Public International Law

Contemporary Principles and Perspectives

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custom, general principles) also depends on fundamental assumptions about its structure.

Lauterpacht described consent as the foundation for international law.[15] Treaty law is self-evidently consensual in character. While it is true that custom and general principles can apply to states that have not even tacitly agreed to those *particular* norms, the validity and binding nature of such norms is a product of the common will of the international community that such sources bear a binding quality. If such communal consent to the sources of international law vanished, the sources would themselves disappear, to be replaced by a differently constituted international order, depending on the substance of the new prevailing will of the international community.

2.1.3 The Obligatory Nature of International Law

Implicit in the concept of an 'international community' is that international law is universal. No state, not even a 'rogue' state, is outside the international system. New states are immediately bound by general customary law and succeed to treaties of their predecessors. The international community under international law is not only open to but also obligatory for all states.

This was not always the case. The major part of modern international law derives from Western European civilization from the sixteenth and seventeenth centuries onwards.[16] The early law of nations grew out of the customary and treaty dealings between Christian states, with the dawn of the concept of state sovereignty after the Peace of Westphalia.[17] Insofar as non-Christian states and peoples were concerned, it was accepted by European states that principles of morality should be applied.[18] It was not until the League of Nations system following the First World War that the idea of an international law which included the contribution of the 'main forms of civilisation and principal legal systems of the world' took definite shape.[19] The United Nations, membership of which covers nearly the entire community of states, has as its first principle 'the sovereign equal-

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15 Lauterpacht, above note 6, 92.

16 Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Harlow, UK: Longman, 1992, 9th edn) 87.

17 See Chapter 1, section 1.3.2.

18 James Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2006, 2nd edn), 176–84.

19 Statute of the Permanent Court of International Justice, Art. 9.

ity of all its Members'.[20] Membership is open to all states that accept the obligations in the UN Charter,[21] but non-Members cannot escape these obligations either: one of the principles of the UN Charter is to 'ensure that states which are not Members . . . act in accordance with [the Charter] so far as may be necessary for the maintenance of international peace and security'.[22] This demonstrates that the international system has trended ever closer to universality, not only of law but of certain core obligations. As the editors of the ninth edition of *Oppenheim's International Law* state:

> A fully universal organisation of the international community, membership of which is not only open to all states but also compulsory for them, without possibility of withdrawal or expulsion, and which involves comprehensive obligations prescribed in the organisation's constitution, unavoidably implies far-reaching derogations from the sovereignty of states. They have so far been unwilling to relinquish their sovereignty to that extent, but the trend to universality over the second half of the twentieth century has nevertheless been marked.[23]

2.1.4 Fragmentation: the Relevance of Normative Frameworks given the Proliferation of *sui generis* Areas of International Law

The International Law Commission, in its recent study on the fragmentation of international law, defined 'fragmentation' as 'the splitting up of the law into highly specialized "boxes" that claim relative autonomy from each other and from the general law'.[24] With the development of the international community after the Second World War, a number of specialized areas of international law developed, with their own tribunals and substantive law that increasingly diverged from each other. Human rights, international criminal law and international environmental law are examples of *sui generis* 'boxes' that emerged only recently – the former two having their own dispute resolution system: the UN Human Rights Committee, and international criminal courts and tribunals respectively.[25]

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[20] Charter of the United Nations, Art. 2(1).
[21] Ibid., Art. 4.
[22] Ibid., Art. 2(6).
[23] Jennings and Watts, above note 16, 90.
[24] Fragmentation Report, above note 3, [13].
[25] The major international courts and tribunals are: the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) (collectively, the ad hoc Tribunals), the International Criminal Court (ICC), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL).

When added to the burgeoning of other strands of international law – such as the law of the sea with its International Tribunal for the Law of the Sea, and international trade law with the Appellate Body of the World Trade Organization (WTO) – a complex patchwork of different tribunals emerges, each applying the overarching principles of international law to its specific subject area without any centralized coordination.

The resulting divergence of parallel strands of international law prompted the ILC to study the effect of this process on international law. Was this process weakening the sources of, and in turn the respect for, international law? The thrust of this argument is that different international law decision-making bodies might be applying the rules of international law differently; applying similar but not identical rules or construing and applying the same or analogous rules in a manner different from that of other tribunals. The ILC ultimately concluded that, while there was a tension between a universal coherence of rules and the place of pluralism in international law, the emergence of special regimes has 'not seriously undermined legal security, predictability or the equality of legal subjects'.[26] The ILC felt that international law provides 'a basic professional tool-box that is able to respond in a flexible way to most substantive fragmentation problems'.[27] Nevertheless, greater efforts need to be made to articulate the general principles of international law and the techniques for dealing with conflicts of norms – the subject of our next section.[28]

2.2 ARTICLE 38(1) ICJ STATUTE

Article 38(1) of the ICJ Statute is generally recognized as expressing the definitive sources of international law:[29]

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognised by civilised nations;

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26 Fragmentation Report, above note 3, [492].
27 Ibid.
28 Ibid., [493] and Appendix.
29 See, e.g., Georg Schwarzenberger, *International Law* (London: Stevens, 1957, 3rd edn) 26–7; G.M. Danilenko, *Law-Making in the International Community* (Dordrecht; London: M. Nijhoff Publishers, 1993), 30–36.

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This formulation succeeded a nearly identical provision in Article 38 of the Statute of the Permanent Court of International Justice,[30] which was modelled in 1920 by the Advisory Committee of Jurists on general understandings about the sources of international law. Of course, Article 38 is not itself the formal source of the rule it contains, but is merely a convenient material source that is in practice the starting point for any analysis of the sources of international law.[31] Nonetheless, it is now beyond question that its contents describe the sources of international law.

2.2.1 International Conventions: the Law of Treaties

2.2.1.1 The Vienna Convention on the Law of Treaties and its customary status

The Vienna Convention on the Law of Treaties 1969 ('Vienna Convention') is one of the most successful treaties ever concluded.[32] Although currently it has only 111 States Parties, the great majority of its provisions are accepted as reflecting customary international law.[33] Many of its provisions represented progressive developments at the time the Convention was signed, and these subsequently crystallized.[34] The success of the Vienna Convention is probably attributable to the fact that most of its provisions are not politically divisive, as they reflect commonly understood and largely universal notions of domestic contract law. Indeed, the ICJ has never held that a particular provision of the Vienna Convention does not reflect customary law.[35] Examples of important provisions held

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[30] The only difference between the formulations is the inclusion of the words 'whose function is to decide in accordance with international law such disputes as are submitted to it'.

[31] See, e.g., Dissenting Opinion of Judge Tanaka in *South West Africa* cases (Second Phase) [1966] ICJ Rep 250, 300.

[32] D.J. Harris, *Cases and Materials on International Law* (London: Sweet & Maxwell, 2004, 6th edn), 786–7.

[33] See, e.g., *Gobčikovo-Nagymaros Project* (*Hungary v Slovakia*) [1997] ICJ Rep 7, [46]; *Kasikili/Sedudu Island* case (*Botswana v Namibia*) [1999] ICJ Rep 1045, [18]; *Fisheries Jurisdiction* case (*United Kingdom v Iceland*) [1973] ICJ Rep 3, [36]. See also Gillian Triggs, *International Law: Contemporary Principles and Practices* (Sydney: LexisNexis Butterworths, 2011, 2nd edn), 89.

[34] Jennings and Watts, above note 16, 1199.

[35] Triggs, above note 33, 90.

by the ICJ as constituting customary law include those relating to the rules of interpretation[36] and the articles on termination and suspension.[37] Even those provisions that reflect a choice made by the Vienna Convention between competing views of the time, such as those on reservations and breach, can be said to have attained general acceptance as rules of customary international law.[38]

The Vienna Convention was negotiated during the UN Conference on the Law of Treaties at Vienna in 1968–69. It was opened for signature on 23 April 1969 and entered into force on 27 January 1980. Its scope is limited to treaties between states,[39] in written form,[40] concluded after the Vienna Convention entered into force,[41] and it expressly disclaims application to state succession, state responsibility and the effect of hostilities on treaties.[42] Its provisions on interpretation have, however, often been applied analogously; for example the ad hoc Tribunals have referred to the Vienna Convention as applying to the interpretation of their statutes.[43]

Two subsequent treaties – the Vienna Convention on Succession of States in respect of Treaties 1978 and the Vienna Convention between States and International Organizations 1986 – were concluded to cover some of the few areas not dealt with in the 1969 Vienna Convention but it is only the 1969 Convention that will be discussed in this chapter, as it contains the general rules on the law of treaties. The other Conventions have implications for international personality, discussed in Chapters 4 and 5.

2.2.1.2 Formation

2.2.1.2.1 Intention to create international legal relations The existence of a treaty does not depend on nomenclature. This reflects the fact that

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36 *Kasikili/Sedudu Island* case, above note 33, [18].

37 *Gobčikovo-Nagymaros Project* (*Hungary v Slovakia*), above note 33, [46].

38 Harris, above note 32, 787.

39 Vienna Convention on the Law of Treaties 1969, Art. 1. Note that the Vienna Convention applies to treaty relations between states notwithstanding that a non-state may also be party to the same convention: see Art. 3(c).

40 Ibid., Art. 2(1)(a).

41 Ibid., Art. 4.

42 Ibid., Art. 73. See also Art. 3: the Vienna Convention does not affect the legal validity or application of any rule of law not covered by it. It does not purport to cover the whole field of the law of treaties.

43 See, e.g., *Prosecutor v Milošević*, (*Amici curiae* Motion for Judgment of Acquittal Pursuant to Rule 98bis) IT–02–54–T (3 March 2004), Separate Opinion of Judge Patrick Robinson, [4].

international agreements have been given various titles – such as convention, protocol and agreement – without anything of substance turning on the use of any particular designation.[44] Article 2(1)(a) of the Vienna Convention 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 and whatever its designation'.

The requirement that a treaty concluded by states be 'governed by international law' is central to the concept of treaty formation. The parties must have an intention to create international legal relations.[45] Such mutual assent, or intention, is ascertained objectively – a party cannot disclaim the assumption of an obligation if the other party was entitled to understand it as such in all the circumstances of the case.[46] There is no requirement that a party should provide consideration. Every state has the capacity to conclude treaties.[47]

These concepts, which codified customary international law, are illustrated in the 1933 case *Legal Status of Eastern Greenland* before the Permanent Court of International Justice (PCIJ).[48] The Court had to decide (1) whether Denmark had title to the territory of Eastern Greenland by occupation,[49] or (2) whether Norway had entered into a treaty with Denmark by the so-called 'Ihlen Declaration'. In a minuted conversation on 14 July 1919, the Danish Minister proposed to the Norwegian Foreign Minister, M. Ihlen, that if Norway did not oppose Denmark's claim to Eastern Greenland at the Paris Peace Conference, then Denmark would not object to Norway's claims on Spitzbergen. In a subsequent conversation, Ihlen declared that the Norwegian government 'would not make any difficulty' in respect of Denmark's claim. According to the PCIJ, the circumstances indicated that the two states had created a bilateral treaty whereby Norway agreed not to occupy or otherwise assert sovereignty over Eastern Greenland:

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[44] *South West Africa* cases (*Ethiopia v South Africa; Liberia v South Africa*) (Preliminary Objections) [1962] ICJ Rep 319, 331.

[45] International Law Commission, Commentary (Treaties), Art. 2(6): (1966) *Yearbook of the International Law Commission*, II, 189; Fourth Report on the Law of Treaties (1965) *Yearbook of the International Law Commission*, II, 12.

[46] See, e.g., *Legal Status of Eastern Greenland* (*Denmark v Norway*) (1933) PCIJ Rep (Ser. A/B) No. 53, 69. The extent to which other actors, such as international organizations, possess this capacity is discussed in Chapter 5.

[47] Vienna Convention on the Law of Treaties 1969, Art. 6.

[48] *Legal Status of Eastern Greenland*, above note 46.

[49] See Chapter 4.

> The Court considers it beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.[50]

This case illustrates the centrality of the requirement of intention to create international legal relations, and shows that the courts will look to the substance rather than the form of any particular agreement.

2.2.1.2.2 Consent to be bound Under Article 11 of the Vienna Convention, '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'. This reflects the fact that treaties may be concluded in 'solemn form' or in 'simplified form'.

Many of the more important treaties have traditionally been concluded in 'solemn form', by which it is meant that at an international conference, after negotiation, the final text of the treaty is settled, or 'adopted' by the representatives (plenipotentiaries) of each state. Article 9 requires the treaty to be adopted unanimously or by consent of a two-thirds majority, unless otherwise specified within the treaty itself;[51] in some cases, the treaty must be adopted by all states.[52] The treaty is then authenticated – most commonly by signature.[53] Authentication requires the plenipotentiaries to produce appropriate 'full powers' – that is, a formal document emanating from the repository of the treaty-making power of the state authorizing the plenipotentiary to adopt and authenticate the treaty.[54]

By signing the treaty, the plenipotentiaries are not yet expressing the state's consent to be bound. In treaties concluded in 'solemn form', ratification is the means by which such consent is intended to be manifested. Ratification occurs after the plenipotentiaries have delivered a copy of the treaty to the repository of the treaty-making power of the state (for example, the minister for foreign affairs), who then ratifies the treaty and either notifies the other states or deposits the treaty with a depositary (a state or international organization tasked with record-keeping and admin-

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50 *Legal Status of Eastern Greenland*, above note 46.

51 Vienna Convention on the Law of Treaties 1969, Art. 9(2).

52 Ibid., Art. 9(1). If the treaty is drawn up within an international organization, the voting rule of the organization will apply: see Art. 5.

53 Ibid., Art. 10.

54 Ibid., Arts 2(1)(c), 7(1).

istration in respect of the treaty).[55] A state is not obliged to ratify a treaty. However, after signature, but before ratification or refusal of ratification, a state must not act to defeat the object or purpose of the treaty.[56] This obligation also applies after ratification, but before entry into force of the treaty, unless entry into force is 'unduly delayed'.[57] Partial or conditional ratifications (except to the extent that a state has made a lawful reservation) are counter-offers that require the assent of other states before they may be binding.[58]

For treaties in 'simplified form', an act other than ratification is intended by the parties to evidence their intention to be bound.[59] Also, the formal requirements of adoption, authentication, signature and ratification can be dispensed with. The *Legal Status of Eastern Greenland* case illustrates this, as consent to be bound was inferred from the circumstances to consist in the oral statement of Minister Ihlen that the Norwegian government would 'make no difficulty' over Denmark's claim to Eastern Greenland.[60] In practice it may be convenient for parties to conclude agreements, usually over more technical or trivial matters, by exchange of notes with signatures appended. It may be advantageous in some cases to avoid the constitutional requirements associated with ratification. For instance, the US Constitution requires the consent of a two-thirds majority of the Senate for ratification of a treaty;[61] the President has, however, an implied power to conclude 'executive agreements', which may equally express the state's consent to be bound.[62]

A person will only express a state's consent to be bound if that person has 'full powers' – otherwise the treaty is without legal effect unless subsequently confirmed by the state.[63] If, however, a state has placed a restriction on a plenipotentiary's otherwise full power to express the state's consent to be bound, the non-observance of the restriction will not render the treaty void, unless the state had notified the other States Parties of the restriction beforehand.[64] A treaty does not become voidable because it was made in breach of the state's domestic law relating to competence to

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55 Ibid., Art. 16.
56 Ibid., Art. 18(a).
57 Ibid., Art. 18(b).
58 Jennings and Watts, above note 16, 1232–3.
59 Vienna Convention on the Law of Treaties 1969, Art. 11.
60 See *Legal Status of Eastern Greenland*, above note 46 and accompanying text.
61 United States Constitution, Art. 1, section 2, clause 2.
62 Jennings and Watts, above note 16, 2387.
63 Vienna Convention on the Law of Treaties 1969, Art. 8.
64 Ibid., Art. 47.

conclude treaties, unless the violation was 'manifest' and involved breach of a provision of 'fundamental importance'.[65] These provisions strike a balance between the principle that a state should not be bound by the acts of a renegade representative, and the principle that other states should be entitled to assume that the state's house is in order. As the state with the renegade representative is the party best placed to prevent the breach, the balance is struck in favour of other states contracting with it. As ratification is performed by the repository of the treaty-making power of the state, in practice these issues will only become relevant when consent to be bound is expressed by another act, such as by signature.[66]

A state that did not take part in the negotiating process can express its consent to be bound by a treaty through a formal process known as 'accession'.[67] For a state to join the treaty in this way, the treaty must so provide, or the parties must have so agreed.[68]

2.2.1.2.3 Pacta sunt servanda *and entry into force* The binding force of treaties is sourced in the principle of *pacta sunt servanda* (agreements must be kept). A customary norm that is by its very nature non-derogable, *pacta sunt servanda* is a *jus cogens* norm.[69] The Vienna Convention formulates the principle as follows: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'[70]

Thus, treaties become binding from the date on which they enter into force. If a treaty deals with matters to be performed before its entry into force, such as matters dealing with the permissibility of reservations,[71] then those provisions apply as from adoption of the text.[72] Treaties almost invariably specify the date on which they enter into force, usually after achieving a certain number of ratifications. Failing such specification, ratification (or other expression of consent to be bound) of all states is required for entry into force.[73] If a state expresses its consent to be bound

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65 Ibid., Art. 46(1). The requirement that the breach be 'manifest' requires that it be objectively evident to a state conducting itself in the matter in accordance with normal practice and in good faith: see Art. 46(2).

66 Jennings and Watts, above note 16, 1222.

67 Vienna Convention on the Law of Treaties 1969, Art. 15.

68 Ibid.

69 See Hans Wehberg, '*Pacta sunt servanda*' (1959) 53 *American Journal of International Law* 775; M. Janis, 'The Nature of *Jus Cogens*' (1988) 3 *Connecticut Journal of International Law* 359, 361.

70 Vienna Convention on the Law of Treaties 1969, Art. 26.

71 For a discussion of reservations to treaties, see section 2.2.1.4 below.

72 Vienna Convention on the Law of Treaties 1969, Art. 24(4).

73 Ibid., Art. 24(2).

after the treaty has entered into force, the treaty comes into force for that state on that day.[74]

2.2.1.2.4 Objects of treaties – jus cogens *and third states* States are generally free to select the objects, or subject-matter, of their treaty. However, any treaty concluded in breach of a *jus cogens* norm is void.[75] The general rule is also restricted by the principle, grounded in the sovereign equality of states[76] and arguably the flipside to *pacta sunt servanda*, that a treaty cannot create obligations or rights for non-states (called 'third states') without their consent: *pacta tertiis nec nocent nec prosunt*. A third state can assume an obligation under a treaty if it expressly accepts the obligation in writing[77] and it is presumed to assent to a right under a treaty unless and until it indicates a contrary intention.[78] No right or obligation will arise for a third state unless the parties to the treaty intended it to have this effect.[79] The consent of all the parties and the third state is required to revoke or modify an obligation that the third state has accepted, while the parties can unilaterally revoke a third state's right under the treaty unless the right was intended to be irrevocable.[80] Despite the provisions of the Vienna Convention, however, obligations and rights are imposed on third states against their will in exceptional cases. For instance, as a result of the importance and international personality of the UN, the provisions of the UN Charter, such as Article 33, are recognized as applicable to third states:

> The parties to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation . . . or other peaceful means of their own choice.[81]

Other treaties that do not require the consent of third states include treaties creating new states, territories or international organizations,[82] or treaties imposing conditions on a defeated aggressor state.

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[74] Ibid., Art. 24(3).
[75] Ibid., Art. 53.
[76] Commentary (Treaties), Art, 30(1): (1966) *Yearbook of the International Law Commission*, II, 253–4.
[77] Vienna Convention on the Law of Treaties 1969, Art. 35.
[78] Ibid., Art. 36(1).
[79] Ibid., Arts 35, 36.
[80] Ibid., Art. 37.
[81] See also Charter of the United Nations, Art. 2(6).
[82] See Chapter 5.

2.2.1.3 Amendment and modification

The rules concerning the amendment and modification of treaties are also grounded in the principles of *pacta sunt servanda* and *pacta tertiis nec nocent nec prosunt*. 'Amendment' refers to a formal process of introducing changes to a treaty whereby every member is entitled to become a party to the treaty as amended.[83] 'Modification' is more informal and often does not involve all parties.[84] The legal treatment of both procedures is substantially the same. 'Revision' is the process whereby a new diplomatic conference comprehensively revises a treaty.[85]

Parties may amend or modify a treaty by agreement.[86] Where a multilateral treaty is amended by some states but not others, the amendments will not bind the non-consenting states.[87] Similarly, if states later accede to the treaty, the original version will govern the acceding state's relations with those parties that did not participate in the amendment.[88] A treaty modification must not affect the rights and obligations of other parties to the treaty or be incompatible with its object and purpose.[89]

A later treaty is taken to impliedly terminate or modify an earlier treaty to the extent of any inconsistency, but only insofar as parties to the later treaty are identical to the earlier one.[90] Where only some parties to an earlier treaty attempt to contract out of that treaty, they can only do so as between themselves.[91] The rights and obligations of states that are only party to the earlier treaty are not affected.[92]

Article 103 of the UN Charter states:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

This provision is widely accepted as creating a hierarchy between treaties, although it is not settled whether an inconsistent provision of a

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83 Vienna Convention on the Law of Treaties 1969 Art. 40(3).
84 Ibid., Art. 41.
85 Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties', in Malcolm D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2006, 2nd edn) 187, 195.
86 Vienna Convention on the Law of Treaties 1969, Arts 39 and 41(1).
87 Ibid., Art. 40(4).
88 Ibid., Art. 40(5).
89 Ibid., Art. 41(1)(b).
90 Ibid., Art. 30(3).
91 Ibid., Art. 30(4).
92 Ibid., Art. 30(4)(b).

treaty would be rendered void or merely unenforceable.[93] The Vienna Convention expressly states that it is subject to Article 103 of the Charter.[94]

2.2.1.4 Reservations

The more parties there are to a treaty, the more likely that some of them would seek to join the treaty only on condition that certain provisions are inapplicable to them or carry a certain interpretation. The Vienna Convention defines a reservation 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.[95]

In the past, the rule was that every party's assent was required for a reservation to be effective. By their nature, reservations would be counter-offers if made to bilateral treaties. But the inflexibility of the rule, if applied to multilateral treaties, caused the ICJ to take a different approach in its Advisory Opinion in the *Reservations* case.[96] Upon certain reservations expressed by Soviet bloc countries to the jurisdiction of the ICJ in relation to the Genocide Convention, and other provisions such as immunity from prosecution, the UN General Assembly asked the ICJ to advise what the effect of reservations was when other states have objected to them. Although the Court was specifically dealing with the Genocide Convention, its views were of general purport. They were incorporated into the Vienna Convention and represent customary law today.[97]

Acceptance by a party of a reservation made by another party modifies the treaty as between them.[98] Objection by another party to a reservation does not prevent the treaty from entering into force as between the objecting and reserving states, unless the objecting state clearly indicates otherwise.[99] It merely renders the treaty inapplicable between the objecting and reserving states to the extent of the reservation.[100] A state is considered to

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93 Jennings and Watts, above note 16, 1216.

94 Vienna Convention on the Law of Treaties 1969, Art. 30(1).

95 Ibid., Art. 2(1)(d).

96 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15; see Jennings and Watts, above note 16, 1244–5.

97 See, e.g., *Temeltasch v Switzerland* (1983) 5 EHRR 417, 432.

98 Vienna Convention on the Law of Treaties 1969, Art. 20(4)(a), 21(1).

99 Ibid., Art. 20(4)(b).

100 Ibid., Art. 21(3).

have accepted the reservation if it has not objected within twelve months of being notified of the reservation, or from when it expressed its consent to be bound by the treaty, whichever occurred later.[101] This system allows as many states as possible to become party to a treaty the core principles of which are substantially agreed.[102] Reservations and objections to reservations may be withdrawn unilaterally by notice.[103]

A state's declaration that seeks to impute a particular interpretation to a provision may or may not be intended to make the state's acceptance of the provision conditional on the acceptance of its interpretation. Only if an interpretative declaration is intended to have this effect will it amount to a reservation.[104]

Reservations may not be made if the treaty expressly excludes them, or if they are incompatible with its object and purpose.[105] What constitutes an impermissible reservation contrary to the object and purpose of a treaty has become the subject of considerable disagreement in the context of human rights treaties. The UN Human Rights Committee has stated that human rights treaties 'are not a web of inter-State exchanges of mutual obligations. . . . They concern the endowment of individuals with rights'.[106] The Committee has complained that, in practice, states have often not seen any advantage to themselves of objecting to reservations that only affect the rights of citizens of other states.[107] Furthermore, the Committee has stated that, as human rights treaties are for the benefit of citizens within the jurisdiction of States Parties, provisions that codify customary international law may not be the subject of reservations.[108] More controversial was the following statement by the Committee:

> The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reserva-

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101 Ibid., Art. 20(5).

102 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 24.

103 Vienna Convention on the Law of Treaties 1969 Art. 22.

104 Donald McRae, 'The Legal Effect of Interpretive Declarations' (1978) 49 *British Year Book of International Law* 155, 72–3.

105 Vienna Convention on the Law of Treaties 1969 Art. 19.

106 United Nations Human Rights Committee, 'General Comment 24 on Reservations to the International Covenant on Civil and Political Rights' (1995) 15 HRLJ 464; 2 IHRR10 ('General Comment 24'), [17].

107 Ibid., [17].

108 Ibid, [8].

> tion will generally be severable, in the sense that the Covenant will be operative for the reserving party without the benefit of the reservation.[109]

The Committee's attempt to establish the different application of the law of treaties in relation to human rights sparked strong objections from several states,[110] leading the ILC to subsequently affirm that a human rights object will not affect the application of the Vienna Convention regime.[111]

A reservation to a provision that expresses a *jus cogens* norm is inadmissible under customary international law. For example, in the *North Sea Continental Shelf* cases,[112] the ICJ considered whether Article 6 of the Geneva Convention on the Continental Shelf had crystallized as a rule of customary law. One issue was the significance of the faculty of making reservations. Three of the judges saw fit to state that *jus cogens* rules codified in a treaty could not be the subject of reservations.[113] Indeed, the UN Human Rights Committee pointed out the incongruity in a state reserving the right, for instance, to engage in slavery.[114]

2.2.1.5 Interpretation

Traditionally, there have been three schools of treaty interpretation: (1) the textual school, which looked to the 'ordinary' meaning of the text; (2) the intentionalist school, which attempted to ascertain the intention of the drafters; and (3) the teleological school, which preferred an interpretation that best fulfilled the object and purpose of the treaty. Article 31(1) of the Vienna Convention incorporates elements of all three schools in stating the general rule: '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 light of its object and purpose.'[115]

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[109] Ibid, [18].

[110] 'Observations on General Comment 24 by France' (1997) 4 IHRR 6; 'Observations on General Comment 24 by the United Kingdom' (1996) 3 IHRR 261; 'Observations on General Comment 24 by the United States' (1996) 3 IHRR 265.

[111] 'Report of the International Law Commission on its Forty-Ninth Session', UN Doc. A/52/10 (1997) 126–7.

[112] *North Sea Continental Shelf* cases (*Federal Republic of Germany v Denmark and the Netherlands*) [1969] ICJ Rep 3. For a discussion of the facts and relevance of this seminal case on the formation of custom, see below sections 2.2.2.2 and 2.2.2.3.

[113] Ibid., 97 (Separate Opinion of Judge Padilla Nervo), 182 (Dissenting Opinion of Judge Tanaka), 248 (Dissenting Opinion of Judge Sørensen).

[114] General Comment 24, above note 106, [8].

[115] Article 31(1) has attained the status of customary law: see *Kasikili/Sedudu Island* case, above note 33, [18].

For these purposes, the 'context' includes the text of the treaty and any instrument made by the parties relevant to its conclusion.[116] Although the Vienna Convention does not presuppose a hierarchy as between the interpretive tools, the ICJ has emphasized that the textual interpretation is central. In the *Territorial Dispute* case, the Court stated that interpretation 'must be based above all upon the text of a treaty'.[117] The Vienna Convention does not countenance the stretching of the wording beyond breaking point to satisfy, for example, a perceived need to bring the provision in line with the treaty's object and purpose. Indeed, what the object and purpose of a treaty requires can be notoriously slippery and thus an unreliable tool of interpretation.[118] Any subsequent agreement about the interpretation of a treaty – for instance, as part of the acceptance by States Parties of an interpretative declaration that amounts to a reservation – must be taken into account.[119]

As a 'supplementary' means of interpretation, regard may be had to the preparatory work (*travaux préparatoires*) of the treaty.[120] At first blush, this seems to relegate the full-blooded intentionalist approach to a minor role, but the *travaux préparatoires* of the Vienna Convention itself, coupled with the jurisprudence of international tribunals, suggest that the word 'supplementary' should not be viewed as a significant obstacle.[121] Indeed, the Vienna Convention itself allows recourse to a treaty's *travaux* even if it is to 'confirm' the meaning arrived at via Article 31.[122]

In addition to the rules set out in the Vienna Convention, treaties are to be interpreted in accordance with various well-established maxims of interpretation. The principle of effectiveness, *ut res magnis valeat quam pereat*, is derived from the teleological approach.[123] In case of ambiguity, an interpretation should be preferred that enables the treaty to have appropriate effect, as the parties are presumed not to create an ineffective instrument. Similarly, the rule against surplusage stipulates that an inter-

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116 Vienna Convention on the Law of Treaties 1969, Art. 31(2).

117 *Territorial Dispute* (*Libya v Chad*) [1994] ICJ Rep 6, [41].

118 Fitzmaurice, above note 85, 202.

119 Vienna Convention on the Law of Treaties 1969, Art. 31(3).

120 Ibid., Art. 32.

121 Herbert W. Briggs, 'The *Travaux Préparatoires* of the Vienna Convention on the Law of Treaties' (1971) 65 *American Journal of International Law* 705, 708, 712.

122 Vienna Convention on the Law of Treaties 1969, Art. 32.

123 International Law Commission, (1966) *Yearbook of the International Law Commission*, II, 219; Hugh Thirlway, 'The Law and Procedure of the International Court of Justice, 1960–1989: Part Three' (1992) 63 *British Year Book of International Law* 1.

pretation giving effect to every provision in the treaty is to be preferred.[124] As limitations on sovereignty are not to be presumed,[125] the meaning that is less onerous to the party assuming an obligation is to be preferred.[126] This is the principle of *in dubio mitius*. Furthermore, exceptions or provisos to principal provisions are interpreted strictly.[127] An ambiguous provision should be interpreted against the party who drafted the provision.[128] Another important maxim is *lex specialis derogat legi generali* – specific words prevail over general words to the extent of any inconsistency. Finally, a treaty is to be interpreted in the light of general rules of international law at the time it was concluded, unless a concept in the treaty is intended to be evolutionary – this is the 'rule of the inter-temporal law'.[129] Other maxims commonly used in the legal systems of the world may also be applied – for example, grammatical rules such as *ejusdem generis* (general words following special words are limited to the same type as the special words).[130]

If a treaty is authenticated in more than one language, the text is equally authoritative in each language and it is presumed to have the same meaning in each.[131]

2.2.1.6 Invalidity

Invalidity will be dealt with separately from termination and suspension because of their differing nature and legal effects. Invalidity may be either *relative* or *absolute*.

Relative invalidity makes the treaty voidable: after becoming aware of the facts, the state whose consent has been affected may elect to consider the treaty invalid, either expressly or by conduct.[132] The first two grounds of invalidity have been discussed above: where the representative expresses the state's consent to be bound in manifest breach of a provision of the state's internal law on entering into treaties of fundamental

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124 Fitzmaurice, above note 85, 202.

125 *SS 'Lotus'* (*France v Turkey*) (1927) PCIJ (Ser. A) No. 10, 18–19.

126 *Nuclear Tests* cases (*Australia and New Zealand v France*) [1974] ICJ Rep 253, 267.

127 Case No. 7/68 *Commission of the European Communities v Italy* [1968] ECR 423. Note that where there is a clash between *in dubio mitius* and the principle that exceptions should be construed strictly, the latter takes precedence: see Jennings and Watts, above note 16, 1279.

128 *Brazilian Loans* case (1929) PCIJ (Ser. A) Nos 20–21, 114.

129 *Namibia (Legal Consequences) Advisory Opinion* [1971] ICJ Rep 31.

130 Jennings and Watts, above note 16, 1280.

131 Vienna Convention on the Law of Treaties 1969 Art. 33.

132 Ibid., Art. 45.

importance;[133] and where the representative has concluded the treaty in breach of an express restriction imposed by the repository of the treaty-making power of the state, where the other parties knew of the restriction.[134] Error is the third ground of invalidity. A state can consider its consent to be bound vitiated if it was in error about a fact or situation that was assumed by the state to exist at the time and formed an essential basis of its consent,[135] although this ground is not available if the state contributed to the error or was put on notice of the error.[136] It would be rare for a state to successfully invoke this ground.[137] Equally rare is the ground of fraud. If a negotiating state induces, by fraudulent conduct, another state's representative to express the state's consent to be bound, the latter state may consider its consent to be invalidated.[138] Corruption by a negotiating state of another state's representative may also make the treaty voidable at the suit of the latter state.[139] 'Corruption' requires something calculated to exercise a substantial influence on the representative.[140] Where multilateral treaties are concerned, a treaty would only be void as between the state whose consent was vitiated and other states.[141]

The following three are grounds of *absolute invalidity*, by which it is meant that states may not elect to validate the treaty, and multilateral treaties will be irrevocably void as between all states.[142] First, coercion by acts or threats directed against state representatives to force them to express the state's consent to be bound, whether or not perpetrated by a negotiating state, also renders the treaty void.[143] Similarly, coercion of the state through the threat or use of force in violation of the UN Charter has the same legal effect.[144] However, recourse to purely political or economic pressure would not invalidate a treaty, despite the fact that a declaration was appended to the Vienna Conference condemning such pressure.[145] Thus, the so-called 'unequal treaties' concluded

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133 Ibid., Art. 46.
134 Ibid., Art. 47.
135 Ibid., Art. 48(1).
136 Ibid., Art. 48(2).
137 S.E. Nahlik, 'Grounds of Invalidity and Termination of Treaties' (1971) 65 *American Journal of International Law* 736, 741.
138 Vienna Convention on the Law of Treaties 1969, Art. 49.
139 Ibid., Art. 50.
140 Jennings and Watts, above note 16, 1290.
141 Vienna Convention on the Law of Treaties 1969, Art. 69(4).
142 Ibid.
143 Vienna Convention on the Law of Treaties 1969, Art. 51.
144 Ibid., Art. 52.
145 Declaration on the Prohibition of Military, Political and Economic

between former colonial powers and their colonies are not invalidated by the Vienna Convention.[146] What is required is procuring the state's consent to be bound through the application of force; 'a vague general charge unfortified by evidence in its support'[147] will not suffice. Finally, a treaty that, when it is concluded, conflicts with a norm of *jus cogens* is void.[148] Article 44(5) of the Vienna Convention states that, in the above cases of absolute invalidity, an offending provision cannot be severed from the treaty itself. To Antonio Cassese, it is illogical that, if only one provision in a treaty is contrary to *jus cogens*, the whole treaty is invalid; he suggests that the Vienna Convention does not reflect customary law on this point.[149] Another way of looking at the effect of Article 44(5), however, is that it contributes to the deterrent effect of *jus cogens* norms, which can be said to be their primary purpose.[150] For relative invalidity, where the ground relates to particular clauses, they may be struck out without impairing the validity of the treaty as a whole, unless those clauses formed the essential basis of the state's consent to be bound.[151]

The consequence of establishing invalidity is the legal rescission of the treaty from its date of conclusion. The parties should, as far as possible, be put in the position in which they would have been had the treaty not been concluded. This means that any performance of the treaty undertaken before it was declared void should be undone.[152] In cases of fraud, corruption or coercion, however, the offending party cannot take the benefit of this provision.[153] Offending conduct may also attract international responsibility of states.[154]

2.2.1.7 Termination and suspension

Termination allows the parties to consider the treaty discharged, or permanently ineffective, from the date of termination. Suspension makes the treaty temporarily ineffective.

Termination or suspension can take place, first, in accordance with an

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Coercion in the Conclusion of Treaties, Annexed to the Final Act of the Vienna Conference on the Law of Treaties, UN Doc. A/CONF 39/26.

146 Harris, above note 32, 855.

147 *Fisheries Jurisdiction* case, above note 33, 14 [24].

148 Vienna Convention on the Law of Treaties 1969, Art. 53.

149 Cassese, above note 7, 206.

150 See discussion below at section 2.2.2.7.

151 Vienna Convention on the Law of Treaties 1969, Art. 44(3).

152 Ibid., Art. 69(2).

153 Ibid., Art. 69(3).

154 See Chapter 9.

express provision in the treaty, or with the consent of all parties.[155] Such consent can be express, or it may be implied – for example, when the parties later conclude another treaty inconsistent with the previous treaty remaining on foot.[156] Otherwise, a party may not denounce or withdraw from a treaty unless the parties intended to admit this possibility, or such a right is implied from the nature of the treaty.[157] 'Denunciation' and 'withdrawal' are cognate terms. Both relate to a declaration by a party that it no longer wishes to be bound by the treaty. 'Denunciation' is used when a treaty is thereby terminated and 'withdrawal' when the departure of a party from a multilateral treaty does not put an end to the effect of the treaty as between the remaining parties.[158]

The other main grounds of termination or suspension are material breach, supervening impossibility of performance and fundamental change of circumstances. Other grounds are termination of a treaty from the date of crystallization of an inconsistent *jus cogens* norm[159] and desuetude (obsolescence).[160]

Material breach by a party gives another party grounds for terminating the treaty or suspending it in whole or part.[161] Material breach occurs when the defaulting party repudiates the treaty or violates a provision essential to the accomplishment of its object or purpose.[162] Repudiation occurs when it appears, by words or conduct, that the defaulting party has an intention not to perform the treaty or one of its essential provisions. The ICJ decision in the *Hungarian Dams* case[163] is a case in point. Through a bilateral treaty, Hungary and Czechoslovakia undertook to construct a series of locks diverting the Danube River along a new channel to produce hydroelectricity, improve navigation and protect against flooding. In 1989, Hungary stopped work on the project because of local protest at its environmental impact, whereupon Czechoslovakia began to construct a bypass canal (known as Variant C) for its own benefit. However, it did not take irreversible steps until it dammed the river in October 1992. Hungary had

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155 Vienna Convention on the Law of Treaties 1969, Arts 54 and 57.

156 Ibid., Art. 59.

157 Ibid., Art. 56.

158 For the difficulties associated with these terms, see Nahlik, above note 137, 749–50.

159 Vienna Convention on the Law of Treaties 1969, Art. 64.

160 Obsolescence is not expressly mentioned by the Vienna Convention, but it is well established in customary law: Jennings and Watts, above note 16, 1297.

161 Vienna Convention on the Law of Treaties 1969, Art. 60(1). The consequences of breach for state responsibility are discussed in Chapter 9.

162 Ibid., Art. 60(3).

163 *Gobčikovo-Nagymaros Project* (*Hungary v Slovakia*), above note 33.

purported to terminate the treaty in May 1992, ostensibly in response to Variant C. The Court held that Czechoslovakia only committed a material breach in October 1992, when it took the irreversible steps to dam the river. Hungary had, therefore, prematurely repudiated the treaty in May 1992. Furthermore, given Hungary's own breaches in unilaterally suspending the treaty, its purported termination was not in good faith and had prejudiced its right to subsequently terminate.[164] The Court stated:

> The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule of *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance.[165]

Another well-established ground of termination or suspension is supervening impossibility of performance. The impossibility must result from the permanent (in the case of termination) or temporary (in the case of suspension) disappearance or destruction of an object indispensable for the execution of the treaty.[166] A commonly cited example is the sinking of an island that was the object of a treaty: the obligations can no longer be carried out. This ground is not available to a party who brought about the impossibility by a breach of the treaty or any other international obligation owed to a party to the treaty.[167]

More contentious is the ground of fundamental change of circumstances, or *rebus sic stantibus*. Given the broad disagreement about the scope and even validity of this ground before the Vienna Convention was drafted, the drafters had to choose between views.[168] In the event, Article 62 harmonizes the approaches somewhat by acknowledging the existence of the ground, but confining it within strict limits. A fundamental change of circumstances with regard to those that existed at the conclusion of the treaty may be invoked only if it was unforeseen by the parties; the circumstances were an essential basis of the consent of the parties to be bound; and the change radically transforms the extent of executory obligations – that is, those still to be performed under the treaty.[169] The ground does not apply to treaties establishing a boundary and a party cannot invoke it if it

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164 Ibid., [110].
165 Ibid., 68.
166 Vienna Convention on the Law of Treaties 1969, Art. 61(1).
167 Ibid., Art. 61(2).
168 Nahlik, above note 137, 748; Hans Kelsen, *Principles of International Law* (New York: Holt, Rinehart and Winston, 1966, 2nd edn), 497–8.
169 Vienna Convention on the Law of Treaties 1969 Art. 62(1).

brought about the changed circumstances by breach of the treaty or other international obligations owed to a contracting party.[170] This formulation goes a way towards ensuring that, in the context of limited enforcement mechanisms at international law, this ground would not be invoked by a state as a pretext for jettisoning treaty obligations. Indeed, Kelsen has observed that 'it is the function of the law in general and treaties in particular to stabilize the legal relations between states in the stream of changing circumstances'.[171] Thus the emphasis in Article 62 on a 'radical' transformation of the extent of executory obligations should ensure that a valid claim of *rebus sic stantibus* would be rare.

Fundamental change of circumstances was one of Hungary's arguments in the *Hungarian Dams* case. However, the Court felt that the change in the political situation in Hungary and Czechoslovakia after the lifting of the iron curtain, greater knowledge about the environmental impact of the project and blowouts in its cost were:

> 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 clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.[172]

The consequences of termination are that the parties are released from performing executory obligations, but the termination does not affect the validity of executed obligations – that is those performed prior to termination.[173] In the case of suspension, the parties are freed from performing the treaty during the suspension period only.[174] Dispute resolution clauses often survive the termination or suspension of a treaty, as one of the purposes of such clauses is to test the validity of a purported termination or suspension.[175]

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[170] Vienna Convention on the Law of Treaties 1969 Art. 62(2).

[171] Kelsen, above note 168, 498.

[172] *Gobčikovo-Nagymaros Project* (*Hungary v Slovakia*), above note 33, 65. See also *Fisheries Jurisdiction* case, above note 33, 20–21; *Free Zones* case (1932) PCIJ (Ser. A/B) No. 46, 156–8.

[173] Vienna Convention on the Law of Treaties 1969, Art. 70.

[174] Ibid., Art. 72.

[175] *Appeal Relating to the Jurisdiction of the ICAO Council* [1972] ICJ Rep 46. The Vienna Convention itself contemplates this, as it states that the provisions

2.2.1.8 Some contemporary issues in treaty law

2.2.1.8.1 Codification and progressive development of international law: the role of multilateral treaties Since the late nineteenth century, states have come together to conclude multilateral treaties on matters of global importance. Significant early examples are the 1899 and 1907 Hague Conventions, which laid down much needed laws on war and neutrality. It was not, however, until the formation of the United Nations that codification and progressive development acquired an institutional character. Under Article 13 of the UN Charter, the UN General Assembly created the International Law Commission. The ILC was to be composed of representatives from all of the major legal systems of the world appearing in their personal capacity with a mandate to promote the 'codification' and 'progressive development' of international law. Thus, in addition to treaties negotiated between states directly, the United Nations Treaty Series is replete with important texts, usually on the more traditional matters such as state responsibility,[176] prepared by the ILC. The Vienna Convention on the Law of Treaties was itself a product of the work of the ILC. The Rome Statute of the International Criminal Court is another example, following several formulations over 40 years of the Draft Code on Offences against the Peace and Security of Mankind. The ILC has defined 'progressive development' as 'the drafting of a convention on a subject which has not yet been highly developed or formulated in the practice of states' and 'codification' as 'the more precise formulation and systematization of the law in areas where there has been extensive state practice, precedent and doctrine'.[177]

For states seeking to establish binding legal regimes, the treaty is their material source of choice. The black and white text of a treaty is more certain than the often uncollated state practice and *opinio juris* that constitute the material source of custom. But treaties can be vital to the development not only of international law between the parties, but international law in general. As discussed below,[178] a treaty can influence the subsequent development of customary law in that it can constitute *opinio juris* of the customary norm. Further, instead of merely constituting *opinio juris*

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relating to the legal effect of termination or suspension do not apply to the extent that the 'treaty otherwise provides or the parties otherwise agree': see Vienna Convention on the Law of Treaties 1969, Arts 70 and 72.

176 Cassese, above note 7, 167.

177 Cited in Robert Jennings, 'The Progressive Development of International Law and Its Codification' (1947) 24 *British Year Book of International Law* 301, 12.

178 See discussion below at section 2.2.2.3.

which contributes to the later crystallization of custom, the conclusion of a treaty may itself trigger the crystallization of an emergent custom. An example is the decisive effect of the UN Convention on the Law of the Sea 1982 (UNCLOS) on the crystallization of most concepts embodied in the Convention.[179] The negotiation and conclusion of UNCLOS had allowed the majority of states to express *opinio juris* on this issue, providing a potent vehicle for the crystallization of custom that was merely aspirational beforehand.

Besides crystallizing a custom and influencing subsequent crystallization, a treaty may 'codify' pre-existing custom, giving it a definite wording. In practice, however, this may also amount to 'progressive development', as the aim of codification is to 'resolve differences and to fill in the gaps'; indeed, the very act of reducing a custom to writing lends it a somewhat different colour.[180] Judge Sørensen stated in his Dissenting Opinion in the *Fisheries* case:[181]

> It has come to be generally recognized, however, that this distinction between codification and progressive development may be difficult to apply rigorously to the facts of international legal relations. Although theoretically clear and distinguishable, the two notions tend in practice to overlap or to leave between them an indeterminate area in which it is not possible to indicate precisely where codification ends and progressive development begins. The very act of formulating or restating an existing customary rule may have the effect of defining its contents more precisely and removing such doubts as may have existed as to its exact scope or the modalities of its application.

Quite apart from the question of the influence of treaties on custom, treaty-making is a useful tool in the progressive development between the parties of more 'radical' obligations, or where state practice is frustratingly slow to form. Although there is no 'international legislation' or 'instant custom'[182] upon the conclusion of treaties, those multilateral treaties with widespread state representation, such as the UN Charter, exert a significant influence on restructuring the prevailing international legal order.

As Gabriella Blum has pointed out, to focus entirely on the positives of the proliferation of multilateral treaties, as restricting the scope for unilateral state conduct and enhancing interdependence and *communitas*, is to

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[179] Triggs, above note 33, 63–4.

[180] Robert Jennings, 'The Progressive Development of International Law and Its Codification' (1947) 24 *British Year Book of International Law* 301, 302, 304.

[181] *Fisheries Jurisdiction* case, above note 33, 242–3.

[182] See discussion below at section 2.2.2.4.

take a 'universalist' view.[183] There is, however, a competing 'unilateralist' view, emanating particularly from the United States, that a state's independence, flexibility and freedom of action in choosing its international obligations, uninfluenced by international 'peer pressure', is something that should not be sacrificed on the altar of the homogenizing influence of a global order.[184] Thus, there is a certain push-back, emphasizing the role bilateral and regional treaties still play in defending state interests. It is perhaps a cause for concern that such unilateralist thinking may, if taken too far, undermine the stability of international law in times of crisis – the failure of the United States to properly observe the Geneva Convention in its treatment of detainees at Guantanamo Bay stands as a notorious recent example.[185]

2.2.2 Customary International Law

2.2.2.1 The origins and dynamic nature of international custom

Customary law is the oldest source of international law and all law generally.[186] Humans have a natural predilection toward the reasoning that, because we have always done things a certain way, it must therefore be the right way.[187] As discussed in Chapter 1, the modern concept of customary international law as the *jus gentium*, or the natural or common law among nations, developed from the Roman Empire's dealings with foreigners. Thereafter, customary law in various forms complemented the slowly emerging system of nation states by recognizing the legitimate expectations created in other states by consistent conduct.[188] It was not, however, until 1899 that the concept of *opinio juris sive necessitatis* was coined and

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[183] Gabriella Blum, 'Bilateralism, Multilateralism, and the Architecture of International Law' (2008) 49(2) *Harvard International Law Journal* 323, 324.

[184] Ibid., 325. Blum noted that the United Nations Treaty Series contained 3500 multilateral treaties and 50 000 bilateral treaties, which indicates the significant role bilateral treaties still play in ordering relations in modern international society: ibid., 326.

[185] See George Aldrich, 'The Taliban, al Qaeda, and the Determination of Illegal Combatants' (2002) 96 *American Journal of International Law* 891.

[186] Jennings and Watts, above note 16, 25.

[187] See also Kopelmanas, cited in I.C. MacGibbon, 'Customary International Law and Acquiescence' (1957) *British Year Book of International Law* 115, 133: '[The] formation and existence of a custom depend on its conformity with the social needs of a legal order. The custom results from acts of the same character because those who do them cannot do otherwise.'

[188] Hugh Thirlway, 'The Sources of International Law', in Evans, above note 85, 121.

assumed its current character as the subjective element of custom, as distinct from the earlier conception that this element expressed a 'spirit of the nation'.[189] Thus custom ostensibly caught up with the positivist spirit of the times, which eschewed natural law concepts of a pre-existing law in favour of a view grounded in the empirically verifiable opinions of states. State practice also had to change as a result of the explosion of states that marked the era of decolonization in the twentieth century.[190] The change from a mere handful of states to a diverse community of close to 200 states has gradually led to a loosening of the requirement of uniformity of state practice, so that it need only be 'widespread and representative'.[191]

The durability of custom over the ages may have something to do with its flexibility, for the existence and content of custom can change over time without the practical difficulties that attend the creation and modification of treaties.[192] Treaties must be expressly negotiated and, especially in the case of multilateral treaties with many States Parties, achieving consensus is rarely straightforward. The final wording must align the political, economic and social interests of the various parties.[193] The treaty text itself is fixed and, except in the case of open-textured obligations discussed above,[194] relatively definite in meaning. Conversely, the formation (commonly referred to as 'crystallization') of custom does not even require the *tacit* consent of all states.[195] The norm may emerge and change simply by virtue of the customary acts (and omissions) of state organs. Thus, no great effort is necessarily required to develop custom. The content of the custom is itself ordinarily more fluid and open to shifting interpretation than black and white treaty text.

In this sense, customary norms tend to be more dynamic (less rigid) than treaty norms. The very quality, however, that gives the norm durability can also be perceived as a weakness, in that it makes determining what custom requires at any particular time difficult to ascertain. The following discussion will show that the elements of custom – state practice and *opinio juris* – are by no means easy to apply.

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[189] Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (London: Routledge, 2010) 534. *Opinio juris sive necessitatis* is widely said to have been coined by the French jurist François Gény in *Methode d'interpretation et sources en droit privé positif* (Paris, 1899).

[190] Kelsen, above note 168, 452; Cassese, above note 7, 165.

[191] *North Sea Continental Shelf* cases, above note 112, [73].

[192] See, e.g., MacGibbon, above note 187, 116.

[193] Cassese, above note 7, 156.

[194] See discussion at section 2.2.

[195] Kelsen, above note 168, 444.