



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

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## A. Introduction

**1** The law of → *treaties* is the body of rules which govern what is a treaty, how it is made and brought into force, amended, terminated, and generally operates. Apart from issues of → *ius cogens*, it is not concerned with the substance of a treaty (the rights and obligations created by it), which is known as treaty law. Although the Vienna Convention on the Law of Treaties ('VCLT') does not occupy the whole ground of the law of treaties, it covers the most important areas and is the indispensable starting point for any description of the law. For good reason, the VCLT has been called the treaty on treaties.

## B. History of the Convention

### 1. The Work of the International Law Commission

**2** The VCLT is a prime achievement of the → *International Law Commission (ILC)*. The law of treaties was one of the topics selected by the ILC at its first session in 1949 as being suitable for codification, and it was given priority (see also → *Codification and Progressive Development of International Law*). This is not surprising. For a long time treaties had been one of the two major → *sources of international law*. Although the → *customary international law* of treaties was well developed, there was still some uncertainty, and even disagreement, on some details. Given the growing importance of treaties, bilateral and multilateral, for international relations, a coherent reformulation of the law was desirable. A succession of eminent British international legal scholars, Brierly, Hersch Lauterpacht, Fitzmaurice, and Waldock were appointed by the ILC as Special Rapporteurs on the subject, the last one also being the Expert Consultant at the eventual United Nations Vienna Conference on the Law of Treaties ('Vienna Conference on the Law of Treaties'; see para. 4 below). They worked on the task over a period of some 15 years. The most significant previous attempt to codify the law of treaties was the Harvard Draft Convention on the Law of Treaties (1935).

**3** For the first 10 years the ILC saw its task as being the production of an expository code, setting out what the ILC considered to be the customary international law on the subject. But in 1961 the ILC decided that such a code would not be so effective for the purpose of restating the law, particularly as so many new → *States* had by then emerged, and were continuing to emerge. Codification through a multilateral treaty would give the new States the opportunity to take part in the formulation of the law, so placing the law of treaties on the widest and most secure foundation. The ILC adopted a final set of draft articles, with a commentary on each one, in 1966 ('1966 Draft Articles on the Law of Treaties').

### 2. Adoption and Entry into Force of the VCLT

**4** The Vienna Conference on the Law of Treaties considered the ILC's 1966 Draft Articles on the Law of Treaties in 1968 and 1969. The conference adopted the VCLT on 22 May 1969. The text is in Arabic, Chinese, English, French, Russian, and Spanish. Its entry into force required 35 ratifications and happened on 27 January 1980 (→ *Treaties, Conclusion and Entry into Force*). The delay in entry into force may have been partly due to the fact that States were reasonably content with the customary international law of treaties under which they had worked for a long time, as well as having some doubts about those parts of the VCLT which, at least in part, may have represented progressive development of the law, such as Arts 9 (2), 19 to 23, 40, 41, and Part V (Sinclair 12–18). But such initial hesitations have now been overcome. The fact that by 2006, out of today's some 191 States, the VCLT still had only 105 which were parties does not mean that the VCLT is not a success.

## C. Flexibility of the VCLT

5 Although the VCLT is now nearly 40 years old, it is likely to remain unchanged for many decades yet. Like the → *United Nations Charter*, the intelligence and clarity of its drafting has enabled States to adapt their practice without distorting or departing from the VCLT. Although the VCLT codified, and to some degree developed, the law as it had evolved through the practice of States, practice has not stood still since 1969. The VCLT's rules provide a framework which is sufficiently flexible to accommodate variations in State practice, and important developments in practice. Many provisions expressly envisage States agreeing to depart from the rules of the VCLT. Art. 7 (1) VCLT requires the representative of a State to produce full powers in order to adopt the text of a treaty, but then makes an exception which recognizes that States often agree to dispense with full powers. This is just one, small example; in many other places the VCLT acknowledges that States may want to depart from the VCLT's rules (see Arts 9 (2), 10 (a), 11, 12 (1) (b), 13, 14 (1) (b), 15, 16, 17 (1), 20 (1), (3), and (4) (b), 22, 24, 25, 28, 29, 33 (1) and (2), 36 (1), 37 (1), 39, 40, 41, 44 (1), 55–60, 70 (1), 72 (1), 76–78, and 79 (1)).

6 The rules are thus largely residual, leaving treaty practice very much in the hands of States. Some commentators say that the VCLT has had its day, that it is incapable of coping with the demands of the 21st century. The experience of international legal practitioners—for whom the VCLT is their 'bible'—is that (perhaps apart from the provisions on objections to reservations), it does not need amending (see also → *Treaties, Amendment and Revision*; → *Treaties, Multilateral, Reservations to*). It has proved itself to be a most adaptable tool, well able to deal with the challenges to treaty-making presented by the many changes in international life. In short, the VCLT is widely regarded by those who have to draft, negotiate, and otherwise deal with treaties, as a sensible and practical guide.

## D. Scope of the VCLT

7 The VCLT sets out the law and procedure for the making, operation, and termination of a treaty. It does not apply to all treaties, only those between States (Art. 1 VCLT). Nor is it concerned with the substance of a treaty as such. That is a matter for the negotiating States. There are also provisions which either specifically, or by necessary implication, restrict further the applicability of the VCLT.

### 1. Treaties with or between other Subjects of International Law

8 States do not enter into treaties only with other States; they enter into treaties with other → *subjects of international law*, in particular international organizations; and international organizations enter into treaties with each other (→ *International Organizations or Institutions, External Relations and Cooperation*). The VCLT does not apply to such treaties, which are the subject of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) ('VCLT-IO'; see also → *International Law Development through International Organizations, Policies and Practice*). In effect, it applies to such treaties the provisions of the VCLT, suitably adapted. The VCLT-IO is not yet in force, and may never enter into force. By 2006 it still had only 28 of the 35 States needed to ratify it in order to bring it into force. Nevertheless, the first 72 articles of the VCLT-IO closely follow Arts 1–72 of the VCLT. Dealing as they do with the same matters, there can be little doubt that the provisions of the VCLT-IO are generally accepted as the applicable law.

9 Although the VCLT could, as such, not apply to a treaty between a State and an international organization, such as a host country (or headquarters) agreement, in so far as the rules of the VCLT reflect the rules of customary international law applicable to treaties with international organizations, they will apply (Art. 3 (b) VCLT; → *International Organizations or Institutions, Headquarters*). When States which are parties to the VCLT are parties to a multilateral treaty to

which other subjects of international law are also parties, as between those States parties it is the VCLT which applies, not customary international law (Art. 3 (c) VCLT). However, the distinction between the rules of the VCLT and customary international law is now rather academic (see Sec. E below).

## 2. Treaties of International Organizations

**10** The VCLT applies to a treaty constituting an international organization (ie its constitution), and a treaty adopted within the organization, since they are concluded by States. But this is without prejudice to any relevant rules of the organization (Art. 5 VCLT). Those rules, for example, may govern the procedure by which treaties are adopted within the organization, how they are to be amended, and the making of reservations. For example, the Constitution of the → *International Labour Organization (ILO)* prohibits reservations being made to an ILO convention.

## 3. State Succession, State Responsibility, and the Outbreak of Hostilities

**11** Art. 73 VCLT confirms that the VCLT does not prejudice any question that may arise in regard to a treaty from a succession of States (→ *State Succession in Treaties*); the responsibility of a State (for breach of a treaty) (→ *State Responsibility*); or from the outbreak of hostilities. Accordingly, the VCLT does not deal with these matters. The topic of State succession to treaties is the subject of the Vienna Convention on Succession of States in respect of Treaties 1978. Although the entry into force of that convention occurred in 1996, when it had eventually received the required 15 ratifications, it is not considered a successful codification of the law. This is not surprising since the law on succession to treaties was not as developed as the law of treaties. Nor does the VCLT deal with other topics of the law of treaties which are still governed only by customary international law, such as State responsibility for breach of a treaty and the effect of war on treaties (→ *War, Effect on Treaties*).

## 4. Oral Agreements

**12** The definition of treaty in Art. 2 (1) (a) VCLT includes only an international agreement which is 'in written form', thus excluding oral agreements. This was done for reasons of clarity and simplicity. Even today, oral agreements between States are not unknown, though they are rare and only found when the matter is so simple that the agreement does not have to be in writing. The dispute between Denmark and Finland about the construction by Denmark of a bridge across the Store Bælt (Great Belt), which Finland had taken to the → *International Court of Justice (ICJ)*, was in 1992 settled in a telephone conversation between the Danish and Finnish Prime Ministers, in which Finland agreed to discontinue the case in return for a payment by Denmark. There is no official joint written record of this oral agreement (see ILM (1993) 103; see also the → *Eastern Greenland Case*). But the exclusion of oral agreements from the VCLT does not affect their legal force, or the application to them of any of the rules in the VCLT to which they would be subject under international law independently of the VCLT, such as customary international law (Art. 3 (a) VCLT).

## E. No Retrospective Effect

**13** Art. 4 VCLT provides that the VCLT applies only to those treaties which are 'concluded' by States after the date on which the VCLT enters into force for those States. The VCLT will thus not apply to States which, even if they took part in the conclusion of the treaty, were not at that time parties to the VCLT. The VCLT entered into force on 27 January 1980. The UN Convention on the Law of the Sea was concluded on 10 December 1982 (→ *Law of the Sea*). Thus for those States which were parties to the VCLT on that date, the rules of the VCLT will apply as between them with regard to UN Convention on the Law of the Sea. Art. 4 VCLT provides, however, that the rule

against retrospection is without prejudice to the application of any rules in the VCLT to which treaties would be subject under international law independently of that VCLT. Thus, those rules of the VCLT which reflect customary international law apply (albeit as customary law) to treaties concluded before the entry into force of the VCLT, or concluded afterwards but before the VCLT entered into force for parties to those treaties. (See further Sinclair 230 and P McDade 'The Effect of Article 4 of the Vienna Convention on the Law of Treaties 1969' (1986) 35 ICLQ 499–511.)

## F. The VCLT and Customary International Law

### 1. The VCLT as a Reflection of Customary International Law

**14** The provisions of Arts 3 (a) and 4 VCLT, and, more generally, the eighth paragraph of the preamble to the VCLT, confirm that the rules of customary international law continue to govern questions not regulated by the VCLT. But this leaves the important question of the extent to which the VCLT itself represents rules of customary international law? A detailed consideration of this is beyond the scope of this contribution, and anyway is of only limited practical relevance. When questions of treaty law arise during negotiations or litigation, whether concerning a new treaty or one concluded before the entry into force of the VCLT, the rules set forth in the VCLT are invariably relied upon by the States concerned, or the international or national court or tribunal, even when the States concerned are not parties to the VCLT. In treaty negotiations non-parties will refer to specific articles of the VCLT. The justification for invoking the VCLT is rarely made clear, though the unspoken assumption is that the VCLT represents customary international law. Whether a particular convention rule represents customary international law is likely to be an issue only if the matter is litigated, and even then the court or tribunal will take the VCLT as its starting—and probable finishing—point.

**15** Despite the reservations made on ratification of the VCLT (see Multilateral Treaties Deposited with the Secretary-General, ch XXIII 1), which were mostly on dispute settlement, this is certainly the approach taken by the ICJ, as well as by other courts and tribunals, international and national. In the → *Kasikili/Sedudu Islands Case (Botswana/Namibia)* the ICJ interpreted and applied the Heligoland-Zanzibar Treaty of 1890 between the United Kingdom and Germany (see also → *Heligoland*) in accordance with the rules in Arts 31 and 32 VCLT, despite the Art. 4 VCLT rule against retrospection, and the fact that neither of the States was a party to the VCLT ([1999] ICJ Rep 1045 para. 18; MN Shaw 'Case concerning Kasikili/Sedudu Island (Botswana/Namibia)' (2000) 49 ICLQ 967–8). Earlier, in 1971, the ICJ held that the rules of the VCLT concerning termination of a treaty for breach 'may in many respects be considered as codification of existing customary law' (*Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa]* [1971] ICJ Rep 3 para. 94) and applied Art. 60 (termination of a treaty for breach) (→ *South West Africa/Namibia [Advisory Opinions and Judgments]*). In 1973 the ICJ held that Art. 52 VCLT recognized that treaties concluded by the threat or use of force were void, and that Art. 62 VCLT (fundamental change of circumstances or *clausula rebus sic stantibus*; → *Treaties, Fundamental Change of Circumstances*) reflected, or was in many respects a codification of, customary international law (*Fisheries Jurisdiction Case [Federal Republic of Germany v Iceland]* [1973] ICJ Rep 49 paras 24 and 36 respectively). In 1997 in the → *Gabčíkovo-Nagymaros Case (Hungary/Slovakia)* ('*Gabčíkovo-Nagymaros Case*'), the principal treaty at issue predated the entry into force of the VCLT for the parties to the case ([1997] ICJ Rep 7 paras 42–46 and 99). Nevertheless, the ICJ brushed aside the question of the possible non-applicability of the VCLT's rules to questions of termination and suspension of treaties, and applied its Arts 60 to 62 as generally reflecting customary law, even though previously they had been considered rather controversial (see also → *Treaties, Suspension*; → *Treaties, Termination*).

**16** Given the previous pronouncements by the ICJ, and mentioned in the *Gabčíkovo-Nagymaros Case*, it is reasonable to assume that the ICJ will take the same approach in respect of virtually all of

the substantive provisions of the VCLT. There has as yet been no case where the ICJ has found that the VCLT does not reflect customary law (see M Mendelson in Lowe and Fitzmaurice [eds], *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* [CUP Cambridge 1996] 66. See also the numerous decisions of international and domestic courts and tribunals, particularly concerning Arts 31 and 32 VCLT (→ *Interpretation*), in the lengthy entry for the VCLT in the ILR Consolidated Table of Cases and Treaties for vols 1–80, 799–801, and for vols 81–100, 161–63). But, see now the judgment of the International Court of Justice of 3 February 2006 in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)*, para. 125, regarding Art. 66 of the Convention

**17** This positive attitude towards the VCLT should come as no surprise. Despite what some commentators may say, as with any successful codification of the law the VCLT inevitably reduces the scope for doubt and argument, and thus judicial law-making. For most practical purposes treaty questions are simply resolved by applying the rules of the VCLT. To attempt to determine whether a particular substantive provision of the VCLT represents customary international law is now a rather futile task. Even some important procedural provisions, such as the requirement to give a minimum period of notice of termination if the treaty is silent (Art. 56 (2) VCLT) may now be accepted as representing customary law. The fact is that the modern law of treaties is now for most purposes authoritatively, and flexibly (see Sec. B above), set out in the VCLT. This is the main reason why only about 55% of States have bothered to ratify the VCLT. In short, as with any court, if the judges consider that the rules in a treaty (or espoused in a learned work) are sensible, they will do their best to find a way of treating them as the law.

**18** The one issue where there may be doubt as to whether the VCLT represents customary international law concerns reservations to treaties, in particular the effect of objections to reservations, which the ILC is currently studying.

## **2. The Effect of Emerging Customary Law on Prior Treaty Rights and Obligations**

**19** Most treaties are bilateral, and so truly contractual in nature. Most multilateral treaties also do not purport to lay down rules of general application. But since 1945 so-called law-making treaties have become so numerous that a sizeable number of topics have come to be regulated by both customary law and treaty law. Whether the emergence of a new rule of customary law can supplant a prior treaty rule seems to have been studied in depth only fairly recently (see M Villiger, *Customary International Law and Treaties* [2nd ed Kluwer The Hague 1997]; K Wolfe 'Treaties and Custom: Aspects of Interrelation' in Klabbers and Lefeber [eds] *Essays on the Law of Treaties. A Collection of Essays in Honour of Bert Vierdag* [Nijhoff The Hague 1998] 31–9; and *Oppenheim's International Law* 31–6). Since there is no hierarchy of → *sources of international law*, it has been argued that even when custom has been codified, it retains its separate existence. This is a controversial theory (→ *Military and Paramilitary Activities in and against Nicaragua Case [Nicaragua v United States of America] [Merits]* [1986] ICJ Rep 92 paras 172–182; and H Thirlway 'The Law and Procedure of the International Court of Justice' (1989) BYIL 143–4) and does not reflect the approach to legal problems taken by foreign ministry legal advisers and international judges, who, when dealing with an actual problem, naturally give more weight to a treaty rule than a different customary rule, subject, of course, to any *ius cogens* rule.

**20** Nevertheless, new customary rules which emerge from economic changes or dissatisfaction with a treaty rule can result in a modification in the operation of even a treaty rule. In the → *Fisheries Jurisdiction Cases (United Kingdom v Iceland; Federal Republic of Germany v Iceland)* ([1974] ICJ Rep 3 paras 49–54, and 175 paras 41–46), the ICJ decided that, since the adoption in 1958 of the Convention on the High Seas ('High Seas Convention'), the right of States to establish 12-mile fishing zones had crystallized as customary law, despite the provisions in the High Seas Convention regarding freedom of fishing on the → *high seas*. International law does not contain any

principle of *acte contraire* by which a rule can be altered only by a rule of the same legal nature. Art. 68 (c) in the ILC's 1964 Draft Articles on the Law of Treaties provided that the operation of a treaty may be modified by the 'subsequent emergence of a new rule of customary international law relating to matters dealt with in the treaty and binding upon all the parties' (1964 YBILC 198). Although the article was not included in the 1966 Draft Articles on the Law of Treaties, this was only because the ILC did not see its mandate as extending to the general relationship between customary law and treaty law.

## G. Reference Material on the VCLT

**21** The single most valuable source of material on the meaning and effect of the articles of the VCLT remains the commentary of the ILC on its 1966 Draft Articles on the Law of Treaties and contained in its final report on the topic (1966 YBILC 173–274; and in Watts [The International Law Commission]). The history of the drafting of the articles can be found in the ILC Yearbooks, beginning with that covering its very first session in 1949 to that for its 18th session in 1966. However, since the Vienna Conference on the Law of Treaties 1968–69 naturally made changes to the 1966 Draft Articles on the Law of Treaties, one needs to refer also to the summary records of the conference and the documents produced at the conference. Shabtai Rosenne (*Guide to the Legislative History of the Vienna Convention*) has a comprehensive guide to the negotiating history (*travaux*). This should be used in conjunction with Wetzel and Rauschnig (*Travaux Préparatoires*), which has the English text of all the most important *travaux*. A comparative table relating the numbering of the articles of the VCLT to that of the ILC's 1966 Draft Articles on the Law of Treaties, and therefore to the ILC's invaluable commentary on each article, can be found in 8 ILM 714.

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