9 Treaties

States make treaties about every conceivable topic.[1] By and large, all treaties, regardless of their subject matter, are governed by the same rules, and the law of treaties therefore tends to have a rather abstract and technical character; it is a means to an end, not an end in itself. For the same reasons, the greater part of the law of treaties is not affected by conflicts of interests between states; every state is a party to hundreds of treaties and has an interest in ensuring that treaties work effectively, just as all states have a common interest in preserving the rules of diplomatic immunity in order to facilitate diplomatic relations.

It should be noted, however, that a treaty is not the only means by which a state can enter into a legal obligation. A unilateral promise is binding in international law on the state making the promise, if that state intended its promise to be legally binding.[2] Similarly a state can lose a legal right by unilaterally waiving it, provided its intention to do so is sufficiently clear.

A convenient starting-point for discussing treaties is the 1969 Vienna Convention on the Law of Treaties which came into force on 27 January 1980.[3] The preliminary research and drafting were carried out by the International Law Commission,[4] whose commentary is a useful guide to the interpretation of the Convention, and indicates the extent to which different articles of the Convention reflect the pre-existing customary law and the agreed views of states.[5] Since 1969 many provisions of the Convention have been frequently cited in judgments and in state practice as accurate statements of the customary rules relating to treaties.

However, the Convention applies only to treaties made after its entry into force (Article 4). *As a convention*, therefore, its value initially has been rather limited. Its importance lies in the fact that most of its provisions attempt to codify the customary law relating to treaties, although there are other provisions which represent a 'progressive development' rather than a codification of the law. Unless otherwise stated, the provisions mentioned in this chapter codify the pre-existing law.

Article 2(1)(a) of the 1969 Vienna Convention defines a treaty, for the purposes of the Convention, 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'. This definition excludes agreements between states which are governed by municipal law and agreements between states which are not intended to create legal relations at all. The exclusion of these two types of agreement from the

1 *Harris CMIL,* 729–812; *Restatement (Third),* Vol. 1, part III, 144 *et seq.;* Lord McNair, *The Law of Treaties,* 2nd edn 1961; T.O.Elias, *The Modern Law of Treaties,* 1974; S.Rosenne, Vienna Convention on the Law of Treaties, *EPIL* 7 (1984), 525–33; R.Bernhardt, Treaties, *ibid.,* 459–64; L.Wildhaber, Treaties, Multilateral, *ibid.,* 480–4; S.K. Chatterjee, International Law of Treaties: Substance or Shadow?, *Indian JIL* 27 (1987), 13; T.M.Franck, Taking Treaties Seriously, *AJIL* 82 (1988), 67–8; S. Rosenne, *Developments in the Law of Treaties 1945–1986,* 1989; A.Z.Hertz, Medieval Treaty Obligation, *Conn. JIL* 6 (1991), 425–43; J.Klabbers, Informal Agreements in International Law: Towards a Theoretical Framework, *FYIL* 5 (1994), 267–387; P.Reuter, *Introduction to the Law of Treaties,* 3rd edn 1995; E.W.Vierdag, The International Court of Justice and the Law of Treaties, in V.Lowe/M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice,* 1996, 145–66; Klabbers, *The Concept of Treaties,* 1996. See also Chapter 3 above, 36–9.

2 *Nuclear Tests Case (Australia v. France), ICJ Rep.* 1974, 253, 267–8 (although it is submitted that the Court was wrong in holding that France's statement that it would conduct no more nuclear tests in the atmosphere was intended to be a legally binding promise). See also Chapter 20 below, 349.

3 Text in *ILM* 8 (1969), 679, *AJIL* 63 (1969), 875. See I.Sinclair, *The Vienna Convention on the Law of Treaties,* 2nd edn 1984.

4 See Chapter 3 above, 61.

5 Text in *AJIL* 61 (1967), 285.

definition of treaties is fairly orthodox, but the definition given in the Vienna Convention is more controversial in so far as it excludes oral agreements between states, and agreements of any sort between international organizations or between states and international organizations. Such agreements are usually called treaties, and the only reason why they are not regarded as treaties—for the purposes of the Convention— is that the rules of international law governing them differ in a few respects from the rules governing written treaties between states; they were therefore not covered by the Convention, in order to prevent the Convention becoming too complicated. A special convention, the Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, was signed in 1986 but has not yet entered into force.[6] In any case, treaties made by international organizations are more usefully studied as part of the law of international organizations,[7] and oral treaties are extremely rare nowadays.

Conclusion and entry into force of treaties

When lawyers talk about the conclusion of a treaty, they are not talking about its termination, but about its coming into effect or formation.[8]

Adoption of the text of a treaty

Article 9 of the 1969 Vienna Convention provides:

> 1 The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.
> 2 The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

Article 9(2) describes what actually happens at most modern conferences (in earlier times unanimity was the normal practice), but each conference adopts its own rules concerning voting procedures, and there is no general rule of customary law governing voting procedures; Article 9(2) therefore represents progressive development rather than codification.

The adoption of the text does not, by itself, create any obligations. A treaty does not come into being until two or more states consent to be bound by it, and the expression of such consent usually comes after the adoption of the text and is an entirely separate process.

Consent to be bound by a treaty

Article 11 of the Vienna Convention provides:

> The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

The multiplicity of methods of expressing consent has unfortunately introduced much confusion into the law. Traditionally, *signature and*

6 Text in *ILM* 25 (1986), 543. See also E.Klein/M.Pechstein, *Das Vertragsrecht internationaler Organisationen,* 1985; G.Gaja, A 'New' Vienna Convention on Treaties Between States and International Organizations or Between International Organizations: A Critical Commentary, *BYIL* 58 (1987), 253 *et seq.;* P.K.Menon, *The Law of Treaties between States and International Organizations,* 1992; K. Zemanek, International Organizations, Treaty-Making Power, *EPIL* II (1995), 1343–6.
7 See the literature in Chapter 6 above, 32–6.
8 S.Rosenne, Treaties, Conclusion and Entry into Force, *EPIL* 7 (1984), 464–7; 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, *BYIL* 59 (1988), 75 *et seq.*

9 See Chapter 4 above, 66–7.
10 See Articles 2(1)(b) and 16, 1969 Vienna Convention.

ratification are the most frequent means of expressing consent. In some cases the diplomats negotiating a treaty are authorized to bind their states by signing the treaty; in other cases their authority is more limited, and the treaty does not become binding until it is ratified (that is, approved) by the head of state. In some countries (including the United States but not the United Kingdom), the constitution requires the head of state to obtain the approval of the legislature, or of part of the legislature (for example, the Senate in the United States), before ratifying a treaty.[9]

Strictly speaking, ratification occurs only when instruments of ratification are exchanged between the contracting states, or are deposited with the depositary.[10] In the case of a multilateral treaty, it is obviously impractical to exchange instruments of ratification between a large number of states, and so, instead, the treaty usually provides that instruments of ratification shall be deposited with a state or international organization which is appointed by the treaty to act as the depositary. Ratifications, accessions, reservations, denunciations and similar communications from states concerning the treaty must be sent to the depositary, which notifies the other states concerned whenever such a communication is received.

The relationship between signature and ratification can be understood only in the light of history. In days when slow communications made it difficult for a diplomat to keep in touch with his sovereign, ratification was necessary to prevent diplomats exceeding their instructions; after receiving the text of the treaty and checking that his representatives had not exceeded their instructions, the sovereign was obliged to ratify their signatures. By 1800, however, the idea of a duty to ratify was obsolete, and ratification came to be used for a different purpose—to give the head of state time for second thoughts. With the rise of democracy, the delay between signature and ratification also gave a chance for public opinion to make itself felt; this was particularly true if important negotiations had been conducted secretly, or if the treaty necessitated changes in municipal law, or if the constitution of the state concerned required the consent of the legislature for ratification.

During the nineteenth century a further change occurred. By this time many states had adopted constitutions requiring the consent of the legislature for ratification, but states also began to conclude an increasing number of routine treaties which legislatures had no time to discuss. The modern practice therefore grew up of treating many treaties as binding upon signature alone. There is much to be said for this practice. Even in the United Kingdom, where the consent of the legislature is not needed for ratification, many treaties which are subject to ratification are never ratified, simply as a result of the inertia inherent in any large administrative machine; treaties are negotiated in a spirit of popular enthusiasm which soon wanes afterwards, so that there is no pressure for ratification.

The subject matter of a treaty has little bearing on the question whether it requires ratification. One might have imagined that politically important treaties would always require ratification, but practice is not consistent; for instance, in urgent cases ratification is sometimes dispensed with, because

there is no time for it. Treaties usually state expressly whether or not ratification is necessary, and this makes it difficult to know what rule to apply if the treaty is silent. Some writers are of the opinion that the general rule is that treaties need ratification; other writers say the general rule is that treaties do *not* need ratification. But each group of writers recognizes that there are many exceptions to the general rule, and so in practice the effects of the difference between the two theories are comparatively slight. The Vienna Convention adopts a 'neutral' attitude; everything depends on the intentions of the parties, and Articles 12(1) and 14(1) of the Convention provide guidelines for ascertaining the intentions of the parties. Article 12(1) provides:

> The consent of a State to be bound by a treaty is expressed by the signature of its representative when:
>
> (a) the treaty provides that signature shall have that effect;
> (b) it is otherwise established that the negotiating States were agreed that signature should have that effect;[11] or
> (c) the intention of the State to give that effect to the signature appears from the full powers[12] of its representative or was expressed during the negotiations.

Article 14(1) provides:

> The consent of a State to be bound by a treaty is expressed by ratification when:
>
> (a) the treaty provides for such consent to be expressed by ratification;
> (b) it is otherwise established that the negotiating States were agreed that ratification should be required;
> (c) the representative of the State has signed the treaty subject to ratification; or
> (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiations.

It should also be added that performance of a treaty can constitute tacit ratification. In particular, if a state successfully claims rights under an unratified treaty, it will be estopped from alleging that it is not bound by the treaty.

In addition to signature and ratification, a state can also become a party to a treaty by *accession* (otherwise known as adhesion or adherence). The difference between accession, on the one hand, and signature or ratification, on the other, is that the acceding state did not take part in the negotiations which produced the treaty, but was invited by the negotiating states to accede to it. Accession is possible only if it is provided for in the treaty, or if all the parties to the treaty agree that the acceding state should be allowed to accede. Accession has the same effects as signature and ratification combined.

These, then, were the traditional methods of expressing consent to a treaty: signature, ratification and accession. However, modern developments have complicated the situation in several different ways.

11 This can be readily inferred if the treaty provides that it shall come into force at once, or on a fixed date in the very near future.

12 Full powers are defined in Article 2 (1)(c) of the 1969 Vienna Convention as 'a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty'.

In the first place, treaties are nowadays often concluded by an exchange of correspondence (usually called an exchange of notes) between the two states. Each note is signed by a representative of the state sending it, and the two signatures are usually enough to establish the consent of the states to be bound; however, exchanges of notes require ratification in the few cases where it can be proved that that was the intention of the states concerned.

Second, the modern practice of leaving certain treaties open for long periods for signature by states which may or may not have participated in the drafting of the treaty has blurred the distinction between accession, on the one hand, and signature and ratification, on the other. For instance, Article 81 of the Vienna Convention provides that the Convention shall be open for nearly a year for signature by certain categories of states, not all of which attended the Vienna Conference; Article 83 provides that the Convention 'shall [thereafter] remain open for accession by any State belonging to any of the categories mentioned in article 81'.

Third, *acceptance* or *approval* is sometimes used nowadays in place of ratification (or, alternatively, in place of accession). This innovation is more a matter of terminology than of substance. Acceptance and approval perform the same function on the international plane as ratification and accession; in particular, they give a state time to consider a treaty at length before deciding whether to be bound. The main reason for the popularity of these terms is that they enable a state to evade provisions in its own constitution requiring the consent of the legislature for ratification. Article 14(2) of the Vienna Convention recognizes the similarity between ratification and acceptance and approval by providing that 'the consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification'.

Finally, it sometimes happens that the text of a treaty is drawn up by an organ of an international organization (for example, the UN General Assembly) and that the treaty is then declared open for 'accession', 'ratification', 'acceptance', or 'approval' by member states. The terminological confusion here becomes complete, because 'accession', 'ratification', 'acceptance' and 'approval' are used interchangeably; different terms are used in different treaties to describe a process which is absolutely identical.

Entry into force

A treaty normally enters into force as soon as all the negotiating states have expressed their consent to be bound by it.[13] But the negotiating states are always free to depart from this general rule, by inserting an appropriate provision in the treaty itself.

Thus, the entry into force of a treaty may be delayed by a provision in the treaty, in order to give the parties time to adapt themselves to the requirements of the treaty (for example, in order to enable them to make the necessary changes in their municipal laws). The treaty may provide for its entry into force on a fixed date, or a specified number of days or months after the last ratification.

When very many states participate in drafting a treaty, it is unlikely that they will all ratify it, and it is therefore unreasonable to apply the normal

13 Article 24. For a special case see R. Platzöder, Substantive Changes in a Multilateral Treaty Before its Entry into Force: The Case of the 1982 United Nations Convention on the Law of the Sea, *EJIL* 4 (1993), 390–402. See also Chapter 12 below, 174–5.

rule that the treaty does not enter into force until all the negotiating states have ratified it. Accordingly, such a treaty often provides that it shall enter into force when it has been ratified by a specified number of states (the number is frequently as high as a third of the number of the negotiating states, because the treaty might not be any use if it were only ratified by a very small number of states). Even when the minimum number of ratifications is reached, the treaty is, of course, in force only between those states which have ratified it; it does not enter into force for other states until they in turn have also ratified it.

A treaty can apply retroactively, but only if the contracting states clearly intend it to do so. In the same way, the contracting states may agree to apply a treaty provisionally between its signature and entry into force; this is a useful device when a treaty deals with an urgent problem but requires ratification. Under the Vienna Convention, however, 'unless…the negotiating States have otherwise agreed, the provisional application of a treaty …with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty'.[14]

Article 18 of the Vienna Convention provides:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

There is some authority for this rule in customary law, but the matter is controversial.

Reservations

A state may be willing to accept most of the provisions of a treaty, but it may, for various reasons, object to other provisions of the treaty. In such cases states often make reservations when they become parties to a treaty.[15] For example, the United States made a reservation concerning the death penalty when it signed the International Covenant on Civil and Political Rights.[16] Article 2(1)(d) of the Vienna Convention defines a reservation as

> a unilateral statement…made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

The effect of a reservation depends on whether it is accepted or rejected by the other states concerned. A reservation to a bilateral treaty presents no problems, because it is, in effect, a new proposal reopening the negotiations between the two states concerning the terms of the treaty; and, unless agreement can be reached about the terms of the treaty, no

14 Article 25(2), 1969 Vienna Convention.

15 D.W.Bowett, Reservations to Non-Restricted Multilateral Treaties, *BYIL* 48 (1976–7), 67–92; R.L.Bindschedler, Treaties, Reservations, *EPIL* 7 (1984), 496–9; R.Kühner, *Vorbehalte zu multilateralen völkerrechtlichen Verträgen,* 1986; F.Horn, *Reservations and Interpretative Declarations to Multilateral Treaties,* 1988; R.W. Edwards, Jr., Reservations to Treaties, *Mich. JIL* 10 (1989), 362; C.Redgwell, Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties, *BYIL* 64 (1993), 245–82. The ILC decided in 1993 to take up the topic of the law and practice relating to reservations to treaties and a preliminary report was submitted by Main Pellet (A/CN.4/470) in 1995.

16 See E.F.Sherman, The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Right: Exposing the Limitations of the Flexible System Governing Treaty Formation, *Texas ILJ* 29 (1994), 69–93. On reservations to human rights treaties see Chapter 14 below, 215.

treaty will be concluded. In the case of a multilateral treaty the problem is more complicated, because the reservation may be accepted by some states and rejected by others.

The traditional rule was that a state could not make a reservation to a treaty unless the reservation was accepted by all the states which had signed (but not necessarily ratified) or adhered to the treaty. However, this rule was undermined by the advisory opinion of the International Court of Justice in the *Genocide* case.[17] The Court said that the traditional theory was of 'undisputed value', but was not applicable to certain types of treaty. More specifically, it was not applicable to the Genocide Convention, which sought to protect individuals, instead of conferring reciprocal rights on the contracting states. The Court therefore advised that

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

Since different states may reach different conclusions about the compatibility of a reservation, the practical effect of the Court's opinion is that a state making a reservation is likely to be regarded as a party to the treaty by some states, but not by others.

Articles 19–21 of the Vienna Convention follow the principles laid down by the Court in the *Genocide* case, but make a concession to the supporters of the traditional rule by recognizing that *every* reservation is incompatible with *certain types* of treaty unless accepted unanimously. The International Law Commission's proposals to this effect met a favourable response from member states of the United Nations, and it is probable that the rules contained in Articles 19–21 will be followed in the future, even by states which are not parties to the Vienna Convention on the Law of Treaties.

Registration

Article 102(1) of the United Nations Charter provides that

> [e]very treaty…entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.[18]

Treaties between non-member states are not covered by Article 102, but are often transmitted voluntarily to the Secretariat for 'filing and recording'; Article 80 of the Vienna Convention seeks, for the first time, to make such transmission obligatory. Article 102 was intended to prevent states entering into secret agreements without the knowledge of their nationals, and without the knowledge of other states, whose interests might be affected by such agreements.[19] An additional advantage of Article 102 is that treaties are published in the United Nations Treaty Series (UNTS), which is a useful work of reference.[20] If states fail to register a treaty, as sometimes happens, the treaty is not void; but '[n]o party

17 *ICJ Rep.* 1951, 15, at 29. See E. Klein, Genocide Convention (Advisory Opinion), *EPIL* II (1995), 544–6.
18 Article 102(1) UN Charter (text in *Brownlie BDIL,* 1). See M.Brandon, Analysis of the Terms 'Treaty' and 'International Agreement' for Purposes of Registration under Article 102 of the United Nations Charter, *AJIL* 47 (1953), 46–69; U.Knapp, Article 102, in *Simma*
19 K.Zemanek, Treaties, Secret, *EPIL* 7 (1984), 505–6.
20 For other collections see Chapter 3 above, 36–7.

to any such treaty…may invoke that treaty…before any organ of the United Nations'.[21]

Application of treaties

Territorial scope of treaties

Article 29 of the Vienna Convention states: 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.'[22] This general rule is often altered by a specific provision in a treaty. For instance, older treaties often contained a 'colonial clause', which provided that the treaty shall apply automatically only to each party's metropolitan (that is, non-colonial) territory, but that each party shall have the option of extending it to one or more of its colonies. One advantage of a colonial clause was that it enabled the wishes of the inhabitants of a colony to be considered before the treaty was extended to the colony.

The interpretation of treaties is dealt with briefly in Articles 31–3 of the Vienna Convention and will be taken up later when dealing with the interpretation of the UN Charter.[23]

Treaties and third states

The general rule is that a treaty creates neither rights nor obligations for third states (that is, states which are not parties to the treaty).[24] But there are exceptions to this general rule, which are laid down in detail in Articles 35–7 of the Convention. It is sometimes suggested that Article 2(6) of the United Nations Charter (which is a treaty) imposes obligations on states without their consent.[25] What Article 2(6) actually says is that:

> The Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles [that is, the principles of the United Nations, set out in Article 2 of the Charter] so far as may be necessary for the maintenance of international peace and security.[26]

In reality, Article 2(6) does not even purport to impose obligations on non-members; it merely announces the policy which the United Nations will follow in its relations with non-members.

Application of successive treaties relating to the same subject matter

It sometimes happens that a party to a treaty subsequently enters into another treaty relating to the same subject matter, and that the provisions of the two treaties are mutually inconsistent; the position is complicated by the fact that the other party or parties to the second treaty may or may not also be parties to the first treaty. Article 30 of the Vienna Convention lays down detailed rules to deal with the resulting problems.[27]

Invalid treaties

Article 42(1) of the Vienna Convention provides:

21 Article 102(2) UN Charter. See D.N. Hutchinson, The Significance of the Registration or Non-Registration of an International Agreement in Determining Whether or Not It Is a Treaty, *CLP* 46 (1993), 257–90.
22 M.B.Akehurst, Treaties, Territorial Application, *EPIL* 7 (1984), 510–11.
23 See Chapter 21 below, 364–8.
24 H.Ballreich, Treaties, Effect on Third States, *EPIL* 7 (1984), 476–80; C. Tomuschat/H.-P.Neuhold/J.Kropholler, *Völkerrechtlicher Vertrag und Drittstaaten,* 1988.
25 On the nature and interpretation of the UN Charter, see Chapter 21 below, 364–8.
26 Article 2(6), UN Charter. See W.Graf Vitzthum, Article 2(6), in *Simma CUNAC,* 131–9.
27 W.G.Grewe, Treaties, Revision, *EPIL* 7 (1984), 499–505; W.Karl, Treaties, Conflicts between, *ibid.,* 467–73; B.M. Carnahan, Treaty Review Conferences, *AJIL* 81 (1987), 226–30. See also Articles 39–41 of the Vienna Convention on the amendment and modification of treaties, and Articles 58(1) and 59 on the termination or suspension of treaties.

> The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.[28]

This is to prevent states attempting to evade inconvenient treaty obligations by making far-fetched allegations that the treaty is invalid.

28 M.Schröder, Treaties, Validity, *EPIL* 7 (1984), 511–4; B.Conforti/A.Labella, Invalidity and Termination of Treaties: The Role of National Courts, *EJIL* 1 (1990), 44–66.
29 See L.Wildhaber, *Treaty-Making Power and Constitution: An Interpretational and Comparative Study,* 1971.

Provisions of municipal law regarding competence to conclude treaties

The constitutions of many countries provide that the head of state may not conclude (or, at least, may not ratify) a treaty without the consent of a legislative organ.[29] What happens if the head of state disregards such a rule when entering into a treaty? Is the treaty valid or not? Opinion is divided. One school of thought says that the treaty is void, although this conclusion is sometimes limited to cases where the constitutional rule in question is well known—an imprecise qualification which would be difficult to apply in practice. Another school of thought considers that the treaty is valid, but some supporters of this school are prepared to make exceptions when one party to the treaty *knew* that the other party was acting in breach of a constitutional requirement. Most states favour the latter point of view, which is reflected in Article 46 of the Vienna Convention:

> 1 A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
> 2 A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Treaties entered into by persons not authorized to represent a state

Article 46 is essentially concerned with the relationship between the executive and the legislature within a state. But it is one thing to say, as Article 46 in effect does, that the executive's act in making a treaty is binding on the state; it is another thing to decide which particular members of the executive are authorized to act in the name of the state. It would be absurd to suppose that a state could be bound by the acts of a junior clerk in the same way that it is bound by the acts of the Minister for Foreign Affairs.

Accordingly, Article 7(1) of the Vienna Convention provides:

> A person is considered as representing a State for the purpose of…expressing the consent of the State to be bound by a treaty if:
>
> (a) he produces appropriate full powers; or
> (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

Article 7(2) provides that heads of state, heads of government and ministers for foreign affairs are, by virtue of their functions and without having to produce full powers, considered as representing their state for the purpose of performing all acts relating to the conclusion of a treaty.

Article 8 provides:

> An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

Specific restrictions on authority to express the consent of a state

Although a person may be authorized to enter into a treaty on behalf of a state, in accordance with Article 7, it sometimes happens that a specific restriction is imposed on his authority; for example, he may be instructed not to enter into a treaty unless it contains a particular provision to which his state attaches importance. What happens if he disregards such a restriction? Article 47 provides:

> If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

Coercion of a representative of a state

Article 51 of the Vienna Convention provides:

> The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.[30]

Coercion of a state by the threat or use of force

Before the First World War, customary international law imposed no limitations on the right of states to go to war,[31] and consequently a treaty procured by the threat or use of force against a state was as valid as any other treaty. Since the First World War there has been a growing tendency to regard aggression as illegal, and the corollary would seem to be that treaties imposed by an aggressor are void. Accordingly, Article 52 of the Vienna Convention provides:

> A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 52 is an accurate statement of the modern law.[32] When Article 52 of the Vienna Convention speaks of 'the threat or use of force in violation of the principles…embodied in the Charter of the United Nations', it is obviously referring to Article 2(4) of the Charter, which prohibits 'the threat or use of force…in any…manner inconsistent with the Purposes of the United Nations'. The communist states and the more militant Third World countries used to argue that 'force' in Article 2(4) covers economic and political pressure as well as military force, and that treaties imposed by economic or political pressure were therefore void. The Western countries disagreed. The International Law Commission adopted

30 H.G.de Jong, Coercion in the Conclusion of Treaties, *NYIL* 15 (1984), 209–47.
31 See Chapter 2 above, 13–20 and Chapter 19 below, 306–7.
32 *Fisheries Jurisdiction Case (UK v. Ireland)* (Jurisdiction), *ICJ Rep*. 1973, 3, at 14, *obiter*. On this case see Chapter 3 above, 93 and Chapter 12 below, 183.

a neutral attitude in its commentary on the law of treaties, saying that the meaning of 'force' 'should be left to be determined in practice by interpretation of the relevant provisions of the Charter'. However, it is submitted that the interpretation placed on the word 'force' by the communist states and the more militant Third World countries is an extremely strained interpretation. Article 2(4) of the Charter gives effect to the principle, stated in the preamble to the Charter, that '*armed* force shall not be used, save in the common interest', and a Brazilian amendment to extend Article 2(4) to include economic and political coercion was rejected at the San Francisco conference, which drew up the United Nations Charter in 1945.

Such treaties are often called 'unequal treaties', although the term is also used to describe treaties whose terms are unfair, regardless of the circumstances of their conclusion.[33] States which argue that unequal treaties are void seldom define their terms. Despite occasional suggestions to the contrary by communist and militant Third World countries, the modern rules against force do not operate retroactively. In other words, if a treaty was procured by force at a time when force was not illegal, the validity of the treaty is not affected by subsequent changes in the law which declare that force is illegal and that treaties procured by force are void.[34]

Other causes of invalidity

According to the Vienna Convention, a state's consent to be bound by a treaty can be invalidated by mistake (in certain circumstances, specified in Article 48), by the fraud of another negotiating state (Article 49), or by the corruption of its representative by another negotiating state (Article 50). It is uncertain whether these causes of invalidity existed in customary international law. A treaty is void if it conflicts with *ius cogens* (Article 53).[35]

The consequences of invalidity

The consequences of invalidity vary according to the precise nature of the cause of invalidity. In cases covered by Articles 8 and 51–3 of the Vienna Convention, the treaty is void, or the expression of consent to be bound by the treaty is 'without legal effect', which comes to the same thing. In cases covered by Articles 46–50, however, the Vienna Convention says that a state may merely *invoke* the vitiating factor as invalidating the treaty; the effect of this formula is that the treaty is probably voidable rather than void; the treaty is valid until a state claims that it is invalid, and the right to make such a claim may be lost in certain circumstances (Article 45). The vitiating factors mentioned in Articles 8 and 51–3 are more serious than those mentioned in Articles 46–50, so this distinction is logical; but it is doubtful whether it is as clearly established in customary law as the Vienna Convention suggests.

In both cases, however, Articles 65–8 of the Vienna Convention provide that a party challenging the validity of a treaty must notify the other parties to the treaty and give them time to make objections before it takes any action (although there are exceptions to this rule). If objections are made, and if the resulting dispute is not settled within twelve months,

33 W.Morvay, Unequal Treaties, *EPIL* 7 (1984), 514–7; C.v.Katte, Denunciation of Treaty of 1865 between China and Belgium (Orders), *EPIL* I (1992), 1010; C.Ku, Change and Stability in the International System: China Secures Revision of the Unequal Treaties, in R.St.J.Macdonald (ed.), *Essays in Honour of Wang Tieya,* 1994, 447–62. See also B.W.Morse/K.A.Hamid, American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine, *Conn. JIL* 5 (1990), 407–56; L Caflisch, Unequal Treaties, *GYIL* 35 (1992), 52.
34 See also Chapter 10 below, 155–7.
35 See Chapter 3 above, 57–8.

Article 66 confers jurisdiction on the International Court of Justice over disputes arising from Article 53 *(ius cogens)* and confers jurisdiction over other disputes on a special conciliation commission set up under an annex to the Convention. These provisions are obviously desirable in order to prevent abuse of the rules concerning causes of invalidity, but they represent an almost complete innovation when one compares them with the pre-existing customary law; in particular, under customary law, international courts and conciliation commissions do not have jurisdiction over all cases concerning claims that a treaty is invalid, but only over those cases which the parties *agree* to refer to the court or conciliation commission.

Termination of treaties

Article 26 of the Vienna Convention provides: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' In other words, a state cannot release itself from its treaty obligations whenever it feels like it; if it could, legal relations would become hopelessly insecure. But the words 'in force' must not be overlooked; few treaties last for ever, and, unless some provision is made for the termination of treaties, the law will become hopelessly rigid. The rules of law concerning the termination of treaties try to steer a middle course between the two extremes of rigidity and insecurity.[36] They work fairly well, because every state is a party to hundreds of treaties on a wide range of topics, and therefore has an interest in ensuring that the right balance between security and flexibility is maintained in practice. Article 42(2) of the Vienna Convention seeks to protect the security of legal relations by providing: 'The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.'

Termination in accordance with the provisions of a treaty

Article 54 of the Vienna Convention provides: 'The termination of a treaty or the withdrawal of a party may take place; (a) in conformity with the provisions of the treaty.'[37] Indeed, the majority of modern treaties contain provisions for termination or withdrawal. Sometimes it is provided that the treaty shall come to an end automatically after a certain time, or when a particular event occurs; other treaties merely give each party an option to withdraw, usually after giving a certain period of notice.

Termination by consent of the parties

Article 54 of the Vienna Convention provides: 'The termination of a treaty or the withdrawal of a party may take place: (a)…(b) at any time by consent of all the parties.' At one time it used to be thought that the treaty could be terminated only in exactly the same way as it was made; thus, a ratified treaty could be terminated only by another ratified treaty, and not by a treaty which came into force on signature alone. But this formalistic view is no longer accepted. Indeed, the International Law Commission thought that an agreement to terminate could even be *implied* if it was

36 M.B.Akehurst, Treaties, Termination, *EPIL* 7 (1984), 507–10; A. Vamvoukos, *Termination of Treaties in International Law. The Doctrines of Rebus Sic Stantibus and Desuetude,* 1985; R.Plender, The Role of Consent in the Termination of Treaties, *BYIL* 57 (1986), 133–68; L.-A.Sicilianos, The Relationship Between Reprisals and Denunciation or Suspension of a Treaty, *EJIL* 4 (1993), 341–59; N.Kontou, *The Termination and Revision of Treaties in the Light of New Customary Law,* 1994. But termination must be distinguished from the amendment of treaties, see M.J.Bowmann, The Multilateral Treaty Amendment Process—A Case Study, *ICLQ* 44 (1995), 540–59.

37 A similar rule applies to suspension of the operation of a treaty (Articles 57 and 58(1) Vienna Convention).

clear from the conduct of the parties that they no longer regarded the treaty as being in force.[38] The technical name for this method of termination is 'desuetude'.[39]

Implied right of denunciation or withdrawal

Article 56 of the Vienna Convention provides:

> 1 A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
>
> (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
> (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.
>
> 2 A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

It follows from the wording of Article 56 that a right of denunciation or withdrawal can never be *implied* if the treaty contains an *express* provision concerning denunciation, withdrawal, or termination.

It is uncertain to what extent Article 56 reflects customary law;[40] this is particularly true of paragraph l(b), which was added to the text of Article 56 at the Vienna conference by twenty-six votes to twenty-five with thirty-seven abstentions. The provisions of Article 56 (especially paragraph 1(b)) reflect the views of most British writers, but many continental writers thought that there could never be an implied right of denunciation or withdrawal under customary international law. However, in *Nicaragua v. USA*, the International Court of Justice seems to have accepted that Article 56 was an accurate statement of customary law.[41]

Treaties of alliance and certain types of commercial treaties are often cited as the main examples of the kind of treaty in which a right of denunciation or withdrawal can be inferred from the nature of the treaty, within the meaning of Article 56(1)(b). A similar inference can also probably be made in the case of treaties conferring jurisdiction on international courts.[42]

Customary international law requires reasonable notice to be given whenever an implied right of denunciation or withdrawal is exercised. Article 56(2) adds greater precision by requiring notice of at least twelve months.

Termination or suspension of a treaty as a consequence of its breach (discharge through breach)

Article 60(1) of the Vienna Convention provides: 'A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.'[43] The injured state's power to terminate or suspend a treaty is one of the main sanctions for breach of a treaty, but it is not the only one; there is nothing to prevent the injured state claiming compensation instead of, or in addition to, exercising its rights under Article 60(1).

38 *AJIL* 61 (1967), 388.
39 See also Article 59 of the Vienna Convention and Vamvoukos, *op. cit.*
40 See K.Widdows, The Unilateral Denunciation of Treaties Containing No Denunciation Clause, *BYIL* 53 (1982), 83–114.
41 *Nicaragua Case* (Jurisdiction), *ICJ Rep.* 1984, 392, at 420. On this case see Chapter 3 above, 40–1 Chapters 18, 284 and 19, 319 below.
42 *Ibid.*
43 S.Rosenne, *Breach of Treaty,* 1985; D.N.Hutchinson, Solidarity and Breaches of Multilateral Treaties, *BYIL* 59 (1988), 151 et seq.; R.Morrison, Efficient Breach of International Agreements, *Denver JILP* 23 (1994), 183–222; M.M.Gomaa, *Suspension or Termination of Treaties on Grounds of Breach,* 1996.

The problem is more complicated if the treaty is multilateral. Obviously, breach by state A cannot entitle state B to denounce the treaty, because that would not be fair to states C, D, E, and so on. Accordingly, Article 60(2) provides:

> A material breach of a multilateral treaty by one of the parties entitles:
>
> (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
>
> (i) in the relations between themselves and the de faulting State, or
> (ii) as between all parties;
>
> (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
> (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

An example of the type of treaty contemplated by paragraph 2(c) is a disarmament treaty.[44] Clearly, breach of a disarmament treaty by one party constitutes a very serious threat to each of the other parties. But should this entitle one of the injured parties to create a similar threat to the other injured parties? Would it not be more appropriate to deal with the problem under paragraph 2(a)? It is in any case doubtful whether paragraph 2(c) really reflects customary law.

It is generally agreed that a right to terminate does not arise unless the breach is a material (that is, serious) one. Article 60(3) defines a material breach as: '(a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty'. This definition is defective, because it does not make clear that violation of an essential provision does not constitute a material breach unless it is a serious violation. If a state makes a treaty to deliver 5,000 tons of tin and delivers only 4,999 tons, a literal interpretation of Article 60(3) would imply that the other party could denounce the treaty because of this minor violation of an essential provision—which is repugnant to common sense.

Breach does not automatically terminate a treaty; it merely gives the injured party or parties an option to terminate or suspend the treaty, and, according to Article 45, an injured party loses the right to exercise this option

> if, after becoming aware of the facts:
>
> (a) it shall have expressly agreed that the treaty…remains in force or continues in operation, as the case may be; or
> (b) it must by reason of its conduct be considered as having acquiesced… in its [that is, the treaty's] maintenance in force or in operation, as the case may be.

44 See Chapter 20 below, 342.

The power of the injured party or parties to terminate or suspend a treaty may also be modified or excluded by the treaty itself.[45]

45 See Article 60(4) and (5), 1969 Vienna Convention.

Supervening impossibility of performance

Article 61 of the Vienna Convention provides:

> 1 A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.
> 2 Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

It is not hard to think of examples; for instance, a treaty providing that the waters of a particular river be used for irrigation would become impossible of performance if the river dried up. The Vienna Convention regards the impossibility not as automatically terminating the treaty, but as merely giving a party an option to terminate; this point was controversial in customary law.

Fundamental change of circumstances *(rebus sic stantibus)*

A party is not bound to perform a treaty if there has been a fundamental change of circumstances since the treaty was concluded. In previous centuries writers tried to explain this rule by saying that every treaty contained an implied term that it should remain in force only as long as circumstances remained the same *(rebus sic stantibus)* as at the time of conclusion. Such an explanation must be rejected, because it is based on a fiction, and because it exaggerates the scope of the rule. In modern times it is agreed that the rule applies only in the most exceptional circumstances; otherwise it could be used as an excuse to evade all sorts of inconvenient treaty obligations.

Article 62 of the Vienna Convention confines the rule within very narrow limits:

> 1 A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
>
> 2 A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from the treaty:
>
> (a) if the treaty established a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3 If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

In the *Fisheries Jurisdiction* case the International Court of Justice said that Article 62 'may in many respects be considered as a codification of existing customary law on the subject'.[46]

Some writers consider that the change of circumstances automatically terminates the treaty; others hold that it merely gives a state an option to terminate. The Vienna Convention adopts the latter approach; moreover, the option to terminate may be lost in certain circumstances under Article 45.[47]

No doubt treaties often need to be altered, to bring them into line with changing conditions. But the *rebus sic stantibus* rule is an unsuitable method for achieving this end; it applies only in extreme cases, and, when it does apply, its effect is not to alter a treaty, but to terminate it. Alterations, as opposed to termination, can be brought about only by agreement, and not all states are prepared to agree to amendments which go against their interests; sometimes they fear that making concessions to one state will induce other states to demand similar changes in other treaties. But the desire of states to obtain the goodwill of other states often induces them to make the necessary concessions. Moreover, the United Nations General Assembly has a power to recommend alterations of treaties, under Article 14 of the United Nations Charter, which provides: 'the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations.'[48]

Emergence of a new peremptory norm *(ius cogens)*

Article 64 of the Vienna Convention provides: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.' The treaty does not, however, become void retroactively.[49]

Outbreak of war

The Vienna Convention does not deal with the effects of war[50] on treaties, apart from stating that 'the provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty…from the outbreak of hostilities between States' (Article 73). The problem is extremely complicated.[51] Originally, war was regarded as ending all treaties between belligerent states, but this rule has now been partly abandoned. Maybe it is not so much the rule which has changed, as the nature of the treaties to which the rule applies. It was sensible to say that war ended all treaties between belligerent states when most treaties were bilateral

46 *UK v. Iceland (Jurisdiction), ICJ Rep.* 1973, 3, 18, para. 36; on this case see Chapter 3, 43 above and Chapter 12, 183 below. See also the *Free Zones* case (1932), PCIJ, series A/B, no. 46, 156–8.
47 See text above, 143.
48 See Chapter 22 below, 387.
49 See Article 71 (2), Vienna Convention. On *ius cogens* generally, see Chapter 3 above, 57–8.
50 See Chapter 19 below, 309.
51 J.Delbrück, War, Effect on Treaties, *EPIL* 4 (1982), 310–15.

52 See Chapter 3 above, 37–8.
53 See text above, 140–1.

'contract treaties'; the rule has to be altered when many treaties are multilateral 'law-making treaties',[52] to which neutrals as well as belligerents are parties.

In any case, this tangled branch of the law is less important now than it used to be, for two reasons. First, when states are engaged in hostilities nowadays, they seldom admit that they are in a state of war in the technical sense; and, unlike war, hostilities falling short of war do not generally terminate treaties between the hostile states. Second, the peace treaty or other instrument which terminates a modern war usually provides what is to happen to pre-war treaties (or at least bilateral treaties) between the belligerent states, so that it is unnecessary to apply the rules of customary law on this point.

Consequences of termination or suspension

Rules concerning the consequences of termination or suspension of a treaty are laid down in Articles 70, 71(2) and 72 of the Vienna Convention, which are too detailed to be discussed here. Many of the rules in the Vienna Convention laying down the procedure to be followed when a treaty is alleged to be invalid also apply, *mutatis mutandis,* to termination or suspension; this is particularly true of Articles 65–8.[53]