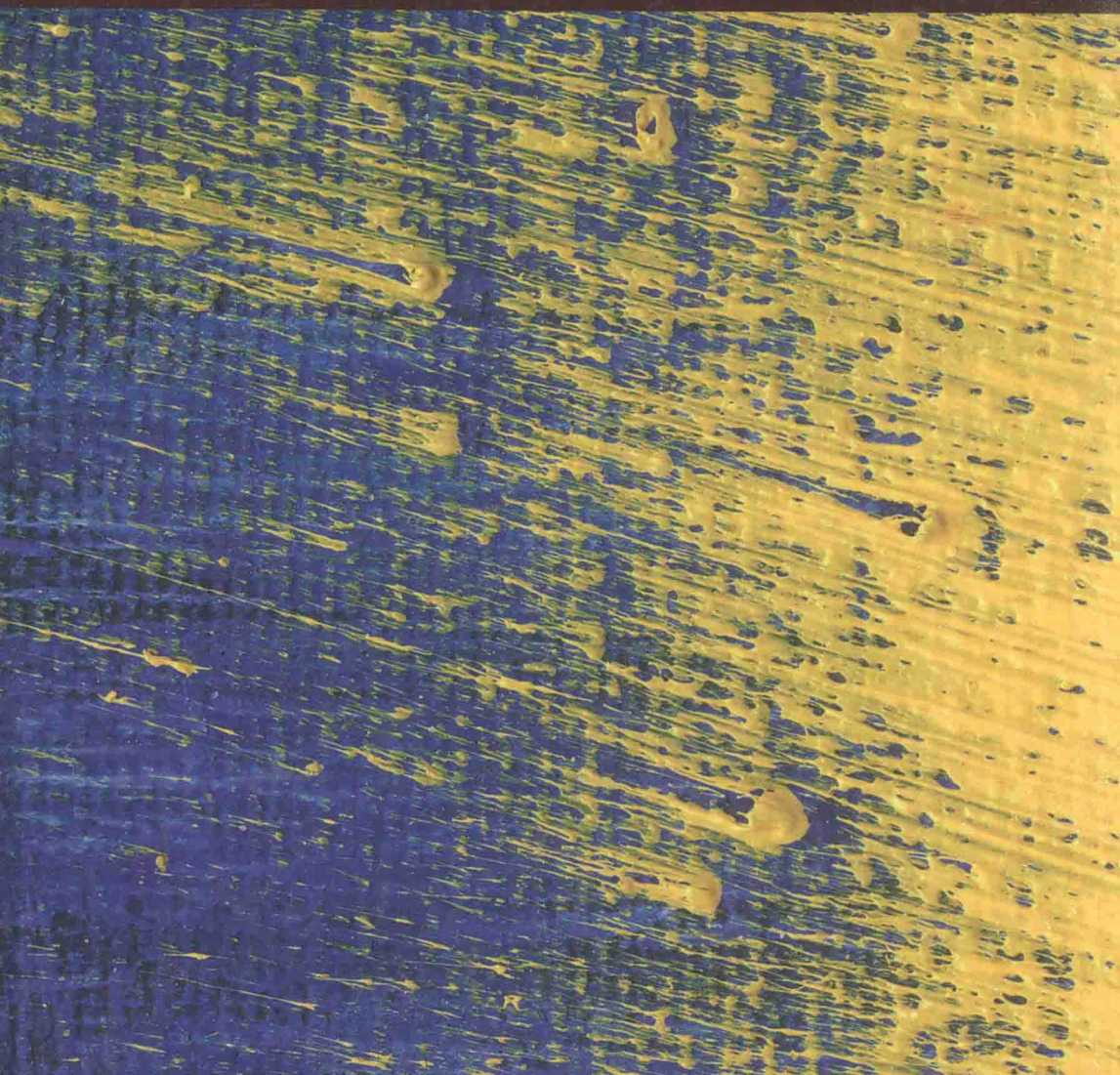
Research Handbooks in International Law

Research Handbook on the Law of Treaties

Edited by Christian J. Tams, Antonios Tzanakopoulos and Andreas Zimmermann
with Athene E. Richford



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RESEARCH HANDBOOKS IN INTERNATIONAL LAW

Edward Elgar

Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2014937749

This book is available electronically in the ElgarOnline.com Law Subject Collection, E-ISBN 978 0 85793 478 9

ISBN 978 0 85793 477 2

Typeset by Columns Design XML Ltd, Reading
Printed and bound in Great Britain by T.J. International Ltd, Padstow

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Preface

The idea to edit a *Research Handbook on the Law of Treaties* came as a reaction to the resurgence of interest in the subject in the late 2000s and early 2010s, which found expression in the publication of new treaty law handbooks and commentaries on the Vienna Convention(s) on the Law of Treaties ('VCLT'). Yet we did not want to add another such book to the already growing literature on the subject. Rather, we set out to edit a collection of reflective pieces, not necessarily on less-studied aspects of the law of treaties, but on aspects that we wished to see pursued from different angles, less attached to the VCLT. This we explain in more detail in our Introduction.

In our endeavour, we found warm support and a hospitable forum in Edward Elgar Publishing – in particular our editor Ben Booth – and the Research Handbook series. The process was long and arduous but staff at Edward Elgar did their best to make it as painless as possible; for this, and for the quality of production of the volume at hand, we owe them heartfelt thanks.

If the *Research Handbook* would not exist without Edward Elgar, it would certainly not exist without the authors who agreed to contribute to this volume, and who were so accommodating of our sometimes demanding editorial instructions and requests. We thank them warmly for their patience and for their excellent contributions: whatever merit there may be to this book is due to the careful and considered work of the contributing authors.

We must not neglect to thank our Assistant Editor, Athene Richford: her careful and tireless work, including the editing of the chapters and the communication with authors, and her happy demeanour, made the process of editing the *Research Handbook* considerably shorter and more enjoyable than it would otherwise have been.

Finally, thanks are due to our home institutions, the Universities of Glasgow, Oxford, and Potsdam, for providing us with a research environment in which projects like this can be pursued.

Christian J. Tams
Antonios Tzanakopoulos
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June 2014

Introduction

Christian J. Tams, Antonios Tzanakopoulos and Andreas Zimmermann

Without treaties, international law and international relations are difficult to imagine. From the dramatic to the mundane, so much activity today is regulated by treaties. Where war is waged, we argue about the scope of the Geneva Conventions, human rights treaties and of course the UN Charter. When States make peace or draw boundaries, they do so by treaty. Where individuals suffer, international agreements provide us with a language and a benchmark to characterise atrocities as 'crimes' or 'human rights violations'. When we are about to board a flight, we make use, usually unconsciously, of international rules on standardised passports derived from treaties, and we benefit from international conventions on civil aviation. Some treaties reflect the international community's hope for a more just world order, others entrench grave injustices. Treaties are ubiquitous: since the end of World War I, around 56,500 have been registered with the United Nations and its predecessor, as envisaged in Article 18 of the League's Covenant and Article 102 of the UN Charter.[1] This figure, however, does not reflect the total number of treaties concluded: it includes neither oral agreements nor treaties between non-UN members; and of course it does not capture the considerable number of treaties that, contrary to Article 102, have not been registered. International law is difficult to imagine without treaties indeed.

The contemporary dominance of treaties as the principal instrument for ordering international relations owes a lot to 19th and 20th century phenomena such as the rise of multilateralism, the establishment of

[1] For details about the United Nations practice see the information provided by the UN Treaty Section, at https://treaties.un.org/Pages/DB.aspx?path=DB/UNTS/page1_CIintro_en.xml. The figure of treaties registered with the League of Nations is given as 4834 (https://treaties.un.org/Pages/LONOnline.aspx). More than fifty years ago, AD McNair rightly described this depository of international regulation as 'an indispensable piece of international apparatus' (*The Law of Treaties*, 2nd edn., 1961, at 179).

international organisations, coordinated attempts at codification, and of course to the major increase in the number of international law subjects (States, and others). However, in addition to dominating contemporary international law, treaties were 'present at creation', too. 'Since ancient times, political entities have used treaties as a tool to shape their international or neighbourly relations', states Malgosia Fitzmaurice.[2] Historical treatments rely on early treaties – boundary agreements between Mesopotamian City States, early versions of FCN treaties between Egyptians and Hittites, or alliance and peace treaties between the Greek City States – to determine when international law really began. And according to the Encyclopedia Britannica, '*pacta sunt servanda*', that quintessential treaty law principle,[3] is 'the oldest principle of international law'.[4]

That treaties – foundational then, ubiquitous today – need a legal framework is unsurprising. They would be useless if treaty parties had not, previously, somehow agreed on their binding force. And in order to operate, unless everything is spelled out in minute detail, treaties presuppose an understanding on how, when, where and between whom they should apply; how they can be terminated or suspended (if at all); what happens if they are breached; whether they survive the demise of their parties, and much more. The law of treaties provides this legal framework. We may debate whether it should be viewed as a unitary set of rules (a point taken up in Vaughan Lowe's opening contribution to this book); but the existence of *some framework* governing treaties is a practical necessity. Dominated by treaties, international law needs a law of treaties.

* * *

The legal framework governing treaties draws on, but is not exhausted by, the 1969 Vienna Convention on the Law of Treaties ('VCLT'). That Convention may be canonical, perhaps even a 'bible'.[5] But if it is a bible, it is a rather short one: authoritative, no doubt, but by no means

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[2] M Fitzmaurice, 'Treaties', in Max Planck *Encyclopedia of Public International Law* (online edition at www.mpepil.com), at para 5.

[3] See ILC, Draft Articles on the Law of Treaties with Commentaries, ILC Yearbook 1966, vol. II, 211, para. 1 ('the fundamental principle of the law of treaties').

[4] See the *Encyclopaedia Britannica*, online edition, at http://www.britannica.com, entry on 'International Law'. (http://www.britannica.com/EBchecked/topic/291011/international-law/233499/Treaties?anchor=ref794916)

[5] A Aust, *Modern Treaty Law and Practice*, 1st edn., CUP 2000, at 4.

comprehensive. To some extent, this flows from its (convention-specific) understanding of the term 'treaty' as set out in Article 2(1)(a).[6] Covering inter-State agreements in writing, the Convention purposefully leaves to a side non-written agreements governed by international law as well as treaties with actors other than States (a limitation partially addressed by the 1986 Vienna Convention). More importantly, even with respect to written inter-State agreements, it addresses only some of the questions raised above. Its focus, as Rosenne notes,[7] is on the treaty as 'an instrument', not primarily on treaty obligations. Hence the convention provides considerable detail on the modalities of concluding treaties, on their scope of application, on reservations, on interpretation, on treaty interaction and contains a very bulky part on the 'invalidity, termination or suspension of the operation of the treaty'. However, core aspects of the legal framework governing treaties are left to a side. This notably applies to the *trias* of reserved matters mentioned in Article 73: treaty breaches are addressed as within the larger framework of responsibility; succession to treaties is outsourced into a separate framework governing State succession (of which succession to treaties is the main part); while the impact of war on treaties, has long been viewed as a discrete topic (which is now being studied in earnest again). As regards other matters, not covered by Article 73, the Vienna Convention rules often remain rudimentary: suffice it to think of the interplay between treaties and domestic law and the regime of reservations; or the VCLT's minimalist provisions on the geographical, temporal, and personal scope of application of treaties.

In the light of all this, the VCLT can hardly be seen as a comprehensive codification of the law of treaties. Its principal historian, Sir Iain Sinclair, noted 'the drafters' unwillingness to venture more than they thought strictly necessary beyond the confines of the law of treaties in the narrower sense – that is to say, as a series of provisions concerning the formation, effects and duration of written agreements between States'.[8] And he went on to observe: 'It is as if the Commission had deliberately decided to paint in the style of Pieter de Hooch rather than Titian or

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[6] According to that provision, '[f]or the purposes of the present Convention: "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

[7] S Rosenne, *Breach of Treaty* (Grotius, 1985), 3–4.

[8] IM Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester UP, 1984), 244.

Veronese. They denied the broader canvas in order to concentrate on the domestic minutiae'.[9]

There is nothing wrong with domestic minutiae, or with Pieter de Hooch for that matter. The VCLT illustrates the beneficial effect of inclusive expert debate and regular practice, which over time can distil agreed norms that, largely irrespective of their force as treaty law,[10] come to be seen as binding. But in view of its purposefully limited scope, and its inadvertent limitations, the VCLT should not be equated to the law of treaties.

* * *

All of this is perhaps trite. If it is spelled out here regardless, then it is because the drafters' 'de Hooch' approach has had an impact on scholarly debates on the law of treaties. Many a textbook chapter on treaties focuses on the VCLT and treats other matters in passing; some even fail to look beyond the VCLT. And of course, no one can overlook the surprising resurgence of VCLT-scholarship in the recent literature. This scholarship is valuable, in some instances invaluable. And yet it covers only part of the law of treaties, and leaves to a side essential aspects.

The contributions to the present book address a different law of treaties. This is not yet another VCLT Commentary or treaty law handbook. Questions addressed in the Vienna Convention of course are covered, and to many chapters they are central. However, as editors we have made a serious attempt to look at 'The Law of Treaties beyond the Vienna Convention'.[11] As a consequence, readers will find chapters addressing the VCLT's main substantive gaps – succession, treaty breaches, impact of war, domestic law, etc. The role of non-State actors as parties to treaties, or as actors in the treaty process, is considered. And we have invited a series of reflections on the concept of treaties, and of treaty law, in the contemporary legal order. The resulting 21 chapters are

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[9] Ibid.

[10] It is worth noting that even today, almost 50 years after the finalisation of the ILC's text, only 114 have joined the VCLT regime. Prominent outsiders include India, Indonesia, South Africa, Turkey, France and Norway. The United States, Bolivia, Iran and Pakistan are signatories only. In terms of treaty participation, the VCLT remains one of the less successful universal agreements sponsored by the UN. (For details see https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en).

[11] Cf. the title of the *Gaja Festschrift* (E. Cannizaro (ed.), *The Law of Treaties Beyond The Vienna Convention,* OUP 2011), as well as G Gaja, '*Jus Cogens* Beyond The Vienna Convention', Receuil des Cours, 172 (1981), 271.

organised in five parts – *Principles, Dimensions, Tensions, Interactions & Ruptures,* and *Expansions*. Each of these parts is selective in its coverage, but we believe taken together, the book provides a 'critical mass' of scholarship on salient questions of treaty law – as addressed, scratched upon, or side-stepped by the VCLT's drafters.

In selecting the issues to be covered, we have sought to identify cross-cutting themes or questions. In this respect, too, this is not another VCLT Commentary. Contributors were invited take a step back and write 'think pieces' reflecting on tensions, premises, undercurrents, challenges, and trends in the law of treaties. This approach reflects our own research interests (and preferences), and also a belief that some of the recent scholarship on the law of treaties may have perhaps been a bit too granular. While it is difficult to break radically new ground when writing about the law of treaties (even in the broader sense of the term, as used here), we believe the chapters do offer novel perspectives and original reflections on important questions of practical and theoretical relevance. In keeping with the aims of the Research Handbook series (which is meant to 'inform as well as to contribute to current debates'), we have asked contributors to conclude their chapters with suggestions for further study in 'their' field of expertise. These concluding sections identify dozens of avenues for research, which we hope will be considered worth pursuing.

* * *

Beyond the individual suggestions for further study, in our view, one central question underlies many of the contributions to the present book: should the law of treaties be seen as one general (and presumably uniform) regime, or does it need to make more room for sectoral rules applicable to particular categories of treaties (such as bilateral treaties, human rights treaties, treaties setting up institutions, etc.)? Vaughan Lowe addresses this tension expressly by inquiring whether it makes sense to,

> lump together treaties declaring the course of international boundaries, treaties for the provision of specified sums of foreign aid, status of forces agreements, multilateral conventions on Antarctica or on the Law of the Sea or human rights, treaties establishing the European Union or the UN or the WHO … . [which], as sets of rules establishing legal relations, … have in common little or nothing.[12]

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[12] AV Lowe, in this volume, p. 4.

As editors, unsurprisingly, we would not hesitate to answer in the affirmative the question he draws from this and which forms the sub-title of his contribution ('Should this book exist?'). Yet that this question is being asked is no doubt useful. It invites serious reflection on whether international law can continue to operate with one legal regime to address treaties in their 'infinite variety'.[13] The Vienna Convention in principle accepts this idea: while admitting certain differentiations between types of treaties and while nearly always allowing parties to opt out of the general regime, the drafters purported to set out general rules. But since 1969, international lawyers have begun to argue about special rules for special classes of treaties, both in relation to matters covered by the VCLT and those left aside.These debates are reflected in the chapters of this book. To name just a few, the two chapters on uniformity versus specialisation take it up directly; as does the one on suspension and termination of treaties. The contributions on treaty breaches, on treaties and armed conflict, and on succession to treaties show how, outside the VCLT, drafters devising general rules embraced differentiations between types of treaties. And the same holds true for the analysis of treaties and domestic law, in which very little depends on whether a rule is found in a treaty, and so much on what type of treaty it is. Of the many questions raised in the subsequent chapters, the tension between general and sectoral rules governing treaties is perhaps the most important. We should be glad if this book was read as an encouragement to pursue it further.

[13] Cf. RR Baxter, 'Internationall Law in "Her Infinite Variety"', ICLQ 29 (1980), 549.

Contents

PART I

PRINCIPLES

1. The law of treaties; or, should this book exist?

Vaughan Lowe

This short chapter is not about rules of international law applicable to treaties. It is about the concept of 'the law of treaties' as a subject or topic within international law. It takes as its starting point the conception of treaties, which is the paradigm implicit in the 1969 Vienna Convention on the Law of Treaties. That paradigm is of a written instrument negotiated by the States parties to it, where the binding force comes from the *consensus ad idem*. It is a clearly consensualist model, as befits a body of doctrine whose roots lie in consensualist conceptions of international law in general.[1] The main argument of the chapter is that 'the law of treaties' may no longer be the most useful way of approaching legal obligations voluntarily assumed by States.

The law of treaties is a curious phenomenon. It has the appearance of solidity and certainty. Scarcely any piece of international litigation does not include in its overture a reference to the rules on treaty interpretation that are contained in the Vienna Convention. That almost ritualistic reference commonly continues with an assertion that the Vienna Convention is regarded as an accurate statement of customary international law; and in most cases that assertion is accepted without demur. And in many cases the court or tribunal is spared a reading of the relevant provisions of the Vienna Convention on the ground that they are too well known to need repetition. One may argue over the results of the application of the

[1] See the classic discussions by JL Brierly, *The Basis of Obligation in International Law* (OUP, 1958) 1–67, and by Sir H Lauterpacht, *Oppenheim's International Law* (8th edn, vol I, Longmans, 1955) 15–23; and compare the brevity with which the International Law Commission ('ILC') dealt with the definition of a 'treaty' in what became Article 2 of the Vienna Convention on the Law of Treaties ('VCLT'): Sir A Watts, *The International Law Commission 1994–1998* (OUP, 1999), 619–23, reprinting the ILC's Final Draft Articles from the Yearbook of the ILC (1966) vol II, 177. The assumption of the consensual basis of the law of treaties continues: see, eg, the discussions of the VLCT Preamble and Articles 1 and 2 in O Corten and P Klein, *The Vienna Convention on the Law of Treaties: A Commentary* (OUP, 2011).