International watercourses[212]

International watercourses are systems of surface waters and ground waters which are situated in more than one state.[213] Such watercourses form a unitary whole and normally flow into a common terminus. While there has historically been some disagreement as to the extent of the watercourse system covered, particularly whether it includes the complete river basin with all associated tributaries and groundwater systems, a broader definition is the approach adopted in recent years. Customary law has developed rules with regard to equal riparian rights to international rivers,[214] but these were not extensive.[215] The International Law Association, a

[212] See e.g. Sands, *Principles*, chapter 10, and Birnie and Boyle, *International Law and the Environment*, chapter 6. See also S. McCaffrey, *The Law of International Watercourses*, 2nd edn, Oxford, 2007; O. McIntyre, *Environmental Protection of International Watercourses in International Law*, Aldershot, 2007; A. Rieu-Clarke, *A Fresh Approach to International Law in the Field of Sustainable Development: Lessons from the Law of International Watercourses*, London, 2007; R. Baxter, *The Law of International Waterways*, Cambridge, MA, 1964; C. Bourne, 'International Law and Pollution of International Rivers and Lakes', 21 *University of Toronto Law Journal*, 1971, p. 193; F. Florio, 'Water Pollution and Related Principles of International Law', 17 Canadian YIL, 1979, p. 134; J. Lammers, *Pollution of International Watercourses: A Search for Substantive Rules and Principles*, The Hague, 1984; S. McCaffrey, 'The Law of International Watercourses: Some Recent Developments and Unanswered Questions', 17 *Denver Journal of International Law and Policy*, 1989, p. 505; J. G. Polakiewicz, 'La Responsabilité de l'État en Matière de Pollution des Eaux Fluviales ou Souterraines Internationales', *Journal de Droit International*, 1991, p. 283; H. Ruiz Fabri, 'Règles Coutumières Générales et Droit International Fluvial', AFDI, 1990, p. 818; J. Sette-Camara, 'Pollution of International Rivers', 186 HR, 1984, p. 117, and P. Wouters, 'The Legal Response to Water Conflicts: The UN Watercourses Convention and Beyond', 42 German YIL, 1999, p. 293.

[213] See e.g. article 1(1) of the UN Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992 and article 2 of the Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997. See also Report of the International Law Commission on its 46th Session, 1994, p. 197.

[214] See the *Territorial Jurisdiction of the International Commission of the Oder* case, PCIJ, Series A, No. 23, p. 27; 5 AD, p. 83. The Permanent Court noted here that, 'the community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian states in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian state in relation to the others'. This was reaffirmed in the case concerning the *Auditing of Accounts between the Netherlands and France*, arbitral award of 12 March 2004, para. 97. The International Court has noted that, 'Modern development of international law has strengthened this principle for non-navigational uses of international watercourses', the *Gabčíkovo–Nagymaros Project* case, ICJ Reports, 1997, pp. 7, 56; 116 ILR, p. 1.

[215] See the *Lac Lanoux* case, 24 ILR, p. 101. The tribunal noted, for example, that while the interests of riparian states had to be taken into account by a riparian state proposing changes to the river system, there was no rule precluding the use of hydraulic power of

private organisation of international lawyers, proposed the Helsinki Rules on the Uses of the Waters of International Rivers in 1966,[216] in which it was noted that each basin state was entitled to a reasonable and equitable share in the beneficial use of the waters and that all states were obliged to prevent new forms of water pollution that would cause substantial injury in the territory of other basin states.[217]

In 1992, the Convention on the Protection and Use of Transboundary Watercourses and International Lakes was adopted in Helsinki within the framework of the UN Economic Commission for Europe.[218] Under this Convention, all parties must take all appropriate measures to prevent, control and reduce any significant adverse effect on the environment resulting from a change in the conditions of transboundary waters caused by a human activity. Such effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and also effects on the cultural heritage.[219] In taking such measures, states parties are to be guided by the precautionary principle[220] and by the polluter-pays principle, by which the costs of pollution prevention, control and reduction measures are to be borne by the polluter.[221] Each party undertakes to set emission limits for discharges from point sources into surface waters based on best available technology[222] and to define, where appropriate, water-quality objectives and adopt water-quality criteria[223] for the purpose of preventing, controlling and reducing transboundary impact. The measures to be taken must ensure, for example, the application of low- and non-waste technology; the prior licensing of waste-water discharge; the application of biological or equivalent processes to municipal waste water; the use of environmental impact assessments and sustainable water-resources management.[224]

The Convention also calls for the parties to establish monitoring programmes, to co-operate in research and development projects and to

international watercourses without a prior agreement between the interested states, *ibid.*, p. 130.

[216] Report of the Fifty-second Conference, 1966, p. 484.

[217] See also the Rules on Water Pollution in an International Drainage Basin adopted by the ILA in 1982, Report of the Sixtieth Conference, 1982, p. 535, and the Rules on International Groundwaters adopted in 1986, Report of the Sixty-second Conference, 1986. See also the work of the Institut de Droit International, *Annuaire de l'Institut de Droit International*, 1979, p. 193.

[218] See also the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters, 2003.

[219] Articles 1(2) and 2(1). [220] See above, p. 867. [221] See above, p. 870.

[222] This is defined in Annex I. [223] See Annex III. [224] Article 3.

exchange relevant information as early as possible.[225] Riparian parties are to enter into bilateral or multilateral agreements or arrangements in order to co-ordinate their activities and to consult together at the request of any one riparian party.[226] Article 7 provides that the parties 'shall support appropriate international efforts to elaborate rules, criteria and procedures in the field of responsibility and liability'.

The Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997 provides that watercourse states shall in their respective territories utilise an international watercourse in an 'equitable and reasonable manner'. In particular, optimal utilisation must be consistent with adequate protection of the watercourse.[227] Factors relevant to equitable and reasonable utilisation include, in addition to physical factors of a natural character and the social and economic needs of the watercourse states concerned, the 'conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect'.[228] Article 7 provides that watercourse states shall take all appropriate measures to prevent the causing of significant harm to other watercourse states. Where such harm is caused, consultations are to take place in order to eliminate or mitigate such harm and with regard to compensation where appropriate. Articles 9 and 11 provide for regular exchanges of data and information, while watercourse states are to exchange information and consult in particular on the possible effects of planned measures on the condition of an international watercourse. Before a watercourse state implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse states, it is to provide such states with timely notification and sufficient technical data and information for the evaluation of the possible effects of the planned measures.[229] Unless otherwise agreed, the notified states have a period of six months for such evaluation during which exchanges of data and information are to take place and the planned measures are not to be implemented without the consent of the notified states. If no reply to the notification is received, the notifying state may

[225] Articles 4–6 and 11–13. Provisions regarding notification about critical situations and mutual asssistance appear in articles 14 and 15.

[226] Articles 9 and 10.

[227] Article 5. This provision was expressly referred to by the International Court in the *Gabčíkovo–Nagymaros Project* case, ICJ Reports, 1997, pp. 7, 80; 116 ILR, p. 1. See also article 8 which emphasises that watercourse states shall co-operate in order to attain optimal utilisation and adequate protection of an international watercourse.

[228] Article 6. [229] Article 12.

proceed to implement the planned measures. If a reply is received, the states are to consult and negotiate with a view to arriving at an equitable resolution of the situation.[230] Where a watercourse state has serious reason to believe that measures that may have a significant adverse impact are being planned, it may itself set in motion the above procedures.[231]

Article 20 stipulates that watercourse states shall protect and preserve the ecosystems of international watercourses[232] and shall act to prevent, reduce and control pollution[233] of an international watercourse that may cause significant harm to other watercourse states or to their environment. Watercourse states are to take all necessary measures to prevent the introduction of species, alien or new, into an international watercourse which may have effects detrimental to the ecosystem of the watercourse resulting in significant harm to other watercourse states.[234]

It is thus clear that the international community is coming to terms with the need to protect the environment of international watercourses.[235] How evolving international environmental rules relate to the more traditional principles of international law was one of the issues before the International Court in the *Gabčíkovo–Nagymaros Project* case.[236] Hungary and Czechoslovakia entered into a treaty in 1977 by which there would be created on the Danube between the two states a barrage system, a dam, a reservoir, hydro-electric power stations and a 25-kilometre canal for diverting the Danube from its original course through a system of locks. A dispute developed in the light of Hungary's growing environmental concerns. Hungary suspended work on the project in 1989, while Czechoslovakia (now the Czech and Slovak Federal Republic) proceeded with a 'provisional solution' as from 1991, which involved damming the

[230] Articles 11–17.

[231] Article 18. Article 19 provides for an expedited procedure where there is the utmost urgency in the implementation of planned measures.

[232] See also article 23 with regard to measures necessary to protect and preserve the marine environment.

[233] Pollution is here defined as 'any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct', article 21(1).

[234] Article 22.

[235] Note that a variety of regional and bilateral agreements and arrangements exist with regard to international watercourses: see e.g. the agreements concerning the International Commission of the Rhine, the US–Canadian International Joint Commission and provisions concerning the Zambezi River System and the Niger Basin. See Sands, *Principles*, pp. 459 ff., and Birnie and Boyle, *International Law and the Environment*, pp. 323 ff.

[236] ICJ Reports, 1997, p. 7; 116 ILR, p. 1.

Danube at a point on Czechoslovakian territory. In 1992, Hungary announced the termination of the treaty of 1977 and related instruments. The case came before the International Court ultimately by way of a Special Agreement in 1993 between Hungary and Slovakia (the successor to the former Czech and Slovak Federal Republic in so far as the project was concerned). The case essentially revolved around the relationship between the treaty and subsequent environmental concerns. The Court emphasised that newly developed norms of environmental law were relevant for the implementation of the treaty,[237] while 'The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the treaty's conclusion.'[238] However, the Court found that the treaty was still in force and Hungary was not entitled to terminate it.[239]

Ultra-hazardous activities[240]

It has been argued that ultra-hazardous activities form a distinct category in the field of international environmental law and one in which the principle of strict or absolute liability operates. The definition of what constitutes such activity, of course, is somewhat uncertain, but the characterisation can be taken to revolve around the serious consequences that are likely to flow from any damage that results, rather than upon the likelihood of pollution occurring from the activity in question. The focus therefore is upon the significant or exceptional risk of severe transnational damage.[241] The effect of categorising a particular activity as ultra-hazardous would, it appears, be to accept the strict liability principle rather than the due diligence standard commonly regarded as the general rule in pollution

[237] ICJ Reports, 1997, p. 67. [238] *Ibid*., p. 68.

[239] *Ibid*., pp. 76 and 82. Note that in March 2003, the establishment of a Water Co-operation Facility to mediate in disputes between countries sharing a single river basin was announced: see http://news.bbc.co.uk/1/hi/sci/tech/2872427.stm.

[240] See e.g. Sands, *Principles*, chapter 12, and Birnie and Boyle, *International Law and the Environment*, chapters 8 and 9. See also D. A. Bagwell, 'Hazardous and Noxious Substances', 62 *Tulane Law Review*, 1988, p. 433; L. F. Goldie, 'Concepts of Strict and Absolute Liability and the Ranking of Liability in Terms of Relative Exposure to Risk', 16 Netherlands YIL, 1985, p. 247; Barboza, 'International Liability', pp. 331 ff.; W. Jenks, 'The Scope and Nature of Ultra-Hazardous Liability in International Law', 117 HR, 1966, p. 99; Handl, 'State Liability', pp. 553 ff., and R. J. Dupuy, *La Responsabilité des États pour les Dommages d'Origine Technologique et Industrielle*, Paris, 1976, pp. 206–9.

[241] Handl, 'State Liability', p. 554.

situations.[242] In other words, the state under whose territory or jurisdiction the activity took place would be liable irrespective of fault. This exception to the general principle can be justified as a method of moving the burden of proof and shifting the loss clearly from the victim to the state. It would also operate as a further incentive to states to take action in areas of exceptional potential harm.

In determining what areas of activity could be characterised as ultra-hazardous, some caution needs to be exercised. There can be little doubt that nuclear activities fall within this category as a general rule, but beyond this there appears to be no agreement. The Convention on International Liability for Damage caused by Space Objects, 1972 specifically provides that a launching state shall be absolutely liable to pay compensation for damage caused by its space objects on the surface of the earth,[243] but this is the only clear example of its kind.

Nuclear activities[244]

The use of nuclear technology brings with it risks as well as benefits and the accident at the Chernobyl nuclear reactor in 1986[245] brought home to international opinion just how devastating the consequences of a nuclear mishap could be. Concern in this area had hitherto focused upon the issue of nuclear weapons. In 1963 the Treaty Banning Nuclear Weapons Testing in the Atmosphere, Outer Space and Under Water was signed.[246] However, France and China did not become parties to this treaty and continued atmospheric nuclear testing. Australia and New Zealand sought a declaration from the International Court that French atmospheric nuclear testing was contrary to international law, but the Court decided the case on the basis that a subsequent French decision to end such testing was

[242] See above, p. 853. [243] See above, p. 546.

[244] See e.g. Sands, *Chernobyl: Law and Communication*; Boyle, 'Nuclear Energy' and 'Chernobyl'; J. C. Woodliffe, 'Tackling Transboundary Environmental Hazards in Cases of Emergency: The Emerging Legal Framework' in *Current Issues in European and International Law* (eds. R. White and B. Smythe), London, 1990, and Woodliffe, 'Chernobyl: Four Years On', 39 ICLQ, 1990, p. 461.

[245] See Sands, *Chernobyl: Law and Communication*, pp. 1–2. See also IAEA, *Summary Report on the Post Accident Review Meeting on the Chernobyl Accident*, Vienna, 1986.

[246] See also the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed, 1971; the Treaty for the Prohibition of Nuclear Weapons in Latin America, 1967 and the South Pacific Nuclear Free Zone Treaty, 1985.

binding and thus the issue was moot.[247] In response to renewed French nuclear testing in the South Pacific in 1995, albeit underground rather than atmospheric, New Zealand asked the International Court to review the situation pursuant to the 1974 judgment and declare that France was acting illegally as being likely to cause the introduction into the marine environment of radioactive material and in failing to conduct an environmental impact assessment. While the Court referred to 'the obligations of states to respect and protect the natural environment', it declared that the request had to be dismissed as not falling within the relevant paragraph of the 1974 judgment permitting a re-examination of the situation since the latter judgment had concerned atmospheric tests alone.[248] Measures to prevent the spread of nuclear weapons were adopted in the Nuclear Non-Proliferation Treaty of 1968, although the possession itself of nuclear weapons does not contravene international law.[249]

A variety of international organisations are now involved to some extent in the process of developing rules and principles concerning nuclear activities and environmental protection. The International Atomic Energy Agency, to take the prime example, was established in 1956 in order to encourage the development of nuclear power, but particularly since the Chernobyl accident its nuclear safety role has been emphasised. The Convention on Assistance in Cases of Nuclear Emergency, 1986, for example, gave it a co-ordinating function and an obligation to provide appropriate resources where so requested.[250] The IAEA has established a series of standards and guidelines including, for example, in the context of the design, construction and operation of nuclear power plants, although such standards do not have the force of law.[251] Other international organisations also have a role to play in the sphere of nuclear activities.[252]

[247] See the *Nuclear Tests* cases, ICJ Reports, 1974, p. 253; 57 ILR, p. 398.

[248] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 1974 in the Nuclear Tests Case*, ICJ Reports, 1995, pp. 288, 305–6; 106 ILR, pp. 1, 27–8.

[249] See e.g. M. N. Shaw, 'Nuclear Weapons and International Law' in *Nuclear Weapons and International Law* (ed. I. Pogany), London, 1987, p. 1. See also below, chapter 21, p. 1187.

[250] See further below, p. 891.

[251] Note, however, that under the Geneva Convention on the High Seas, 1958, states are to take account of IAEA standards in preventing pollution of the seas from the dumping of nuclear waste.

[252] E.g. EURATOM (established in 1957), the Nuclear Energy Agency of the OECD (established in 1957) and the ILO (International Labour Organisation). See Boyle, 'Nuclear Energy', pp. 266–8.

The provision of information

There appears to be a general principle requiring that information be provided in certain situations[253] and several bilateral agreements have expressed this in the context of nuclear accidents.[254] In general, such agreements provide that each state is to inform the other without delay of any emergency resulting from civil nuclear activities and any other incident that could have radiological consequences for the second state. Reciprocal information systems are set up and warning notification centres established. Such agreements, however, do not cover exchange of military information.[255]

Following the Chernobyl accident and the failure of the USSR to provide immediate information, the Vienna Convention on Early Notification of a Nuclear Accident, 1986 was rapidly adopted, under the auspices of the IAEA. This provides that in the event of a nuclear accident, the relevant state shall 'forthwith notify, directly or through the International Atomic Energy Agency . . . those states which are or may be physically affected . . . of the nuclear accident, its nature, the time of its occurrence and its exact location'. Additionally, such states must be promptly provided with information relevant to minimising the radiological consequences.[256] States are to respond promptly to a request for further information or consultations sought by an affected state.[257]

It is also to be noted that although the Convention does not apply to military nuclear accidents, the five nuclear weapons states made Statements of Voluntary Application indicating that they would apply the Convention to all nuclear accidents, including those not specified in that agreement.[258]

Since this Convention was adopted, a variety of bilateral agreements have been signed which have been more wide-ranging than those signed beforehand and which in some cases have gone beyond the provisions specified in the Notification Convention. The agreements signed by the

[253] See above, p. 865. See also Principle 20 of the Stockholm Declaration and Principle 9 of the Rio Declaration.

[254] The first was concluded between France and Belgium in 1966 concerning the Ardennes Nuclear Power Station. Other examples include Switzerland–Federal Republic of Germany, 1978 and France–UK, 1983. The latter agreement was supplemented by a formal arrangement between the UK Nuclear Installations Inspectorate and the French equivalent for the continuous exchange of information on safety issues.

[255] See Woodliffe, 'Tackling Transboundary Environmental Hazards', at pp. 117–20.

[256] Article 2. See also article 5. [257] Article 6.

[258] See text in 25 ILM, 1986, p. 1394.

UK with Norway, the Netherlands and Denmark during 1987–8, for example, specify that there is an obligation to notify the other parties if there is an accident or activity in the territory of the notifying state from which a transboundary effect of radiological safety significance is likely and additionally where abnormal levels of radiation are registered that are not caused by release from facilities or activities in the notifying state's territory. Extensive provisions dealing with exchanges of information are also included.[259]

The provision of assistance[260]

The earliest treaty providing for assistance in the event of radiation accidents was the Nordic Mutual Assistance Agreement, 1963. This dealt with the general terms of assistance, the advisory and co-ordinating role of the IAEA, financing, liability and privileges and immunities. The United Nations established the UN Disaster Relief Office (UNDRO) in 1972[261] and this provides assistance in pre-disaster planning. In 1977 the IAEA concluded an agreement with UNDRO with the purpose of co-ordinating their assistance activities in the nuclear accident field and in 1984 published a series of guidelines[262] setting out the mechanics of co-operation between states, including references to the problems of costs, liability, privileges and immunities.

In 1986, following the Chernobyl accident and at the same time as the Notification Convention, the Vienna Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency was adopted. This provides that a state in need of assistance in the event of a nuclear accident or radiological emergency may call for such assistance from any other state party either directly or through the IAEA.[263] This applies whether or not

[259] See e.g. Woodliffe, 'Chernobyl', p. 464. See the European Community Council Directive 87/600 of December 1987, which provides for the early exchange of information in the event of a radiological emergency. See also the EC Environmental Information Directive 1990 providing for a right of access to environmental information; article 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992 and Chapter III of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 1993.

[260] See e.g. A. O. Adede, *The IAEA Notification and Assistance Conventions in Case of a Nuclear Accident: Landmarks in the History of Multilateral Treaty-Making*, London, 1987.

[261] A Disaster Relief Coordinator was provided for in General Assembly resolution 2816 (XXVI). See Sands, *Chernobyl: Law and Communication*, p. 45.

[262] Guidelines for Mutual Emergency Assistance Arrangements in Connection with a Nuclear Accident or Radiological Emergency, Sands, *Chernobyl: Law and Communication*, p. 199.

[263] Article 2(1).

such accident or emergency originated within its territory, jurisdiction or control. States requesting assistance (which may include medical assistance and help with regard to the temporary relocation of displaced persons[264]) must provide details of the type of assistance required and other necessary information.[265] The IAEA must respond to a request for assistance by making available appropriate resources allocated for this purpose and by transmitting promptly the request to other states and international organisations possessing the necessary resources. In addition, if requested by the state seeking assistance, the IAEA will co-ordinate the assistance at the international level. The IAEA is also required to collect and disseminate to the states parties information concerning the availability of experts, equipment and materials and with regard to methodologies, techniques and available research data relating to the response to such situations.[266] The general range of assistance that can be provided by the Agency is laid down in some detail.[267]

In general terms, the Assistance Convention seeks to balance considerations relating to the sovereignty of the requesting state,[268] the legitimate rights of the assisting state or states[269] and the interests of the international community in rendering rapid assistance to affected states. Whether the balance achieved is a fair one is open to discussion.[270]

Nuclear safety

The Convention on Nuclear Safety was adopted by the IAEA in 1994. This emphasises that responsibility for nuclear safety rests with the state having jurisdiction over a nuclear installation[271] and obliges states parties to take legislative and administrative measures to implement Convention obligations[272] via a regulatory body[273] and to submit reports to periodic

[264] Article 2(5). [265] Article 2(2). [266] Article 5. [267] *Ibid.*

[268] Under article 3(a), and unless otherwise agreed, the requesting state has the overall direction, control, co-ordination and supervision of the assistance within its territory.

[269] Under article 7, the assisting state is entitled, unless it offers its assistance without costs, to be reimbursed for all the costs incurred by it, which are to be provided promptly, and under article 10(2), unless otherwise agreed, a requesting state is liable to compensate the assisting state for all loss of or damage to equipment or materials and for the death of or injury to personnel of the assisting party or persons acting on its behalf. There is no provision dealing with liability for damage caused by the assisting state. See also article 8 dealing with privileges and immunities.

[270] See e.g. Sands, *Chernobyl: Law and Communication*, p. 47, and Woodliffe, 'Tackling Transboundary Environmental Hazards', p. 127.

[271] Defined as 'a land-based civil nuclear power plant', article 2(1).

[272] Articles 4 and 7. [273] Article 8.

review meetings of all parties.[274] The Convention provides that operators of nuclear installations must be licensed[275] and it is the operators that remain primarily responsible for the safety of the installations.[276] The Convention specifies a number of safety considerations, but these are not in the form of binding obligations upon the parties.[277]

Civil liability[278]

In addition to the issue of the responsibility or liability of the state for the activity under consideration, the question of the proceedings that may be taken by the individual victims is also raised. One possible approach is to permit the victim to have access to the legal system of the foreign polluter and thus to all remedies available on a non-discriminatory basis. This would have the effect of transforming the transboundary pollution into a national matter.[279] This approach is evident in some treaties.[280] The problem is that while placing the foreign victim on a par with nationals within the domestic legal system of the offender, it depends for its value upon the legal system possessing internal legislation of appropriate substantive content. This is not always the case. There are, however, several international agreements dealing specifically with the question of civil liability in the sphere of nuclear activities which operate on the basis of certain common general principles.

The OECD Paris Convention on Third Party Liability in the Field of Nuclear Energy, 1960[281] provides that the operator of a nuclear installation shall be liable for damage to or loss of life of any person and damage to or loss of any property (other than the nuclear installation and associated property or means of transport). The IAEA Vienna Convention on Civil Liability for Nuclear Damage, 1963 has similar provisions, but is aimed at

[274] Articles 5 and 20–5. The IAEA is to provide the secretariat for the meetings of the parties, article 28.

[275] Article 7(2)ii. [276] Article 9.

[277] Articles 10–19. See also the Joint Convention on the Safety of Spent Fuel and Radioactive Waste Management, 1997, which is based upon the IAEA's Principles of Radioactive Waste Management, 1995 and the Code of Practice on the International Transboundary Movement of Radioactive Waste, 1990. Its main provisions are similar to those of the Nuclear Safety Convention.

[278] See e.g. Birnie and Boyle, *International Law and the Environment*, pp. 476 ff., and Sands, *Principles*, pp. 904 ff.

[279] See e.g. Boyle, 'Nuclear Energy', pp. 297–8.

[280] See e.g. the Nordic Convention on the Protection of the Environment, 1974. See also OECD Recommendations C(74)224, C(76)55 and C(77)28.

[281] Together with Protocols of 1964 and 1982.

global participation. However, both the Paris Convention and the Vienna Convention systems have suffered from relatively limited participation and a Joint Protocol was adopted in 1988 linking the Paris and Vienna Convention regimes, so that parties under each of these conventions may benefit from both of them. In 1997 a Protocol to Amend the 1963 Vienna Convention and a Convention on Supplementary Compensation for Nuclear Damage were adopted by over eighty states. These instruments increased the scope of liability of operators to a limit of not less than 300 million Special Drawing Rights (approx 400 million US dollars) and the geographical scope of the Convention. In addition, an improved definition of nuclear damage, to include, for example, environmental damage, was provided.[282]

These conventions operate upon similar principles. It is the actual operator of the nuclear installation or ship that is to bear the loss[283] and this is on the basis of absolute or strict liability. Accordingly, no proof of fault or negligence is required. The conventions require operators to possess appropriate liability insurance or other financial security under the conditions laid down by the competent public authorities, unless the operator is itself a state,[284] and the relevant states are to ensure that claims up to the liability limits are met.[285] This recognition of the residual responsibility of the state is unique.[286] The amount of liability of the operator may, however, be limited.[287] The relevant conventions also determine

[282] See e.g. 36 ILM, 1997, p. 1454, and *ibid*., p. 1473. See also www.iaea.or.at/worldatom/Documents/Legal/protamend.shtm and www.iaea.or.at/worldatom/Documents/Legal/supcomp.shtml. Note also the Brussels Convention on the Liability of Operators of Nuclear Ships, 1962, which provides that the operator of a nuclear ship shall be absolutely liable for any nuclear damage upon proof that such damage has been caused by a nuclear incident involving the nuclear fuel of, or radioactive products or waste produced in, such ship, and the Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971, which provides that a person held liable for damage caused by a nuclear incident shall be exonerated from such liability if the operator of a nuclear installation is liable for such damage under either the Paris or Vienna Conventions.

[283] A carrier or handler of nuclear material may be regarded as such an operator where the latter consents and the necessary legislative framework so provides: see e.g. article 4(d) of the Paris Convention.

[284] See e.g. article 10 of the Paris Convention, article VII of the Vienna Convention and article III of the Brussels Convention on Nuclear Ships.

[285] *Ibid.*

[286] Cf. the Convention on Civil Liability for Oil Pollution Damage, 1969.

[287] See articles V and VI of the Vienna Convention as amended in 1997, articles 7 and 8 of the Paris Convention and articles III and V of the Brussels Convention on Nuclear Ships.

which state has jurisdiction over claims against operators or their insurers. In general, jurisdiction lies with the state where the nuclear incident occurred, although where a nuclear incident takes place outside the territory of a contracting party or where the place of the nuclear incident cannot be determined with certainty, jurisdiction will lie with the courts of the contracting party in whose territory the nuclear installation of the operator liable is situated.[288] Judgments given by the competent courts are enforceable in the territory of any contracting party.

The issue of inter-state claims is more difficult, as was demonstrated by the aftermath of the Chernobyl accident. Many states have paid compensation to persons affected within their jurisdiction by the fallout from that accident, but while positions have been reserved with regard to claims directly against the former USSR, it seems that problems relating to the obligations actually owed by states and the doubt over the requisite standard of care have prevented such claims from actually being made.[289]

Hazardous wastes [290]

The increasing problem of the disposal of toxic and hazardous wastes and the practice of dumping in the Third World, with its attendant severe health risks, has prompted international action.[291] The Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, 1972[292] provides for a ban on the dumping of certain substances[293] and for controls to be placed on the dumping of others.[294] The London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972[295] prohibits the dumping of wastes except as provided in the Convention itself, and this is strictly controlled.

[288] Article 13 of the Paris Convention, article XI of the Vienna Convention and article X of the Brussels Convention on Nuclear Ships.

[289] See e.g. Sands, *Chernobyl: Law and Communication*, pp. 26–8.

[290] See e.g. Sands, *Principles*, chapter 12, and Birnie and Boyle, *International Law and the Environment*, chapter 8.

[291] See *Keesing's Record of World Events*, pp. 36788–9 (1989). See also Principle 6 of the Stockholm Declaration 1972 and Principle 14 of the Rio Declaration 1992.

[292] This is limited essentially to the North-East Atlantic area.

[293] Listed in Annex I. [294] Listed in Annex II. [295] This is a global instrument.

In 1988, the Organisation of African Unity adopted a resolution proclaiming the dumping of nuclear and industrial wastes in Africa to be a crime against Africa and its people. In 1991, the OAU adopted the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa,[296] under which parties are to prohibit the import of all hazardous wastes for any reason into Africa by non-parties and to prohibit the dumping at sea of such wastes. The OECD has adopted a number of Decisions and Recommendations concerning the transfrontier movements and exports of hazardous wastes.[297] In 1989 the OECD adopted a Recommendation[298] noting that the polluter-pays principle should apply to accidents involving hazardous substances. The Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989 provides that parties shall prohibit the export of hazardous and other wastes to parties which have prohibited the import of such wastes and have so informed the other parties. In the absence of prohibition by the importing state, export to that state of such wastes is only permissible where consent in writing to the specific import is obtained.[299] The Convention also provides that any proposed transboundary movement of hazardous wastes must be notified to the competent authorities of the states concerned by the state of export. The latter shall not allow the generator or exporter of hazardous wastes to commence the transboundary movement without the written consent of the state of import and any state of transit.[300]

In 1990, the IAEA adopted a Code of Practice on the International Transboundary Movement of Radioactive Waste,[301] emphasising that every state should ensure that such movements take place only with the prior notification and consent of the sending, receiving and transit states in accordance with their respective laws and regulations. Appropriate regulatory authorities were called for, as well as the necessary administrative

[296] 30 ILM, 1991, p. 773.
[297] See e.g. 23 ILM, 1984, p. 214; 25 ILM, 1986, p. 1010 and 28 ILM, 1989, pp. 277 and 259.
[298] C(89)88.
[299] Article 4. Note also the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998.
[300] Article 6. [301] 30 ILM, 1991, p. 556.

and technical capacity to manage and dispose of such waste in a manner consistent with international safety standards.[302]

The Convention on the Transboundary Effects of Industrial Accidents adopted in 1992 applies to industrial accidents in an installation or during transportation resulting from activities involving hazardous substances (identified in Annex I). It does not apply to nuclear accidents, accidents at military installations, dam failures, land-based transport accidents, accidental release of genetically modified organisms, accidents caused by activities in the marine environment or spills of oil or other harmful substances at sea.[303] The Convention provides that parties of origin[304] should identify hazardous activities within the jurisdiction and ensure that affected parties are notified of any such proposed or existing activity. Consultations are to take place on the identification of those hazardous activities that may have transboundary effects.[305] A variety of preventive measures are posited.[306] In particular, the party of origin shall require the operator in charge of such hazardous activity to demonstrate the safe performance of that activity by the provision of information.[307] Parties are to develop policies on the siting of new hazardous activities and on significant modifications to existing hazardous activities, while adequate emergency preparedness to respond to industrial accidents is to be established and maintained.[308] An industrial accident notification system is established,[309] while by article 13 the parties 'shall support appropriate international efforts to elaborate rules, criteria and procedures in the field of responsibility and liability'.[310]

[302] See now also the Principles of Radioactive Waste Management, 1995 and the Joint Convention on the Safety of Spent Fuel and Radioactive Waste Management, 1997.

[303] Article 2(2).

[304] I.e. parties under whose jurisdiction an industrial accident occurs or is capable of occurring, article 1(g).

[305] Article 4. See also Annexes II and III.

[306] See article 6 and Annex IV.

[307] Article 6(2) and Annex V.

[308] Articles 7 and 8 and Annex V.

[309] Article 10 and Annex IX.

[310] See also the Memorandum of Understanding Concerning Establishment of the Inter-Organisation Programme for the Sound Management of Chemicals, 1995 signed by the Food and Agriculture Organisation, the International Labour Organisation, the Organisation for Economic Co-operation and Development, the UN Industrial Development Programme, the UN Environment Programme and the World Health Organisation. The areas for co-ordination include the international assessment of chemical risks, information exchange and the prevention of illegal international traffic in toxic and dangerous products: see 34 ILM, 1995, p. 1311.

Marine pollution[311]

Marine pollution can arise from a variety of sources, including the operation of shipping, dumping at sea,[312] activities on the seabed[313] and the effects of pollution originating on the land and entering the seas.[314] There are a large number of treaties, bilateral, regional and multilateral, dealing with such issues and some of the more significant of them in the field of pollution from ships will be briefly noted.

Pollution from ships

The International Convention for the Prevention of Pollution of the Sea by Oil, 1954 basically prohibits the discharge of oil within 50 miles of land and has been essentially superseded by the International Convention for

[311] See e.g. Sands, *Principles*, chapter 9; Birnie and Boyle, *International Law and the Environment*, chapter 7; R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd edn, Manchester, 1999, chapter 15; A. E. Boyle, 'Marine Pollution under the Law of the Sea Convention', 79 AJIL, 1985, p. 347; L. Caflisch, 'International Law and Ocean Pollution: The Present and the Future', 8 *Revue Belge de Droit International*, 1972, p. 7, and O. Schachter, 'The Value of the 1982 UN Convention on the Law of the Sea: Preserving our Freedoms and Protecting the Environment', 23 *Ocean Development and International Law*, 1992, p. 55.

[312] See above, p. 620, and Churchill and Lowe, *Law of the Sea*, p. 363. See also D. Bodansky, 'Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond', 18 *Ecology Law Quarterly*, 1991, p. 719, and Y. Sasamura, 'Prevention and Control of Marine Pollution from Ships', 25 *Law of the Sea Institute Proceedings*, 1993, p. 306.

[313] See Churchill and Lowe, *Law of the Sea*, p. 370.

[314] Articles 194 and 207 of the Convention on the Law of the Sea, 1982 provide in general terms for states to reduce marine pollution from land-based sources. Note that the Montreal Guidelines on the Protection of the Environment Against Pollution from Land-Based Sources, 1985 built upon article 207. A number of regional conventions (many of them UN Environment Programme Regional Seas Conventions) lay down specific rules dealing with the control of particular substances: see e.g. the Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution, 1976 and its two Protocols of 1980 and 1982; the Kuwait Regional Convention for Co-operation on Protection of the Marine Environment from Pollution, 1978 and Protocols of 1978, 1989 and 1990; the Abidjan Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central Africa Region, 1981 and Protocol of 1981; the Lima Convention for the Protection of the Marine Environment and Coastal Areas of the South-East Pacific, 1981 and Protocols; the Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 1983 and two Protocols of 1983 and 1990; the Convention on the Protection of the Black Sea Against Pollution, 1992; the Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992 and the Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992.

the Prevention of Pollution from Ships, 1973,[315] which is concerned with all forms of non-accidental pollution from ships apart from dumping. In Annexes and other amendments and Protocols to the Convention,[316] detailed standards are laid down covering oil, noxious liquid substances in bulk, harmful substances carried by sea in packaged form, sewage and garbage. The Convention covers ships flying the flag of, or operated under the authority of, a state party, but does not apply to warships or state-owned ships used only on governmental non-commercial service.

Article 211(2) of the Convention on the Law of the Sea, 1982 provides that states are to legislate for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such rules are to have the same effect at least as that of generally accepted international rules and standards established through the competent international organisation[317] or general diplomatic conference. States are also to ensure that the ships of their nationality or of their registry comply with 'applicable international rules and standards' and with domestic rules governing the prevention, reduction and control of pollution.[318] In addition, coastal states have jurisdiction physically to inspect, and, where the evidence so warrants, commence proceedings against ships in their territorial waters, where there are clear grounds for believing that the ship concerned has violated domestic or international pollution regulations.[319] It should also be noted that a state in whose port a vessel is may take legal proceedings against that vessel not only where it is alleged to have violated that state's pollution laws or applicable international rules in its territorial sea or economic zone,[320] but also in respect of any discharge outside its internal waters, territorial sea or exclusive economic zone in violation of applicable international rules and standards.[321]

[315] Known as the MARPOL Convention. This was modified by Protocols of 1978 and 1997 and has been further amended: see www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258.

[316] Note e.g. that Annexes I and II are fully binding, while Annexes III, IV and V are options which a state may declare it does not accept when first becoming a party to the Convention, article 14.

[317] The International Maritime Organisation: see www.imo.org.

[318] Article 217. [319] Article 220(2). [320] Article 220(1).

[321] Article 218, a provision characterised as 'truly innovatory' by Churchill and Lowe, *Law of the Sea*, p. 350.

Where an accident takes place, the Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969[322] permits states parties to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil.[323] An International Convention on Oil Pollution Preparedness, Response and Co-operation was signed in London in November 1990, with the purpose of ensuring prompt and effective action in the event of a pollution incident. It requires ships to carry detailed plans for dealing with pollution emergencies. Pollution incidents must be reported without delay and, in the event of a serious incident, other states likely to be affected must be informed and details given to the International Maritime Organisation. National and regional systems for dealing with such incidents are encouraged and the contracting parties agree to co-operate and provide advisory services, technical support and equipment at the request of other parties.[324]

As far as liability is concerned, the Convention on Civil Liability for Oil Pollution Damage, 1969 provides that where oil escaping from a ship causes damage on the territory or territorial sea of a contracting party, the shipowner is strictly liable for such damage, which includes the costs of both preventive measures and further loss or damage caused by such measures.[325] This liability is limited, however, unless the pollution is the

[322] The adoption of this Convention followed the *Torrey Canyon* incident in 1967 in which a ship aground, although on the high seas, was bombed in order to reduce the risk of oil pollution: see Churchill and Lowe, *Law of the Sea*, p. 354. See also the Report of the Home Office, Cmnd 3246 (1967).

[323] This was extended by a Protocol of 1973 to cover pollution from substances other than oil. Note that the International Convention on Salvage, 1989 seeks to integrate environmental factors into the salvage rewards system.

[324] See e.g. the Bonn Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil, 1969 and the Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil and Other Harmful Substances, 1983. Many of the UN Environment Programme Regional Seas Conventions have Protocols dealing with emergency situations: see e.g. Sands, *Principles*, pp. 399 ff.

[325] Except where the damage results from war or acts of God; is wholly caused by an act or omission done by a third party with intent to cause damage; or where the damage is wholly caused by the negligent or other wrongful act of any government or other authority responsible for the maintenance of navigational aids: see articles II and III. See also the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration and Exploitation of Seabed Mineral Resources, 1977, which establishes the liability of the operator of an installation under the jurisdiction of a party for pollution damage resulting from incidents taking place beyond the coastal low-water line.

result of the fault of the shipowner.[326] The shipowner must maintain insurance or other financial security to cover its liability. Claims may be brought in the courts of the party in which loss or damage has occurred or preventive measures taken and the judgments of such courts are generally recognisable and enforceable in the courts of all parties. The 1969 Convention was amended by the Protocol on Liability, 1992,[327] which includes in the definition of damage compensation for impairment of the environment provided that this is limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.[328] The Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage was adopted in 1971 and enables compensation to be paid in certain cases not covered by the Civil Liability Convention. The Convention and Protocols of 1976 and 1984 were superseded by a Protocol of 1992 and the Convention ceased to be in force as from 24 May 2002. The 1992 Protocol established a separate, 1992 International Oil Pollution Compensation Fund, known as the 1992 Fund.[329]

Suggestions for further reading

P. Birnie and A. Boyle, *International Law and the Environment*, 2nd edn, Oxford, 2002

R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd edn, Manchester, 1999

P. Okowa, *State Responsibility for Transboundary Air Pollution*, Oxford, 2000

The Oxford Handbook of International Environmental Law (eds. D. Bodansky, J. Brunee and E. Hay), Oxford, 2007

P. Sands, *Principles of International Environmental Law*, 2nd edn, Manchester, 2003

[326] Article V.

[327] When this entered into force on 30 May 1996, the 1969 Convention became known as the International Convention on Civil Liability for Oil Pollution Damage, 1992.

[328] Article 2(3).

[329] Amendments adopted in 2000 raised the amounts of compensation: see generally Sands, *Principles*, pp. 912 ff. See also www.imo.org/Conventions/contents.asp?topic_id=256&doc_id=661.

16

The law of treaties

Compared with municipal law the various methods by which rights and duties may be created in international law are relatively unsophisticated.[1] Within a state, legal interests may be established by contracts between two or more persons, or by agreements under seal, or under the developed system for transferring property, or indeed by virtue of legislation or judicial decisions. International law is more limited as far as the mechanisms for the creation of new rules are concerned. Custom relies upon a measure of state practice supported by *opinio juris* and is usually, although not invariably, an evolving and timely process. Treaties, on the other hand, are a more direct and formal method of international law creation.

States transact a vast amount of work by using the device of the treaty, in circumstances which underline the paucity of international law procedures when compared with the many ways in which a person within a state's internal order may set up binding rights and obligations. For instance, wars will be terminated, disputes settled, territory acquired,

[1] See generally A. D. McNair, *The Law of Treaties*, Oxford, 1961; J. Klabbers, *The Concept of Treaty in International Law*, Dordrecht, 1996; A. Aust, *Modern Treaty Law and Practice*, 2nd edn, Cambridge, 2007; M. Fitzmaurice and O. Elias, *Contemporary Issues in the Law of Treaties*, Utrecht, 2005; *Les Conventions de Vienne de 1969 et de 1986 sur le Droit des Traités: Commentaire Article par Article* (eds. O. Corten and P. Klein), Brussels, 3 vols., 2006; *Developments of International Law in Treaty Making* (eds. R. Wolfrum and V. Röben), Berlin, 2005; *Multilateral Treaty Calendar* (ed. C. Wiktor), The Hague, 1998; *Multilateral Treaty-Making* (ed. V. Gowlland-Debas), The Hague, 2000; I. Detter, *Essays on the Law of Treaties*, Stockholm, 1967; T. O. Elias, *The Modern Law of Treaties*, London, 1974; D. P. O'Connell, *International Law*, 2nd edn, London, 1970, vol. I, pp. 195 ff.; I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn, Manchester, 1984; P. Reuter, *Introduction to the Law of Treaties*, 2nd edn, Geneva, 1995; S. Bastid, *Les Traités dans la Vie Internationale*, Paris, 1985, and S. Rosenne, *Developments in the Law of Treaties 1945–1986*, Cambridge, 1989. See also *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, p. 1197; Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 117; I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, chapter 27, and M. Fitzmaurice, 'Actors and Factors in the Evolution of Treaty Norms (An Empirical Study)', 4 *Austrian Review of International and European Law*, 1999, p. 1.

special interests determined, alliances established and international organisations created, all by means of treaties. No simpler method of reflecting the agreed objectives of states really exists and the international convention has to suffice both for straightforward bilateral agreements and complicated multilateral expressions of opinions. Thus, the concept of the treaty and how it operates becomes of paramount importance to the evolution of international law.

A treaty is basically an agreement between parties on the international scene. Although treaties may be concluded, or made, between states and international organisations, they are primarily concerned with relations between states. An International Convention on the Law of Treaties was signed in 1969 and came into force in 1980, while a Convention on Treaties between States and International Organisations was signed in 1986.[2] The emphasis, however, will be on the appropriate rules which have emerged as between states. The 1969 Vienna Convention on the Law of Treaties partly reflects customary law[3] and constitutes the basic framework for any discussion of the nature and characteristics of treaties. Certain provisions of the Convention may be regarded as reflective of customary international law, such as the rules on interpretation,[4] material breach[5] and fundamental change of circumstances.[6] Others may not be so regarded, and constitute principles binding only upon state parties.

The fundamental principle of treaty law is undoubtedly the proposition that treaties are binding upon the parties to them and must be performed in good faith.[7] This rule is termed *pacta sunt servanda* and is arguably

[2] This was based upon the International Law Commission's Draft Articles on the Law of Treaties between States and International Organisations or between International Organisations, *Yearbook of the ILC*, 1982, vol. II, part 2, pp. 9 ff. These articles were approved by the General Assembly and governmental views solicited and received. A plenipotentiary conference was held between 18 February and 21 March 1986 to produce a Convention based on those draft articles. See Assembly resolutions 37/112, 38/139 and 39/86.

[3] See e.g. the *Namibia* case, ICJ Reports, 1971, pp. 16, 47; 49 ILR, pp. 2, 37 and the *Fisheries Jurisdiction* case, ICJ Reports, 1973, pp. 3, 18; 55 ILR, pp. 183, 198. See also Rosenne, *Developments*, p. 121.

[4] See e.g. the *Beagle Channel* case, HMSO, 1977, p. 7; 52 ILR, p. 93; the *La Bretagne* case, 82 ILR, pp. 590, 612; the *Golder* case, European Court of Human Rights, Series A, No. 18, p. 14; 57 ILR, pp. 201, 213–14 and the *Lithgow* case, European Court of Human Rights, Series A, No. 102, para. 114; 75 ILR, pp. 438, 482–3.

[5] See e.g. the *Namibia* case, ICJ Reports, 1971, pp. 16, 47; 49 ILR, pp. 2, 37.

[6] See e.g. the *Fisheries Jurisdiction* cases (jurisdictional phase), ICJ Reports, 1973, pp. 3, 21; 55 ILR, pp. 183, 201.

[7] Note also the references to good faith in articles 31, 46 and 69 of the 1969 Convention. See the *Nuclear Tests* cases, ICJ Reports, 1974, pp. 253, 268; 57 ILR, pp. 398, 413; the *Nicaragua*

the oldest principle of international law. It was reaffirmed in article 26 of the 1969 Convention,[8] and underlies every international agreement for, in the absence of a certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other.

The term 'treaty' itself is the one most used in the context of international agreements but there are a variety of names which can be, and sometimes are, used to express the same concept, such as protocol, act, charter, covenant, pact and concordat. They each refer to the same basic activity and the use of one term rather than another often signifies little more than a desire for variety of expression.

A treaty is defined, for the purposes of the Convention, in article 2 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 particular designation.[9]

In addition to excluding agreements involving international organisations, the Convention does not cover agreements between states which are to be governed by municipal law, such as a large number of commercial accords. This does not mean that such arrangements cannot be characterised as international agreements, or that they are invalid, merely that they are not within the purview of the 1969 Convention. Indeed, article 3 stresses that international agreements between states and other subjects of international law or between two or more subjects of international law, or oral agreements, do not lose their validity by being excluded from the framework of the Convention.

case, ICJ Reports, 1986, pp. 392, 418; 76 ILR, pp. 104, 129 and the *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Reports, 1996, para. 102; 110 ILR, pp. 163, 214. See also J. F. O'Connor, *Good Faith in International Law*, Aldershot, 1991; E. Zoller, *La Bonne Foi en Droit International Public*, Paris, 1977, and H. Thirlway, 'The Law and Procedure of the International Court of Justice, 1960–89 (Part One)', 60 BYIL, 1989, pp. 4, 7.

[8] See e.g. the *Gabčíkovo–Nagymaros Project* case, ICJ Reports, 1997, pp. 7, 78–9; 116 ILR, p. 1.

[9] The same definition is given (substituting states and international organisations for states alone) in the 1986 Convention on Treaties between States and International Organisations and in draft article 2(1) of the ILC Draft Articles on the Effects of Armed Conflicts on Treaties, A/CN.4/178, 2007, p. 5. See also H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989: Supplement, 2006, Part Three', 77 BYIL, 2006, pp. 1, 3; M. Fitzmaurice, 'The Identification and Character of Treaties and Treaty Obligations between States in International Law', 73 BYIL, 2002, p. 141, and P. Gautier, 'Article 2' in Corten and Klein, *Conventions de Vienne*, p. 45.

There are no specific requirements of form in international law for the existence of a treaty,[10] although it is essential that the parties intend to create legal relations as between themselves by means of their agreement.[11] This is logical since many agreements between states are merely statements of commonly held principles or objectives and are not intended to establish binding obligations. For instance, a declaration by a number of states in support of a particular political aim may in many cases be without legal (though not political) significance, as the states may regard it as a policy matter and not as setting up juridical relations between themselves. To see whether a particular agreement is intended to create legal relations, all the facts of the situation have to be examined carefully.[12] Examples of non-binding international agreements would include the Final Act of the Conference on Security and Co-operation in Europe, 1975.[13]

The International Court regarded a mandate agreement as having the character of a treaty,[14] while in the *Anglo-Iranian Oil Co.* case[15] doubts were expressed about whether a concession agreement between a private company and a state constituted an international agreement in the sense of a treaty.[16] Optional declarations with regard to the compulsory jurisdiction of the International Court itself under article 36(2) of the Statute of the Court have been regarded as treaty provisions,[17] while declarations made by way of unilateral acts concerning legal or factual situations may have the effect of creating legal obligations.[18] In the latter instance, of course, a treaty as such is not involved.

Where the parties to an agreement do not intend to create legal relations or binding obligations or rights thereby under international law,

[10] See e.g. the *Newfoundland/Nova Scotia* arbitration, 2001, para. 3.15. See also the *Aegean Sea Continental Shelf* case, ICJ Reports, 1978, pp. 3, 39; 60 ILR, p. 511. See K. Raustiala, 'Form and Substance in International Agreements', 99 AJIL, 2005, p. 581.

[11] See e.g. *Third US Restatement of Foreign Relations Law*, Washington, 1987, vol. I, p. 149.

[12] Registration of the agreement with the United Nations under article 102 of the UN Charter is one useful indication. However, as the International Court pointed out in the *Qatar* v. *Bahrain* case, non-registration does not affect the actual validity of an international agreement nor its binding quality, ICJ Reports, 1994, pp. 115, 121; 102 ILR, pp. 1, 18.

[13] See further above, chapter 7, p. 372.

[14] *South-West Africa* cases, ICJ Reports, 1962, pp. 319, 330; 37 ILR, pp. 3, 12.

[15] ICJ Reports, 1952, pp. 93, 112; 19 ILR, pp. 507, 517.

[16] But see *Texaco* v. *Libya*, 53 ILR, p. 389.

[17] The *Fisheries Jurisdiction* cases, ICJ Reports, 1973, pp. 3, 16; 55 ILR, pp. 183, 196.

[18] The *Nuclear Tests* case, ICJ Reports, 1974, pp. 253, 267; 57 ILR, pp. 398, 412. See also the Ihlen Declaration, held to constitute a binding statement, in the *Eastern Greenland* case, PCIJ, Series A/B, No. 53, 1933; 6 AD, p. 95 and *Burkina Faso* v. *Mali*, ICJ Reports, 1986, pp. 554, 573–4; 80 ILR, pp. 459, 477. See further above, chapter 3, p. 121.

the agreement will not be a treaty, although, of course, its political effect may still be considerable.[19] Of particular interest are memoranda of understanding, which are not as such legally binding,[20] but may be of legal consequence.[21] In fact a large role is played in the normal course of interstate dealings by informal non-treaty instruments precisely because they are intended to be non-binding and are thus flexible, confidential and relatively speedy in comparison with treaties.[22] They may be amended with ease and without delay and may be terminated by reasonable notice (subject to provision to the contrary). It is this intention not to create a binding arrangement governed by international law which marks the difference between treaties and informal international instruments.[23] The

[19] The test will focus upon the intent of the parties as seen in the language and context of the document concerned, the circumstances of its conclusion and the explanations given by the parties: see the view of the US Assistant Legal Adviser for Treaty Affairs, 88 AJIL, 1994, p. 515. See also O. Schachter, 'The Twilight Existence of Nonbinding International Agreements', 71 AJIL, 1977, p. 296, and Rosenne, *Developments*, p. 91. See e.g. the Helsinki Final Act of 1975, which was understood to be non-binding and thus not a treaty by the parties involved, DUSPIL, 1975, pp. 326–7.

[20] The UK Foreign Office has noted that a memorandum of understanding is 'a form frequently used to record informal arrangements between states on matters which are inappropriate for inclusion in treaties or where the form is more convenient than a treaty (e.g. for confidentiality). They may be drawn up as a single document using non-treaty terms, signed on behalf of two or more governments, or consist of an exchange of notes or letters recording an understanding between two governments', UKMIL, 71 BYIL, 2000, p. 534, and see FCO, *Treaties and MOUs: Guidance on Practice and Procedures*, 2nd edn, 2004, www.fco.gov.uk/resources/en/pdf/pdf8/fco_pdf_treatymous. See also Aust, *Modern Treaty Law*, chapter 3.

[21] See e.g. the dispute between the USA and the UK as to the legal status of a memorandum of understanding relating to the US–UK Air Services Agreement, 1977 (Bermuda II) in the context of *Heathrow Airport User Charges* Arbitration, UKMIL, 63 BYIL, 1992, pp. 712 ff. and 88 AJIL, 1994, pp. 738 ff. The Tribunal noted that the memorandum of understanding was not a source of independent legal rights and duties but 'consensual subsequent practice of the parties' and an aid to the interpretation of the Bermuda II Agreement, 102 ILR, pp. 215, 353. In the *Iron Rhine (Belgium/Netherlands)* case, arbitral award of 24 May 2005, paras. 156 ff., the Tribunal noted that the memorandum in question, while not as such binding, in the circumstances of the case was not legally irrelevant.

[22] See e.g. Rosenne, *Developments*, pp. 107 ff.; A. Aust, 'The Theory and Practice of Informal International Instruments', 35 ICLQ, 1986, p. 787; R. Baxter, 'International Law in "Her Infinite Variety"', 29 ICLQ, 1980, p. 549, and Roessler, 'Law, *De Facto* Agreements and Declarations of Principles in International Economic Relations', 21 German YIL, 1978, p. 41.

[23] Aust provides as examples the UK memoranda of understanding on deportations with Jordan, Libya and Lebanon in 2005, *Modern Treaty Law*, p. 21. See also *AS & DD (Libya)* v. *Secretary of State for the Home Department* [2008] EWCA Civ 289 and *Othman (Jordan)* v. *Secretary of State for the Home Department* [2008] EWCA Civ 290.

International Court addressed this issue in the *Qatar* v. *Bahrain* case,[24] with regard to Minutes dated 25 December 1990 signed by the parties and Saudi Arabia. The Court emphasised that whether an agreement constituted a binding agreement would depend upon 'all its actual terms' and the circumstances in which it had been drawn up,[25] and in the situation involved in the case, the Minutes were to be construed as an international agreement creating rights and obligations for the parties since on the facts they enumerated the commitments to which the parties had consented.[26] In addition, a treaty may contain a variety of provisions, not all of which constitute legal obligations.[27]

The 1969 Convention also concerns treaties which are the constituent instruments of international organisations, such as the United Nations Charter, and internal treaties adopted within international organisations.[28]

The making of treaties[29]

Formalities

Treaties may be made or concluded by the parties in virtually any manner they wish. There is no prescribed form or procedure, and how a treaty is formulated and by whom it is actually signed will depend upon the intention and agreement of the states concerned. Treaties may be drafted as between states, or governments, or heads of states, or governmental departments, whichever appears the most expedient. For instance, many

[24] ICJ Reports, 1994, p. 112; 102 ILR, p. 1.

[25] ICJ Reports, 1994, p. 121; 102 ILR, p. 18, citing the *Aegean Sea Continental Shelf* case, ICJ Reports, 1978, p. 39; 60 ILR, p. 511.

[26] ICJ Reports, 1994, pp. 121–2; 102 ILR, pp. 18–19. See also K. Widdows, 'What is an International Agreement in International Law?', 50 BYIL, 1979, p. 117, and J. A. Barberis, 'Le Concept de "Traité International" et ses Limites', AFDI, 1984, p. 239.

[27] See the *Oil Platforms (Preliminary Objections)* case, ICJ Reports, 1996, pp. 803, 820; 130 ILR, pp. 174, 201. Note that the use of the word 'treaty' may not necessarily be determinative of its legal status, for example 'treaties' signed with representatives of indigenous peoples during the colonial period giving protectorate or territorial or sovereignty rights to the colonial power: see *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 404 ff. and the *Island of Palmas* case, UNRIAA, vol. II, pp. 858–9. See also I. Brownlie, *Treaties with Indigenous Peoples*, Oxford, 1992.

[28] Article 5. See further Rosenne, *Developments*, chapter 4.

[29] See e.g. H. Blix, *Treaty-Making Power*, New York, 1960, and E. W. Vierdag, 'The Time of the Conclusion of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions', 59 BYIL, 1988, p. 75. See also *Oppenheim's International Law*, p. 1222, and Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 125.

of the most important treaties are concluded as between heads of state, and many of the more mundane agreements are expressed to be as between government departments, such as minor trading arrangements.

Where precisely in the domestic constitutional establishment the power to make treaties is to be found depends upon each country's municipal regulations and varies from state to state. In the United Kingdom, the treaty-making power is within the prerogative of the Crown,[30] whereas in the United States it resides with the President 'with the advice and consent of the Senate' and the concurrence of two-thirds of the Senators.[31] International law leaves such matters to domestic law.[32]

Nevertheless, there are certain rules that apply in the formation of international conventions. In international law, states have the capacity to make agreements, but since states are not identifiable human persons, particular principles have evolved to ensure that persons representing states indeed have the power so to do for the purpose of concluding the treaty in question. Such persons must produce what is termed 'full powers' according to article 7 of the Convention, before being accepted as capable of representing their countries.[33] 'Full powers' refers to documents certifying status from the competent authorities of the state in question. This provision provides security to the other parties to the treaty that they are making agreements with persons competent to do so.[34] However, certain persons do not need to produce such full powers, by virtue of their position and functions. This exception refers to heads of state and government, and foreign ministers for the purpose of performing all acts relating to the conclusion of the treaty; heads of diplomatic missions for the purpose of adopting the text of the treaty between their country and the country to which they are accredited; and representatives accredited to international conferences or organisations for the purpose of adopting the text of the treaty in that particular conference or organisation. The International Court noted in the preliminary objections to jurisdiction phase of the *Genocide*

[30] See e.g. S. de Smith and R. Brazier, *Constitutional and Administrative Law*, 6th edn, London, 1989, p. 140.

[31] See e.g. *Third US Restatement of Foreign Relations Law*, p. 159. See, with regard to the Presidential power to terminate a treaty, DUSPIL, 1979, pp. 724 ff., and *Goldwater* v. *Carter* 617 F.2d 697 and 100 S. Ct. 533 (1979). See also L. Henkin, 'Restatement of the Foreign Relations Law of the United States (Revised)', 74 AJIL, 1980, p. 954.

[32] See e.g. *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 429.

[33] See Sinclair, *Vienna Convention*, pp. 29 ff.; Aust, *Modern Treaty Law*, chapter 5, and M. Jones, *Full Powers and Ratification*, Cambridge, 1946.

[34] See *Yearbook of the ILC*, 1966, vol. II, p. 193.

Convention (Bosnia v. *Serbia)* case that, 'According to international law, there is no doubt that every head of state is presumed to be able to act on behalf of the state in its international relations.'[35]

Sinclair notes that UK practice distinguishes between 'general full powers' held by the Secretary of State for Foreign and Commonwealth Affairs, Ministers of State and Parliamentary Under-Secretaries in the Foreign and Commonwealth Office and UK Permanent Representatives to the UN, European Communities and General Agreement on Tariffs and Trade, which enable any treaty to be negotiated and signed, and 'special full powers' granted to a particular person to negotiate and sign a specific treaty.[36]

Any act relating to the making of a treaty by a person not authorised as required will be without any legal effect, unless the state involved afterwards confirms the act.[37] One example of this kind of situation arose in 1951 with regard to a convention relating to the naming of cheeses. It was signed by a delegate on behalf of both Sweden and Norway, but it appeared that he had authority only from Norway. However, the agreement was subsequently ratified by both parties and entered into effect.[38]

Consent

Once a treaty has been drafted and agreed by authorised representatives, a number of stages are then necessary before it becomes a binding legal obligation upon the parties involved. The text of the agreement drawn up by the negotiators of the parties has to be adopted and article 9 provides that adoption in international conferences takes place by the vote of two-thirds of the states present and voting, unless by the same majority it is decided to apply a different rule. This procedure follows basically the practices recognised in the United Nations General Assembly[39] and carried out in the majority of contemporary conferences. An increasing number of conventions are now adopted and opened for signature by means of UN General Assembly resolutions, such as the 1966 International Covenants on Human Rights and the 1984 Convention against Torture, using normal Assembly voting procedures. Another significant point is the tendency in

[35] ICJ Reports, 1996, pp. 595, 622; 115 ILR, p. 1 and see also *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 430.

[36] Sinclair, *Vienna Convention*, p. 32. See also *Satow's Guide to Diplomatic Practice*, 5th edn, London, 1979, p. 62.

[37] Article 8. [38] See *Yearbook of the ILC*, 1966, vol. II, p. 195.

[39] See article 18 of the UN Charter.

recent conferences to operate by way of consensus so that there would be no voting until all efforts to reach agreement by consensus have been exhausted.[40] In cases other than international conferences, adoption will take place by the consent of all the states involved in drawing up the text of the agreement.[41]

The consent of the states parties to the treaty in question is a vital factor, since states may (in the absence of a rule being also one of customary law) be bound only by their consent. Treaties are in this sense contracts between states and if they do not receive the consent of the various states, their provisions will not be binding upon them. There are, however, a number of ways in which a state may express its consent to an international agreement. It may be signalled, according to article 11, by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession. In addition, it may be accomplished by any other means, if so agreed.

Consent by signature[42]

A state may regard itself as having given its consent to the text of the treaty by signature in defined circumstances noted by article 12, that is, where the treaty provides that signature shall have that effect, or where it is otherwise established that the negotiating states were agreed that signature should have that effect, or where the intention of the state to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiations.

Although consent by ratification is probably the most popular of the methods adopted in practice, consent by signature does retain some significance, especially in light of the fact that to insist upon ratification in each case before a treaty becomes binding is likely to burden the administrative machinery of government and result in long delays. Accordingly, provision is made for consent to be expressed by signature.[43] This would be appropriate for the more routine and less politicised of treaties. The

[40] See e.g. the Third UN Conference on the Law of the Sea, Sinclair, *Vienna Convention*, pp. 37–9. See also the UN *Juridical Yearbook*, 1974, pp. 163–4, where the Director of the General Legal Division, Office of Legal Affairs, declared that the term 'consensus' in UN organs, 'was used to describe a practice under which every effort is made to achieve unanimous agreement; and if that could not be done, those dissenting from the general trend were prepared simply to make their position and reservations known and placed on the record'. See also Aust, *Modern Treaty Law*, pp. 86 ff.

[41] Article 9(1). This reflects the classic rule, Sinclair, *Vienna Convention*, p. 33.

[42] See *Yearbook of the ILC*, 1966, vol. II, p. 196.

[43] See, for example, the Maroua Declaration, *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 429–30.

act of signature is usually a formal affair. Often in the more important treaties, the head of state will formally add his signature in an elaborate ceremony. In multilateral conventions, a special closing session will be held at which authorised representatives will sign the treaty. However, where the convention is subject to acceptance, approval or ratification, signature will in principle be a formality and will mean no more than that state representatives have agreed upon an acceptable text, which will be forwarded to their particular governments for the necessary decision as to acceptance or rejection.[44] However, signature has additional meaning in that in such cases and pending ratification, acceptance or approval, a state must refrain from acts which would defeat the object and purpose of the treaty until such time as its intentions with regard to the treaty have been made clear.[45]

Consent by exchange of instruments

Article 13 provides that the consent of states to be bound by a treaty constituted by instruments exchanged between them may be expressed by that exchange when the instruments declare that their exchange shall have that effect or it is otherwise established that those states had agreed that the exchange of instruments should have that effect.

Consent by ratification[46]

The device of ratification by the competent authorities of the state is historically well established and was originally devised to ensure that the representative did not exceed his powers or instructions with regard to the making of a particular agreement. Although ratification (or approval) was originally a function of the sovereign, it has in modern times been made subject to constitutional control.

[44] The International Court has stated that, 'signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature', *Qatar* v. *Bahrain*, ICJ Reports, 2001, pp. 40, 68.

[45] Article 18. See Sinclair, *Vienna Convention*, pp. 42–4, and *Certain German Interests in Polish Upper Silesia*, PCIJ, Series A, No. 7, 1926, p. 30. See also H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989 (Part Four)', 63 BYIL, 1992, pp. 1, 48 ff., and J. Klabbers, 'How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Towards Manifest Intent', 34 *Vanderbilt Journal of Transnational Law*, 2001, p. 283. Note that having signed the Rome Statute for the International Criminal Court in December 2000, the US withdrew its signature in May 2002: see www.state.gov/r/pa/prs/ps/2002/9968.htm.

[46] Defined in article 2(1)b as 'the international act . . . whereby a state establishes on the international plane its consent to be bound by a treaty'. It is thus to be distinguished as a concept from ratification in the internal constitutional sense, although clearly there is an important link: see *Yearbook of the ILC*, 1966, vol. II, pp. 197–8. See also Brownlie, *Principles*, pp. 582–3.

The advantages of waiting until a state ratifies a treaty before it becomes a binding document are basically twofold, internal and external. In the latter case, the delay between signature and ratification may often be advantageous in allowing extra time for consideration, once the negotiating process has been completed. But it is the internal aspects that are the most important, for they reflect the change in political atmosphere that has occurred in the last 150 years and has led to a much greater participation by a state's population in public affairs. By providing for ratification, the feelings of public opinion have an opportunity to be expressed with the possibility that a strong negative reaction may result in the state deciding not to ratify the treaty under consideration.

The rules relating to ratification vary from country to country. In the United Kingdom, although the power of ratification comes within the prerogative of the Crown, it has become accepted that treaties involving any change in municipal law, or adding to the financial burdens of the government or having an impact upon the private rights of British subjects will be first submitted to Parliament and subsequently ratified. There is, in fact, a procedure known as the Ponsonby Rule which provides that all treaties subject to ratification are laid before Parliament at least twenty-one days before the actual ratification takes place.[47] Different considerations apply in the case of the United States.[48] However, the question of how a state effects ratification is a matter for internal law alone and outside international law.

Article 14 of the 1969 Vienna Convention notes that ratification will express a state's consent to be bound by a treaty where the treaty so provides; it is otherwise established that the negotiating states were agreed that ratification should be required; the representative of the state has signed the treaty subject to ratification or the intention of the state to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during negotiations.

Within this framework, there is a controversy as to which treaties need to be ratified. Some writers maintain that ratification is only necessary if it is clearly contemplated by the parties to the treaty,[49] and this approach has been adopted by the United Kingdom.[50] On the other hand, it has been suggested that ratification should be required unless the treaty clearly

[47] See above, chapter 4, p. 152. [48] *Ibid.*, p. 161.

[49] See e.g. G. Fitzmaurice, 'Do Treaties Need Ratification?', 15 BYIL, 1934, p. 129, and O'Connell, *International Law*, p. 222. See also H. Blix, 'The Requirement of Ratification', 30 BYIL, 1953, p. 380.

[50] See e.g. Sinclair, *Vienna Convention*, p. 40, and O'Connell, *International Law*, p. 222.

reveals a contrary intention.[51] The United States, in general, will dispense with ratification only in the case of executive agreements.[52] Ratification in the case of bilateral treaties is usually accomplished by exchanging the requisite instruments, but in the case of multilateral treaties the usual procedure is for one party to collect the ratifications of all states, keeping all parties informed of the situation. It is becoming more accepted that in such instances, the Secretary-General of the United Nations will act as the depositary for ratifications.[53] In some cases, signatures to treaties may be declared subject to 'acceptance' or 'approval'. The terms, as noted in articles 11 and 14(2), are very similar to ratification and similar provisions apply. Such variation in terminology is not of any real significance and only refers to a somewhat simpler form of ratification.

Consent by accession[54]

This is the normal method by which a state becomes a party to a treaty it has not signed either because the treaty provides that signature is limited to certain states, and it is not such a state, or because a particular deadline for signature has passed. Article 15 notes that consent by accession is possible where the treaty so provides, or the negotiating states were agreed or subsequently agree that consent by accession could occur in the case of the state in question. Important multilateral treaties often declare that states or, in certain situations, other specific entities may accede to the treaty at a later date, that is after the date after which it is possible to signify acceptance by signature.[55]

Reservations to treaties[56]

A reservation is defined in article 2 of the Convention as:

> a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it

[51] See e.g. McNair, *Law of Treaties*, p. 133.

[52] O'Connell, *International Law*, p. 222. See also DUSPIL, 1974, pp. 216–17 and *ibid.*, 1979, pp. 678 ff.

[53] See P. T. B. Kohona, 'Some Notable Developments in the Practice of the UN Secretary-General as a Depositary of Multilateral Treaties: Reservations and Declarations', 99 AJIL, 2005, p. 433.

[54] See *Yearbook of the ILC*, 1966, vol. II, p. 199.

[55] See e.g. articles 26 and 28 of the Convention on the Territorial Sea and the Contiguous Zone.

[56] See e.g. Aust, *Modern Treaty Law*, chapter 8; A. Pellet, 'Article 19' in Corten and Klein, *Conventions de Vienne*, p. 641; C. Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties', 64 BYIL, 1993, p. 245; G. Gaja, 'Unruly

> purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.[57]

Where a state is satisfied with most of the terms of a treaty, but is unhappy about particular provisions, it may, in certain circumstances, wish to refuse to accept or be bound by such provisions, while consenting to the rest of the agreement. By the device of excluding certain provisions, states may agree to be bound by a treaty which otherwise they might reject entirely. This may have beneficial results in the cases of multilateral conventions, by inducing as many states as possible to adhere to the proposed treaty. To some extent it is a means of encouraging harmony amongst states of widely differing social, economic and political systems, by concentrating upon agreed, basic issues and accepting disagreement on certain other matters.

The capacity of a state to make reservations to an international treaty illustrates the principle of sovereignty of states, whereby a state may refuse its consent to particular provisions so that they do not become binding upon it. On the other hand, of course, to permit a treaty to become honeycombed with reservations by a series of countries could well jeopardise the

Treaty Reservations', *Le Droit International à l'Heure de sa Codifications*, Milan, 1987, p. 313; J. K. Gamble, 'Reservations to Multilateral Treaties: A Macroscopic View of State Practice', 74 AJIL, 1980, p. 372; G. Fitzmaurice, 'Reservations to Multilateral Treaties', 2 ICLQ, 1953, p. 1; D. W. Bowett, 'Reservations to Non-restricted Multilateral Treaties', 48 BYIL, 1976–7, p. 67; P. H. Imbert, *Les Réserves aux Traités Multilatéraux*, Paris, 1979; Sinclair, *Vienna Convention*, chapter 3; D. W. Greig, 'Reservations: Equity as a Balancing Force?', 16 Australian YIL, 1995, p. 21; O'Connell, *International Law*, pp. 229 ff.; J. M. Ruda, 'Reservations to Treaties', 146 HR, 1975, p. 95; G. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, Leiden, 1988; *Oppenheim's International Law*, p. 1241, and Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 178. See also A. Pellet, Reports on the Law and Practice Relating to Reservations to Treaties, e.g. Report of the International Law Commission, 2007, A/62/10, pp. 15 ff. The intention is to draw up a Guide to Practice consisting of guidelines which, while not binding in themselves, might guide the practice of states and international organisations with regard to reservations and interpretative declarations on the basis of the Commission's fundamental decision not to call into question the work of the Vienna Conventions. The Draft Guidelines adopted to date may be found at A/62/10, pp. 46 ff.

[57] Article 2(1)d of the Vienna Convention on the Law of Treaties between States and International Organisations, 1986 provides that a reservation means 'a unilateral statement, however phrased or named, made by a state or by an international organisation when signing, ratifying, formally confirming, 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 or to that organisation'. See also the definition contained in draft guideline 1.1 of the ILC Guide to Practice, Report of the ILC on its 54th Session, 2002, p. 50.

whole exercise. It could seriously dislocate the whole purpose of the agreement and lead to some complicated inter-relationships amongst states. This problem does not arise in the case of bilateral treaties, since a reservation by one party to a proposed term of the agreement would necessitate a renegotiation.[58] An agreement between two parties cannot exist where one party refuses to accept some of the provisions of the treaty.[59] This is not the case with respect to multilateral treaties, and here it is possible for individual states to dissent from particular provisions, by announcing their intention either to omit them altogether, or understand them in a certain way. Accordingly, the effect of a reservation is simply to exclude the treaty provision to which the reservation has been made from the terms of the treaty in force between the parties.[60]

Reservations must be distinguished from other statements made with regard to a treaty that are not intended to have the legal effect of a reservation, such as understandings, political statements or interpretative declarations. In the latter instance, no binding consequence is intended with regard to the treaty in question. What is involved is a political manifestation for primarily internal effect that is not binding upon the other parties.[61] A distinction has been drawn between 'mere' interpretative declarations and 'qualified' interpretative declarations,[62] with the latter category

[58] See the statement of British practice to this effect, UKMIL, 68 BYIL, 1997, p. 482.

[59] See *Yearbook of the ILC*, 1966, vol. II, p. 203. See also draft guideline 1.5.1 of the ILC Guide to Practice, Report of the ILC on its 54th Session, 2002, p. 55.

[60] See e.g. *Legality of the Use of Force* (*Yugoslavia* v. *USA*), Provisional Measures Order, ICJ Reports, 1999, pp. 916, 924 and the *Fisheries Jurisdiction* (*Spain* v. *Canada*) case, ICJ Reports, 1998, p. 432.

[61] See e.g. the *Temeltasch* case, 5 *European Human Rights Reports*, 1983, p. 417 on the difference between reservations and interpretative declarations generally and in the context of the European Human Rights Convention. Cf. the *Ette* case, European Court of Human Rights, Series A, No. 117. See, for examples of UK practice, UKMIL, 68 BYIL, 1997, p. 483. See also L. D. M. Nelson, 'Declarations, Statements and "Disguised Reservations" with respect to the Convention on the Law of the Sea', 50 ICLQ, 2001, p. 767; R. Sapienza, 'Les Déclarations Interprétatives Unilatérales et l'Interprétation des Traités', 103 RGDIP, 1999, p. 601, and P. H. Imbert, 'Reservations to the European Convention on Human Rights before the Strasbourg Commission', 33 ICLQ, 1984, p. 558 and *UN Juridical Yearbook*, 1976, pp. 220–1. Draft guideline 1.2 of the ILC Guide to Practice provides that an interpretative declaration means 'a unilateral statement, however phrased or named, made by a state or an international organisation whereby that state or international organisation purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions', Report of the ILC on its 54th Session, 2002, p. 52.

[62] See D. McRae, 'The Legal Effect of Interpretative Declarations', 49 BYIL, 1978, p. 155. See also the *Temeltasch* case, pp. 432–3 and the First Pellet Report, pp. 58 ff.

capable in certain circumstances of constituting reservations.[63] Another way of describing this is to draw a distinction between 'simple interpretative declarations' and 'conditional interpretative declarations'.[64] The latter is described in the ILC Guide to Practice as referring to a situation where the state subjects its consent to be bound by the treaty to a specific interpretation of the treaty, or specific provisions of it.[65]

In the *Anglo-French Continental Shelf* case,[66] the Arbitral Tribunal emphasised that French reservations to article 6 of the Geneva Convention on the Continental Shelf, 1958, challenged by the UK, had to be construed in accordance with the natural meaning of their terms.[67] The UK contended that the third French reservation to article 6 (which concerned the non-applicability of the principle of equidistance in areas of 'special circumstances' as defined by the French government, naming specifically *inter alia* the Bay of Granville) was in reality only an interpretative declaration. The Tribunal, however, held that although this reservation contained elements of interpretation, it also constituted a specific condition imposed by France on its acceptance of the article 6 delimitation regime. This went beyond mere interpretation as it made the application of that regime dependent upon acceptance by other states of France's designation of the named areas as involving 'special circumstances'. It therefore had the purpose of seeking to exclude or modify the legal effect of certain treaty provisions with regard to their application by the reserving state and thus constituted a reservation.[68]

In the *Belilos* case[69] in 1988, the European Court of Human Rights considered the effect of one particular interpretative declaration made by Switzerland upon ratification.[70] The Court held that one had to look

[63] Quite what the effect might be of the former is unclear: see e.g. the First Pellet Report, p. 60.

[64] See e.g. Nelson, 'Declarations', p. 776.

[65] Draft guideline 1.2.1, Report of the ILC on its 54th Session, 2002, p. 52.

[66] Cmnd 7438 (1979); 54 ILR, p. 6.

[67] Cmnd 7438, pp. 41–2; 54 ILR, pp. 48–9. It was also stressed that reservations have to be appreciated in the light of the law in force at the time that the reservations (and any objections to them) are made, Cmnd 7438, p. 35; 54 ILR, p. 42.

[68] Cmnd 7438, p. 43; 54 ILR, p. 50.

[69] European Court of Human Rights, Series A, No. 132. See also S. Marks, 'Reservations Unhinged: The *Belilos* Case Before the European Court of Human Rights', 39 ICLQ, 1990, p. 300.

[70] Switzerland made in total two interpretative declarations and two reservations upon ratification of the European Convention on Human Rights. The declaration in question concerned article 6, paragraph 1 of the Convention dealing with the right to fair trial and

behind the title given to the declaration in question and to seek to determine its substantive content. It was necessary to ascertain the original intention of those drafting the declaration and thus recourse to the *travaux préparatoires* was required. In the light of these, the Court felt that Switzerland had indeed intended to 'avoid the consequences which a broad view of the right of access to the courts . . . would have for the system of public administration and of justice in the cantons and consequently . . . put forward the declaration as qualifying [its] consent to be bound by the Convention'.[71] Having so decided, the Court held that the declaration in question, taking effect as a reservation, did not in fact comply with article 64 of the Convention, which prohibited reservations of a general character[72] and required a brief statement of the law in force necessitating the reservation.[73] Accordingly, the declaration was invalid. It is hard to escape the conclusion that the Court has accepted a test favourable to states as to the situations under which a declaration may be regarded as a reservation, only to emphasise the requirements of article 64 concerning the validity of reservations to the European Convention. One should therefore be rather cautious before applying the easier test regarding interpretative declarations generally. Nevertheless, there remains a problem of states making interpretative declarations that seek to act as reservations to treaties that prohibit reservations. In such situations, it is likely that the effect of such declarations would be ineffective as against other parties who would therefore be entitled to regard the treaty as in force fully between all the parties, taking no account of the declaration.[74]

In order to determine whether a unilateral statement made constitutes a reservation or an interpretative declaration, the statement will have to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms and within the context of the treaty in question. The intention of the state making the statement at that time will also need to

provided that Switzerland considered that that right was intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities. The issue concerned the right of appeal from the Lausanne Police Board to the Criminal Cassation Division of the Vaud Cantonal Court, which could not in fact hear fresh argument, receive witnesses or give a new ruling on the merits, and whether the declaration prevented the applicant from relying on article 6 in the circumstances.

[71] At pp. 18–19. [72] *Ibid.*, pp. 20–1. [73] *Ibid.*, pp. 21–2.

[74] See e.g. Nelson, 'Declarations', p. 781. See also below, p. 920.

be considered.[75] In the special case of a bilateral treaty, an interpretative declaration made by one party which is accepted by the other party will constitute an authoritative interpretation of that treaty.[76]

The general rule that became established was that reservations could only be made with the consent of all the other states involved in the process. This was to preserve as much unity of approach as possible to ensure the success of an international agreement and to minimise deviations from the text of the treaty. This reflected the contractual view of the nature of a treaty,[77] and the League of Nations supported this concept.[78] The effect of this was that a state wishing to make a reservation had to obtain the consent of all the other parties to the treaty. If this was not possible, that state could either become a party to the original treaty (minus the reservation, of course) or not become a party at all. However, this restrictive approach to reservations was not accepted by the International Court of Justice in the *Reservations to the Genocide Convention* case.[79] This was an advisory opinion by the Court, requested by the General Assembly after some states had made reservations to the 1948 Genocide Convention, which contained no clause permitting such reservations, and a number of objections were made.

The Court held that:

> a state which has made and maintained a reservation which has been objected to by one or more parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention.

Compatibility, in the Court's opinion, could be decided by states individually since it was noted that:

> if a party to the Convention objects to a reservation which it considers incompatible with the object and purpose of the Convention, it can . . . consider that the reserving state is not a party to the Convention.[80]

[75] See draft guideline 1.3.1 of the ILC Guide to Practice, Report of the ILC on its 54th Session, 2002, p. 53. Draft guideline 1.3.2 also states that the phrasing or name used provides an indication of the purported legal effect, *ibid*.

[76] *Ibid*., p. 56.

[77] See Sinclair, *Vienna Convention*, pp. 54–5, and Ruda, 'Reservations', p. 112. See also Redgwell, 'Universality or Integrity', p. 246.

[78] Report of the Committee of Experts for the Progressive Codification of International Law, 8 LNOJ, pp. 880–1 (1927).

[79] ICJ Reports, 1951, p. 15; 18 ILR, p. 364.

[80] ICJ Reports, 1951, pp. 29–30.

The Court did emphasise the principle of the integrity of a convention, but pointed to a variety of special circumstances with regard to the Genocide Convention in question, which called for a more flexible interpretation of the principle. These circumstances included the universal character of the UN under whose auspices the Convention had been concluded; the extensive participation envisaged under the Convention; the fact that the Convention had been the product of a series of majority votes; the fact that the principles underlying the Convention were general principles already binding upon states; that the Convention was clearly intended by the UN and the parties to be definitely universal in scope and that it had been adopted for a purely humanitarian purpose so that state parties did not have interests of their own but a common interest. All these factors militated for a flexible approach in this case.

The Court's approach, although having some potential disadvantages,[81] was in keeping with the move to increase the acceptability and scope of treaties and with the trend in international organisations away from the unanimity rule in decision-making and towards majority voting.[82] The 1969 Convention on the Law of Treaties accepted the Court's views.[83]

By article 19, reservations may be made when signing, ratifying, accepting, approving or acceding to a treaty, but they cannot be made where the reservation is prohibited by the treaty, or where the treaty provides that only specified reservations may be made and these do not include the reservation in question, or where the reservation is not compatible with the object and purpose of the treaty.[84]

In the instances where a reservation is possible, the traditional rule requiring acceptance by all parties will apply where, by article 20(2), 'it appears from the limited number of the negotiating states and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty'.

[81] See e.g. Fitzmaurice, 'Reservations'.

[82] Although the International Law Commission was initially critical, it later changed its mind: see *Yearbook of the ILC*, 1951, vol. II, pp. 130–1, cf. *ibid.*, 1962, vol. II, pp. 62–5 and 178–9. Note also that the UN General Assembly in 1959 resolved that the Secretary-General as a depositary was to apply the Court's approach to all conventions concluded under UN auspices unless they contained provisions to the contrary.

[83] See Redgwell, 'Universality or Integrity', pp. 253 ff.

[84] See also draft guideline 1.3.1 of the ILC Guide to Practice, A/61/10, 2006, pp. 327 ff.

Article 20(4) then outlines the general rules to be followed with regard to treaties not within article 20(2) and not constituent instruments of international organisations. These are that:

> (a) acceptance by another contracting state of a reservation constitutes the reserving state a party to the treaty in relation to that other state if or when the treaty is in force for those states;
> (b) an objection by another contracting state to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving states unless a contrary intention is definitely expressed by the objecting state;
> (c) an act expressing a state's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting state has accepted the reservation.

The effect of reservations is outlined in article 21. This declares that a reservation established with regard to another party modifies, for the reserving state in its relations with the other party, the provisions of the treaty to which the reservation relates, to the extent of the reservation. The other party is similarly affected in its relations with the reserving state. An example of this was provided by the Libyan reservation to the 1961 Vienna Convention on Diplomatic Relations with regard to the diplomatic bag, permitting Libya to search the bag with the consent of the state whose bag it was, and insist that it be returned to its state of origin. Since the UK did not object to the reservation, it could have acted similarly with regard to Libya's diplomatic bags.[85] However, the reservation does not modify the provisions of the treaty for the other parties to the treaty as between themselves.

Article 21(3) provides that where a state objects to a reservation, but not to the entry into force of the treaty between itself and the reserving state, then 'the provisions to which the reservation relates do not apply as between the two states to the extent of the reservation'. This provision was applied by the arbitration tribunal in the *Anglo-French Continental Shelf* case, where it was noted that:

> the combined effect of the French reservations and their rejection by the United Kingdom is neither to render article 6 [of the Geneva Convention on the Continental Shelf, 1958] inapplicable *in toto*, as the French Republic contends, nor to render it applicable *in toto*, as the United Kingdom

[85] See Foreign Affairs Committee, *Report on the Abuse of Diplomatic Immunities and Privileges*, 1984, pp. 23–4, and above, chapter 13, p. 760.

primarily contends. It is to render the article inapplicable as between the two countries to the extent of the reservations.[86]

A number of important issues, however, remain unresolved. In particular, it is unclear what effect an impermissible reservation has.[87] One school of thought takes the view that such reservations are invalid,[88] another that the validity of any reservation is dependent upon acceptance by other states.[89] While there is a presumption in favour of the permissibility of reservations, this may be displaced if the reservation is prohibited explicitly or implicitly by the treaty or it is contrary to the object and purpose of the treaty.[90] A further problem is to determine when these conditions under which reservations may be deemed to be impermissible have been met. This is especially difficult where it is contended that the object and purpose of a treaty have been offended. The meaning of the term is not free from uncertainty,[91] although it has been accepted that a reservation to a particular method of dispute settlement laid down in a treaty would not normally be seen as contrary to the object and purpose of a treaty.[92]

[86] Cmnd 7438 (1979), p. 45; 54 ILR, p. 52. See also A. E. Boyle, 'The Law of Treaties and the Anglo-French Continental Shelf Arbitration', 29 ICLQ, 1980, p. 498, and Sinclair, *Vienna Convention*, pp. 70–6.

[87] See e.g. J. K. Koh, 'Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision', 23 *Harvard International Law Journal*, 1982, p. 71, and Redgwell, 'Universality or Integrity', p. 263. See also above, p. 915, concerning interpretative declarations being used as 'disguised' reservations where no reservations are permitted under the treaty in question.

[88] See e.g. Bowett, 'Reservations', pp. 77 and 84. Impermissible reservations are divided into those that may be severed from ratification of or accession to the convention in question and those that are contrary to the object and purpose of the treaty. In the latter case, both the reservation and the whole acceptance of the treaty by the reserving state are to be regarded as nullities. This question of permissibility is the preliminary issue; the question of opposability, or the reaction of other states, is a secondary issue, presupposing the permissibility of the reservation, *ibid.*, p. 88. See also *Oppenheim's International Law*, p. 1247, note 1.

[89] See e.g. Ruda, 'Reservations', p. 190.

[90] See the First Pellet Report, p. 50.

[91] Note that draft guideline 3.1.5 of the ILC Guide to Practice provides that, '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 general thrust, in such a way that the reservation impairs the *raison d'être* of the treaty': see A/62/10, 2007, pp. 66 ff. Draft guideline 3.1.6 states that, 'The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context. Recourse may also be had in particular to the title of the treaty, the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice agreed upon by the parties', *ibid.*, pp. 77 ff.

[92] See e.g. *Yugoslavia* v. *Spain*, ICJ Reports, 1999, pp. 761, 772; *Yugoslavia* v. *USA*, ICJ Reports, 1999, pp. 916, 924 and *Democratic Republic of the Congo* v. *Rwanda*, ICJ Reports,

The question is also raised as to the authority able to make such a determination. At the moment, unless the particular treaty otherwise provides,[93] whether a reservation is impermissible is a determination to be made by states parties to the treaty themselves. In other words, it is a subjective application of objective criteria.[94] Once the impermissibility of a reservation has been demonstrated, there are two fundamental possibilities. Either the treaty provision to which the reservation has been attached applies in full to the state that made the impermissible reservation or the consent of the state to the treaty as a whole is vitiated so that the state is no longer a party to the treaty. A further question is whether the other parties to the treaty may accept and thus legitimate an impermissible reservation or whether a determination of impermissibility is conclusive. All that can be said is that state practice on the whole is somewhat inconclusive.

There is a trend with regard to human rights treaties to regard impermissible reservations as severing that reservation so that the provision in question applies in full to the reserving state.[95] In the *Belilos* case,[96] the European Court of Human Rights laid particular emphasis upon Switzerland's commitment to the European Convention on Human Rights,[97] so that the effect of defining the Swiss declaration as a reservation which was then held to be invalid was that Switzerland was bound by the provision (article 6) in full. This view was reaffirmed in the *Loizidou (Preliminary Objections)* case.[98] The Court analysed the validity of the territorial restrictions attached to Turkey's declarations under former articles 25 and

2006, pp. 6, 32. In a joint separate opinion, five judges suggested that the principle is not necessarily absolute in scope, ICJ Reports, 2006, pp. 6, 70 ff. See also draft guideline 3.1.13 of the ILC Guide to Practice, A/62/10, 2007, pp. 116 ff.

93 Note e.g. that article 20(2) of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 provides that a reservation will be regarded as contrary to the object and purpose of the treaty if at least two-thirds of the states parties to the convention object to the reservation.

94 See e.g. Ago, *Yearbook of the ILC*, 1965, vol. I, p. 161.

95 See e.g. Y. Tyagi, 'The Conflict of Law and Policy on Reservations to Human Rights Treaties', 71 BYIL, 2000, p. 181; Aust, *Modern Treaty Law*, pp. 146 ff.; *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (ed. J. P. Gardner), London, 1997, and K. Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights', 13 EJIL, 2002, p. 437. See also the Second Pellet Report, 1996, A/CN.4/4777.Add.1.

96 European Court of Human Rights, Series A, No. 132. See also above, p. 916.

97 The Court noted that 'it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration', *ibid.*, p. 22.

98 European Court of Human Rights, Series A, No. 310 (1995); 103 ILR, p. 621.

46 recognising the competence of the Commission and the Court[99] and held that they were impermissible under the terms of the Convention. The Court then concluded that the effect of this in the light of the special nature of the Convention as a human rights treaty was that the reservations were severable so that Turkey's acceptance of the jurisdiction of the Commission and the Court remained in place, unrestricted by the terms of the invalid limitations attached to the declarations.[100]

The UN Human Rights Committee in its controversial General Comment 24/52 of 2 November 1994[101] emphasised the special nature of human rights treaties and expressed its belief that the provisions of the Vienna Convention on the Law of Treaties were 'inappropriate to address the problems of reservations to human rights treaties'. The Committee took the view that provisions contained in the International Covenant on Civil and Political Rights, 1966, which represented customary international law could not be the subject of reservations, while in the case of reservations to non-derogable provisions not falling into this category, states had 'a heavy onus' to justify such reservations. The Committee also emphasised that the effect of an unacceptable reservation would normally be that the provision operated in full with regard to the party making such a reservation and not that the Covenant would not be in force at all for such a state party. The Committee also regarded itself as the only body able to determine whether a specific reservation was or was not compatible with the object and purpose of the Covenant.[102]

The controversy with regard to this included the issue as to the powers of the Committee and other such monitoring organs as distinct from courts which under their constituent treaties had the competence to

[99] These were held to constitute 'a disguised reservation', ECHR, Series A, No. 310, p. 22.

[100] *Ibid.*, pp. 22–9.

[101] CCPR/C/21/Rev.1/Add. 6. See also 15 *Human Rights Law Journal*, 1994, p. 464, and M. Nowak, 'The Activities of the UN Human Rights Committee: Developments from 1 August 1992 to 31 July 1995', 16 *Human Rights Law Journal*, 1995, pp. 377, 380.

[102] See the critical observations made by the governments of the US and the UK with regard to this General Comment, 16 *Human Rights Law Journal*, 1995, pp. 422 ff. Note in particular the US view that 'reservations contained in the United States instruments of ratification are integral parts of its consent to be bound by the Covenant and are not severable. If it were to be determined that any one or more of them were ineffective, the ratification as a whole could thereby be nullified', *ibid.*, p. 423. The UK government took the view that while 'severability of a kind may well offer a solution in appropriate cases', severability would involve excising both the reservation and the parts of the treaty to which it related, *ibid.*, p. 426. It was noted that a state which sought to ratify a human rights treaty subject to a reservation 'which is fundamentally incompatible with participation in the treaty regime' could not be regarded as a party to that treaty, *ibid.*

interpret the same in a binding manner.[103] The International Law Commission adopted Preliminary Conclusions on Reservations to Normative Multilateral Treaties Including Human Rights Treaties in 1997, in which it reaffirmed the applicability of the Vienna Convention on the Law of Treaties reservations regime to all treaties, including human rights treaties. The ILC accepted that human rights monitoring bodies were competent to comment and express recommendations upon *inter alia* the admissibility of reservations, but declared that this did not affect 'the traditional modalities of control' by contracting parties in accordance with the two Vienna Conventions of 1969 and 1986, nor did it mean that such bodies could exceed the powers given to them for the performance of their general monitoring role. It was particularly emphasised that 'it is the reserving state that has the responsibility of taking action' in the event of inadmissibility and such state could modify or withdraw the reservation or withdraw from the treaty.[104]

There is, however, apart from this controversy, the question as to the large number of reservations to human rights treaties, many of which have been criticised as being contrary to the object and purpose of the treaties.[105]

In general, reservations are deemed to have been accepted by states that have raised no objections to them at the end of a period of twelve months

[103] See also e.g. C. Redgwell, 'Reservations to Treaties and Human Rights General Comment No. 24 (52)', 46 ICLQ, 1997, p. 390.

[104] Report of the ILC on its 49th Session, A/52/10, pp. 126–7. See also the working group on reservations established by the UN human rights treaty organs, A/60/278; HRI/MC/2005/5/Add.1; and HRI/MC/2006/5. Draft guideline 3.1.12 of the ILC Guide to Practice notes that, 'To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it': see A/62/10, 2007, pp. 113 ff.

[105] See e.g. the Convention on the Elimination of Discrimination Against Women, 1979, General Recommendations No. 4 (1987), No. 20 (1992) and No. 21 (1994) of the Committee on the Elimination of Discrimination Against Women. See generally B. Clark, 'The Vienna Conventions Reservations Regime and the Convention on Discrimination against Women', 85 AJIL, 1991, p. 281, and R. J. Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women', 30 Va. JIL, 1990, p. 643. See also Council of Europe Parliamentary Assembly Recommendation 1223 (1993) on Reservations Made by Member States to Council of Europe Conventions; W. A. Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform', 32 Canadian YIL, 1994, p. 39, and I. Ziemele, *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation*, Leiden, 2004.

after notification of the reservation, or by the date on which consent to be bound by the treaty was expressed, whichever is the later.[106] Reservations must be in writing and communicated to the contracting states and other states entitled to become parties to the treaty, as must acceptances of, and objections to, reservations.

Most multilateral conventions today will in fact specifically declare their position as regards reservations. Some, however, for example the Geneva Convention on the High Seas, 1958, make no mention at all of reservations, while others may specify that reservations are possible with regard to certain provisions only.[107] Still others may prohibit altogether any reservations.[108]

Reservations to a multilateral treaty may be withdrawn, subject to agreement to the contrary, only when the other states to the treaty have received notification of that withdrawal.[109]

Entry into force of treaties

Basically treaties will become operative when and how the negotiating states decide, but in the absence of any provision or agreement regarding this, a treaty will enter into force as soon as consent to be bound by the treaty has been established for all the negotiating states.[110] In many cases, treaties will specify that they will come into effect upon a certain date or after a determined period following the last ratification. It is usual where multilateral conventions are involved to provide for entry into force upon ratification by a fixed number of states, since otherwise large multilateral treaties may be prejudiced. The Geneva Convention on the High Seas, 1958, for example, provides for entry into force on the thirtieth day following the deposit of the twenty-second instrument of ratification with the United Nations Secretary-General, while the Convention on the

[106] Article 20(5) of the Vienna Convention on the Law of Treaties. See the Inter-American Court of Human Rights, Advisory Opinion on *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, 22 ILM, 1983, p. 37; 67 ILR, p. 559.

[107] E.g. the 1958 Geneva Convention on the Continental Shelf, article 12(1). See also above, p. 917, regarding article 64 of the European Convention on Human Rights, 1950.

[108] See e.g. article 37 of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, 1952.

[109] See article 22(3)a of the Vienna Convention on the Law of Treaties and *Democratic Republic of the Congo* v. *Rwanda*, ICJ Reports, 2006, paras. 41–2. See also draft guideline 2.5.2 and 2.5.8 of the ILC Guide, A/58/10, 2003, pp. 201 ff. and 231 ff.

[110] Article 24. See Sinclair, *Vienna Convention*, pp. 44–7. See also Thirlway, 'Law and Procedure (Part four)', pp. 32 ff., and Aust, *Modern Treaty Law*, chapter 9.

Law of Treaties, 1969 itself came into effect thirty days after the deposit of the thirty-fifth ratification and the Rome Statute for the International Criminal Court required sixty ratifications. Of course, even though the necessary number of ratifications has been received for the treaty to come into operation, only those states that have actually ratified the treaty will be bound. It will not bind those that have merely signed it, unless of course, signature is in the particular circumstances regarded as sufficient to express the consent of the state to be bound.

Article 80 of the 1969 Convention (following article 102 of the United Nations Charter) provides that after their entry into force, treaties should be transmitted to the United Nations Secretariat for registration and publication. These provisions are intended to end the practice of secret treaties, which was regarded as contributing to the outbreak of the First World War, as well as enabling the United Nations Treaty Series, which contains all registered treaties, to be as comprehensive as possible.[111]

The application of treaties[112]

Once treaties enter into force, a number of questions can arise as to the way in which they apply in particular situations. In the absence of contrary intention, the treaty will not operate retroactively so that its provisions will not bind a party as regards any facts, acts or situations prior to that state's acceptance of the treaty.[113] Unless a different intention appears from the treaty or is otherwise established, article 29 provides that a treaty is binding upon each party in respect of its entire territory. This is the general rule, but it is possible for a state to stipulate that an international agreement will apply only to part of its territory. In the past, so-called 'colonial application clauses' were included in some treaties by the European colonial powers, which declared whether or not the terms of the particular agreement would extend to the various colonies.[114]

[111] Article 102 of the UN Charter also provides that states may not invoke an unregistered treaty before any UN organ. See also above, p. 905, and http://untreaty.un.org/.

[112] See e.g. Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 217, and *Oppenheim's International Law*, p. 1248.

[113] Article 28. See *Yearbook of the ILC*, 1966, vol. II, pp. 212–13 and the *Mavrommatis Palestine Concessions* case, PCIJ, Series A, No. 2, 1924. Note article 4 of the Convention, which provides that, without prejudice to the application of customary law, the Convention will apply only to treaties concluded by states after the entry into force of the Convention with regard to such states.

[114] See Sinclair, *Vienna Convention*, pp. 87–92. See also e.g. article 63 of the European Convention on Human Rights, 1950. Practice would appear to suggest that, in the absence of

With regard to the problem of successive treaties on the same subject matter, article 30 provides that:

1. Subject to article 103 of the Charter of the United Nations,[115] the rights and obligations of states parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59,[116] the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
   (a) as between states parties to both treaties the same rule applies as in paragraph 3;
   (b) as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41,[117] or to any question of the termination or suspension of the operation of a treaty under article 60[118] or to any question of responsibility which may arise for a state from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another state under another treaty.

The problem raised by successive treaties is becoming a serious one with the growth in the number of states and the increasing number of treaties entered into, and the added complication of enhanced activity at the

evidence to the contrary, a treaty would under customary law apply to all the territory of a party, including colonies: see e.g. McNair, *Law of Treaties*, pp. 116–17.

[115] This stipulates that in the event of a conflict between the obligations of a member state of the UN under the Charter and their obligations under any other international agreement, the former shall prevail. See also the *Lockerbie (Libya* v. *UK; Libya* v. *US)* case, ICJ Reports, 1992, pp. 3, 15; 94 ILR, pp. 478, 498.

[116] This deals with termination or suspension of a treaty by a later treaty: see further below, p. 947.

[117] This deals with agreements to modify multilateral treaties between certain of the parties only: see further below, p. 931.

[118] This deals with material breach of a treaty: see further below, p. 947.

regional level.[119] The rules laid down in article 30 provide a general guide and in many cases the problem will be resolved by the parties themselves expressly.

Third states

A point of considerable interest with regard to the creation of binding rules of law for the international community centres on the application and effects of treaties upon third states, i.e. states which are not parties to the treaty in question.[120] The general rule is that international agreements bind only the parties to them. The reasons for this rule can be found in the fundamental principles of the sovereignty and independence of states, which posit that states must consent to rules before they can be bound by them. This, of course, is a general proposition and is not necessarily true in all cases. However, it does remain as a basic line of approach in international law. Article 34 of the Convention echoes the general rule in specifying that 'a treaty does not create either obligations or rights for a third state without its consent'.[121]

It is quite clear that a treaty cannot impose obligations upon third states and this was emphasised by the International Law Commission during its deliberations prior to the Vienna Conferences and Convention.[122] There is, however, one major exception to this and that is where the provisions of the treaty in question have entered into customary law.[123] In such a case, all states would be bound, regardless of whether they had been parties to the original treaty or not. One example of this would be the laws relating to warfare adopted by the Hague Conventions earlier this century and now regarded as part of customary international law.[124]

This point arises with regard to article 2(6) of the United Nations Charter which states that:

[119] See Sinclair, *Vienna Convention*, pp. 93–8, and Aust, *Modern Treaty Law*, chapter 12. See also McNair, *Law of Treaties*, pp. 219 ff.

[120] See e.g. Sinclair, *Vienna Convention*, pp. 98–106; Aust, *Modern Treaty Law*, chapter 14, and *Oppenheim's International Law*, p. 1260. The rule is sometimes referred to by the maxim *pacta tertiis nec nocent nec prosunt.* See also Thirlway, 'Law and Procedure (Part One)', p. 63.

[121] See also below, chapter 17, p. 970, on succession of states in respect of treaties.

[122] *Yearbook of the ILC*, 1966, vol. II, p. 227.

[123] Article 38. See above, chapter 3, p. 95 and the *North Sea Continental Shelf* cases, ICJ Reports, 1969, p. 3; 41 ILR, p. 29. See also *Yearbook of the ILC*, 1966, vol. II, p. 230.

[124] See below, chapter 21, p. 1168.

> the organisation shall ensure that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.

It is sometimes maintained that this provision creates binding obligations rather than being merely a statement of attitude with regard to non-members of the United Nations.[125] This may be the correct approach since the principles enumerated in article 2 of the Charter can be regarded as part of customary international law, and in view of the fact that an agreement may legitimately provide for enforcement sanctions to be implemented against a state guilty of aggression. Article 75 of the Convention provides:

> the provisions of the Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor state in consequence of measures taken in conformity with the Charter of the United Nations with reference to that state's aggression.

Article 35 notes that an obligation may arise for a third state from a term of a treaty if the parties to the treaty so intend and if the third state expressly accepts that obligation in writing.[126]

As far as rights allocated to third states by a treaty are concerned, the matter is a little different. The Permanent Court of International Justice declared in the *Free Zones* case[127] that:

> the question of the existence of a right acquired under an instrument drawn between other states is . . . one to be decided in each particular case: it must be ascertained whether the states which have stipulated in favour of a third state meant to create for that state an actual right which the latter has accepted as such.

Article 36 of the Vienna Convention provides that:

> a right arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state, or to a group of states to which it belongs, or to all states, and the third state assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

[125] See e.g. H. Kelsen, *The Law of the United Nations*, London, 1950, pp. 106–10. See also McNair, *Law of Treaties*, pp. 216–18.

[126] See, as to the creation here of a collateral agreement forming the basis of the obligation, *Yearbook of the ILC*, 1966, vol. II, p. 227.

[127] PCIJ, Series A/B, No. 46, 1932, pp. 147–8; 6 AD, pp. 362, 364.

Further, particular kinds of treaties may create obligations or rights *erga omnes* and in such cases, all states would presumptively be bound by them and would also benefit. Examples might include multilateral treaties establishing a particular territorial regime, such as the Suez and Kiel Canals or the Black Sea Straits.[128] In the *Wimbledon* case,[129] the Permanent Court noted that 'an international waterway . . . for the benefit of all nations of the world' had been established. In other words, for an obligation to be imposed by a treaty upon a third state, the express agreement of that state in writing is required, whereas in the case of benefits granted to third states, their assent is presumed in the absence of contrary intention. This is because the general tenor of customary international law has leaned in favour of the validity of rights granted to third states, but against that of obligations imposed upon them, in the light of basic principles relating to state sovereignty, equality and non-interference.

The amendment and modification of treaties

Although the two processes of amending and modifying international agreements share a common aim in that they both involve the revision of treaties, they are separate activities and may be accomplished in different manners. Amendments refer to the formal alteration of treaty provisions, affecting all the parties to the particular agreement, while modifications relate to variations of certain treaty terms as between particular parties only. Where it is deemed desirable, a treaty may be amended by agreement between the parties, but in such a case all the formalities as to the conclusion and coming into effect of treaties as described so far in this chapter will have to be observed except in so far as the treaty may otherwise provide.[130] It is understandable that as conditions change, the need may arise to alter some of the provisions stipulated in the international agreement in question. There is nothing unusual in this and it is a normal facet of international relations. The fact that such alterations must be effected with

[128] See e.g. Aust, *Modern Treaty Law*, pp. 258–9; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 248, and N. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford, 1997. See further, as to *erga omnes* obligations, above, chapter 14, p. 807.

[129] PCIJ, Series A, No. 1, 1923, p. 22; 2 AD, p. 99. See also *Yearbook of the ILC*, 1966, vol. II, pp. 228–9, and E. Jiménez de Aréchaga, 'International Law in the Past Third of a Century', 159 HR, 1978, pp. 1, 54, and de Aréchaga, 'Treaty Stipulations in Favour of Third States', 50 AJIL, 1956, pp. 338, 355–6.

[130] Article 39. See also Sinclair, *Vienna Convention*, pp. 106–9; Aust, *Modern Treaty Law*, chapter 15, and *Yearbook of the ILC*, 1966, vol. II, p. 232.

the same formalities that attended the original formation of the treaty is only logical since legal rights and obligations may be involved and any variation of them involves considerations of state sovereignty and consent which necessitate careful interpretation and attention. It is possible, however, for oral or tacit agreement to amend, providing it is unambiguous and clearly evidenced. Many multilateral treaties lay down specific conditions as regards amendment. For example, the United Nations Charter in article 108 provides that amendments will come into force for all member states upon adoption and ratification by two-thirds of the members of the organisation, including all the permanent members of the Security Council.

Problems can occur where, in the absence of specific amendment processes, some of the parties oppose the amendments proposed by others. Article 40 of the Vienna Convention specifies the procedure to be adopted in amending multilateral treaties, in the absence of contrary provisions in the treaty itself. Any proposed amendment has to be notified to all contracting states, each one of which is entitled to participate in the decision as to action to be taken and in the negotiation and conclusion of any agreements. Every state which has the right to be a party to the treaty possesses also the right to become a party to the amendment, but such amendments will not bind any state which is a party to the original agreement and which does not become a party to the amended agreement,[131] subject to any provisions to the contrary in the treaty itself.

The situation can become a little more complex where a state becomes a party to the treaty after the amendments have come into effect. That state will be a party to the amended agreement, except as regards parties to the treaty that are not bound by the amendments. In this case the state will be considered as a party to the unamended treaty in relation to those states.

Two or more parties to a multilateral treaty may decide to change that agreement as between themselves in certain ways, quite irrespective of any amendment by all the parties. This technique, known as modification, is possible provided it has not been prohibited by the treaty in question and provided it does not affect the rights or obligations of the other parties. Modification, however, is not possible where the provision it is intended to alter is one 'derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole'.[132] A treaty

[131] See article 30(4)b. [132] Article 41.

may also be modified by the terms of another later agreement[133] or by the establishment subsequently of a rule of *jus cogens*.[134]

Treaty interpretation[135]

One of the enduring problems facing courts and tribunals and lawyers, both in the municipal and international law spheres, relates to the question of interpretation.[136] Accordingly, rules and techniques have been put forward to aid judicial bodies in resolving such problems.[137] As far as international law is concerned, there are three basic approaches to treaty interpretation.[138] The first centres on the actual text of the agreement and emphasises the analysis of the words used.[139] The second looks to the intention of the parties adopting the agreement as the solution to ambiguous provisions and can be termed the subjective approach in contradistinction to the objective approach of the previous school.[140] The third approach adopts a wider perspective than the other two and emphasises the object and purpose of the treaty as the most important backcloth against which

[133] See article 30, and above, p. 927.

[134] See above, chapter 3, p. 123, and below, p. 944.

[135] See e.g. Sinclair, *Vienna Convention*, chapter 5; J. M. Sorel, 'Article 31' in Corten and Klein, *Conventions de Vienne*, p. 1289; Y. Le Bouthillier, 'Article 32' in *ibid.*, p. 1339; A. Papaux, 'Article 33' in *ibid.*, p. 1373; G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4', 33 BYIL, 1957, p. 203 and 28 BYIL, 1951, p. 1; H. Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties', 26 BYIL, 1949, p. 48; M. S. McDougal, H. Lasswell and J. C. Miller, *The Interpretation of Agreements and World Public Order*, Yale, 1967; E. Gordon, 'The World Court and the Interpretation of Constitutive Treaties', 59 AJIL, 1965, p. 794; O'Connell, *International Law*, pp. 251 ff., and Brownlie, *Principles*, pp. 602 ff. See also S. Sur, *L'Interprétation en Droit International Public*, Paris, 1974; M. K. Yasseen, 'L'Interprétation des Traités d'après la Convention de Vienne', 151 HR, 1976 III, p. 1; H. Thirlway, 'The Law and Practice of the International Court of Justice 1960–1989 (Part Three)', 62 BYIL, 1991, pp. 2, 16 ff. and '(Part Four)', 62 BYIL, 1992, p. 3, and Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989; Supplement, 2006: Part Three', 77 BYIL, 2006, p. 1; Aust, *Modern Treaty Law*, chapter 13; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 252, and *Oppenheim's International Law*, p. 1266.

[136] Note that a unilateral interpretation of a treaty by the organs of one state would not be binding upon the other parties: see McNair, *Law of Treaties*, pp. 345–50, and the *David J. Adams* claim, 6 RIAA, p. 85 (1921); 1 AD, p. 331.

[137] But see J. Stone, 'Fictional Elements in Treaty Interpretation', 1 *Sydney Law Review*, 1955, p. 344.

[138] See Sinclair, *Vienna Convention*, pp. 114–15, and Fitzmaurice, 'Reservations'.

[139] See Fitzmaurice, 'Law and Procedure', pp. 204–7.

[140] See e.g. H. Lauterpacht, 'De l'Interprétation des Traités: Rapport et Projet de Résolutions', 43 *Annuaire de l'Institut de Droit International*, 1950, p. 366.