Articles 14, 15 VCLT)
- [Article 18](#) simply states parties who are signatory must not engage in actions which undermine the objective of the treaty given the number of years it could take for a multilateral treaty into force
- When does it enter into force?
  - Generally when the treaty says it does; if silent there is presumption it enters into force when all negotiating states have consented to be bound: [VCLT, Article 24\(2\)](#)
  - Treaty enters into force for a specific party when it has consented to be bound and when the treaty has entered into force generally

### Ratification; Accession, Acceptance and Approval; Consent to be Bound; Entry Into Force

- **Ratification, two distinct procedural acts:**
  - Internal act of approval
  - International procedure which brings the treaty into force by a formal exchange or deposit of instruments of ratification
- **Accession**
  - Occurs when a state which did not sign a treaty formally accepts its provisions, either before or after the treaty enters into force
  - Conditions for accession depend on the provisions of the treaty
  - May be the only means of becoming a party
- **Acceptance and Approval**
  - Describes the substance of accession
  - Where a treaty is expressed to be open to signature 'subject to acceptance' this is the equivalent to 'subject to ratification'
- **Consent to be Bound**
  - Consent to be bound may also occur through other means, such as an exchange of instruments constituting a treaty
- **Entry into Force, Deposit and Registration**
  - Provisions of the treaty determines how it enters into force, where it does not specify a date, there is a presumption it comes into force as soon as all negotiating states consent to be bound
  - After it is concluded, the written instruments of ratification, accession, etc, as well as reservations and other declarations are placed in the custody of a depositary
  - Secretariat accepts agreements for registration without conferring any status on them
  - Non-registration does not affect the validity of agreements, but they may not be relied upon

by UN organs

### State Succession to Treaties

- Issue of succession of States to treaties was important during the decolonisation era after WWII
- It became a live issue again with the breakup of the federal republics of Soviet Union and Yugoslavia
- See:
  - *Application of the Genocide Convention (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* ICJ Rep 1993 325, International Court of Justice (Indication of Provisional Measures)
  - Exceptions listed in the [Vienna Convention on Succession of States in Respect of Treaties 1978](#)
    - [Article 11 & 12](#) Boundary and Territorial Regimes

### Amendment or Modification of Treaties

- Amendment depends on the consent of the parties, and is primarily political
- Many treaties involve a procedure for amendment
- Apart from an 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
  - Restricted by [Article 41 VCLT](#)
- Modification may also result from the conclusion of a subsequent treaty or the emergence of a new norm of general international law
  - ILC Final Draft → treaty can be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions
  - Vienna Conference rejected this on the grounds it created instability, though this is unsatisfactory
    - Article 39 provides a treaty may be amendment by agreement without formality for the expression of agreement
    - Consistent practice may provide cogent evidence of common consent to a change
    - Modification of this type occurs in practice

### *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* ICJ Rep 2006 6, International Court of Justice (Jurisdiction and Admissibility)

<b>Facts</b>	<ul style="list-style-type: none"><li>- The court was required to consider the legal effect of a statement made by the Minister of Justice of Rwanda, regarding the proposed withdrawal of Rwandan reservations to various human rights treaties, including the <a href="#">Genocide Convention</a></li></ul>
<b>Issues</b>	<ul style="list-style-type: none"><li>- Rwanda argued that it cannot be legally bound by the statement in question inasmuch as a statement made not by a Foreign Minister or Head of Government 'with automatic authority to bind the State in matters of international relations, but by a Minister of Justice, cannot bind the State to lift a particular reservation'</li></ul>
<b>Held</b>	<ul style="list-style-type: none"><li>- It is a well-established rule of international law that Heads of State, Heads of Government and Minister of Foreign Affairs represent the State merely by virtue of exercising their</li></ul>

	<p>functions, including for the performance, on behalf of said State, of unilateral acts having the force of international commitments</p> <ul style="list-style-type: none"> <li>- The court recalls that in the matter of the conclusion of treaties, this rule of customary law finds expression in <a href="#">Article 7(2) VCLT</a></li> <li>- Court noted that with increasing frequency in modern international relations of other persons representing the State in specific fields <b>may be authorised by that State to bind it by their statements in respect of matters falling within their purview</b></li> <li>- This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials</li> </ul>
<b>Principle</b>	<ul style="list-style-type: none"> <li>- Heads of State, Heads of Government and Minister of Foreign Affairs represent the State merely by virtue of exercising their functions</li> <li>- Other people <u>may be authorised</u> by heads of state to be bound by statements in respect of matters falling in their purview</li> </ul>

*Application of the Genocide Convention (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) ICJ Rep 1993 325, International Court of Justice (Indication of Provisional Measures)*

<b>Held</b>	<ul style="list-style-type: none"> <li>- Judge Weeramantry (separate opinion):</li> <li>- Generally speaking, a new State is not bound to the treaties its predecessor were bound to</li> <li>- The 'clean slate' principle is justified on several powerful bases including: <ul style="list-style-type: none"> <li>- Principle of individual state autonomy and sovereignty</li> <li>- Principle of self-determination</li> <li>- Principle of <i>res inter alios acta</i> - things done between others does not harm or benefit third party</li> <li>- Principle that there can be no limitations on a State's rights, except with consent</li> </ul> </li> <li>- However, this is not without exception <ul style="list-style-type: none"> <li>- Human rights and humanitarian treaties involve no loss of sovereignty or autonomy of new States</li> <li>- Some may involve economic burdens but important ones like right to life protected by <a href="#">Genocide Convention</a> automatically succeeds to new States</li> </ul> </li> </ul>
<b>Principle</b>	<ul style="list-style-type: none"> <li>- States not bound by the treaties of its predecessor</li> <li>- Treaties that involve no burden or loss of sovereignty may carry over</li> </ul>

## Reservations

<b>Summary</b>
<ul style="list-style-type: none"> <li>- Reservations are the means whereby States accept as many of the rights and obligations under a treaty as possible, while expressly stating that there are some provisions they cannot accept</li> <li>- They are a useful and pragmatic device for ensuring that treaties do enter into force</li> <li>- However, reservations can have the effect of excluding altogether the legal effect of a particular</li> </ul>

provision of a treaty, or modifying or qualifying the extent of the provisions

#### Article 2(1)(d) VCLT - Definition of a Reservation

- Reservation means a unilateral statement, however phrased or names, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, where it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State
- Note → a 'reservation' is distinct to an 'interpretative declaration' (a statement as to the meaning a state ascribes to the treaty or treaty provision)

#### Article 23 VCLT - Procedure for Making Reservations

- A reservation, an express acceptance to a reservation and to an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty
- The withdrawal of a reservation or of an objection to a reservation must be formulated in writing

#### Article 19 VCLT - Formulation of Reservations

- Governs where a reservation is incompatible with the treaty:
  - Where the reservation is prohibited by the treaty
  - Where the treaty indicates only specific reservations may be made
  - Where the reservation is incompatible with the object and purpose of the treaty
- **Reservations to the Genocide Convention, ICJ Opinion in OMW**
  - Unclear and must be examined on a case by case basis, Genocide Convention was intended by the GA and by party States to be adopted by as many states as possible, contracting parties understood that one minor reservation would not exclude the entire Convention, parties would not have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible

#### Reservations to Treaties Allowed, unless:

- a) Reservation is prohibited by the treaty (eg. Rome Statute of the International Criminal Court), or
- b) The treaty provides only specified reservations are allowed, not including reservation in question,
- c) In other cases, if the reservation is incompatible with the object and purpose of the treaty (compatibility test)

#### ILC Guide to Practice on Reservation to Treaties, Guidelines 3.1.5

- A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its generous tenor, to such a way that the reservation impairs the *raison d'etre* of the treaty

#### Article 20 VCLT - Acceptance of an Objection to Reservations

- Even if reservations allowed, other parties may object (for any reason)
  - 1) No acceptance required if reservation expressly authorised by the treaty

- 2) Acceptance required if appears from small number of parties and object and purpose that application of the treaty in entirety an essential condition of consent of parties
- 4) In other cases
  - a) Acceptance by other contracting state of reservation means reserving state a party in relation to that other state
  - b) Objection by another contracting state does not prevent entry into force of treaty as between objecting and reserving state unless objecting state says so
  - c) An act expressing state's consent to be bound by treaty and containing reservation is effective as soon as one other contracting state accepts reservation
- 5) Unless treaty otherwise provides, a reservation considered to be accepted by a state if no objection raised within 12 months

#### **Effect of Reservation when Permissible**

- [Article 21](#) - a permissible reservation modifies the treaty relationship between the reserving state (R) and other parties, eg,
  - If State A accepts the reservation → treaty is modified between R and R, as set out in the reservation (on the reciprocal basis) [Article 21\(1\)](#)
  - If State B objects to the reservation and says that the treaty is not to apply - there is no treaty at all between R and B ([Act 20\(4\)](#))
  - If State C objects to the reservation, but does not say that the treaty is not to apply - the treaty applied between R and C, but the provisions to which the reservation relate 'do not apply as between the two States to the extent of the reservation
- Note the effect of the third situation (State C) is that the reservation is usually given effect; the ILC suggests that it should not be given effect (ILC Guide to practice)

#### **Effect of Reservation when Impermissible**

- VCLT is silent
- Traditional view is that impermissible reservation vitiates consent of the state to the treaty as a whole, and it is not a party: [Reservations to Genocide Convention \(1951\)](#)
- Emerging (especially for human rights treaties) is that the offending reservation is null and void and may be severed, with the state bound by the treaty without the protection of the reservation: [ILC Guide to Practice on Reservations to Treaties, Guideline 4.5.3](#) (presumption that author of invalid reservation bound, unless party expresses contrary intention)