VASSILIS PERGANTIS

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THE PARADIGM OF STATE CONSENT IN THE LAW OF TREATIES

Challenges and Perspectives

ELGAR INTERNATIONAL LAW

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Vassilis Pergantis

American College of Thessaloniki (ACT) and Aristotle University of Thessaloniki, Greece

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ELGAR INTERNATIONAL LAW

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Abbreviations

ACHR	American Convention on Human Rights
AFDI	Annuaire français de droit international
AJIL	American Journal of International Law
AnnIDI	Annuaire de l'Institut de droit international
ARIEL	Austrian Review of International and European Law
ASIL	American Society of International Law
AYIL	Australian Yearbook of International Law
BYIL	British Yearbook of International Law
CAHDI	Committee of Legal Advisers on Public International Law (Council of Europe)
CAT	Committee against Torture
CEDAW	Convention/Committee on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COP/MOP	Conference/Meeting of the Parties
CYIL	Canadian Yearbook of International Law
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
EJIR	European Journal of International Relations

EJLS	European Journal of Legal Studies
ELR	European Law Review
ESCOR	Economic and Social Council Official Records
ESIL	European Society of International Law
ETS/CETS	European Treaty Series/Council of Europe Treaty Series
FRG	Federal Republic of Germany
FYIL	Finnish Yearbook of International Law
GAOR	(United Nations) General Assembly Official Records
GDR	German Democratic Republic
GoJIL	Goettingen Journal of International Law
GYIL	German Yearbook of International Law
HILJ	Harvard International Law Journal
HRCttee	Human Rights Committee
HRLJ	Human Rights Law Journal
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly
I-ACtHR	Inter-American Court of Human Rights
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Reports	Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHR	International Health Regulations
IJHR	International Journal of Human Rights

ILA	International Law Association
ILC	International Law Commission
ILCYb	Yearbook of the International Law Commission
ILO	International Labour Organization
ILR	International Law Reports
ILM	International Legal Materials
IMO	International Maritime Organization
IOLR	International Organizations Law Review
IRRC	International Review of the Red Cross
ITLOS	International Tribunal for the Law of the Sea
IYIL	Italian Yearbook of International Law
JCSL	Journal of Conflict and Security Law
JICJ	Journal of International Criminal Justice
JYIL	Japanese Yearbook of International Law
LJIL	Leiden Journal of International Law
Max Planck UNYb	Max Planck Yearbook of United Nations Law
MEAs	Multilateral environmental agreements
NILR	Netherlands International Law Review
NJIL	Nordic Journal of International Law
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
NQHR	Netherlands Quarterly of Human Rights
NYIL	Netherlands Yearbook of International Law
NYUJILP	New York University Journal of International Law and Politics
OAS	Organizations of American States
OECD	Organization for Economic Co-operation and Development
OLA	(United Nations) Office of Legal Affairs
ÖZöRV	Österreichische Zeitschrift für öffentliches Recht und Völkerrecht
PCIJ	Permanent Court of International Justice
PYIL	Polish Yearbook of International Law
RBDI	Revue belge de droit international

RdC	Recueil des cours de l'Académie de droit international de La Haye
RDI	Rivista di diritto internazionale
RDILC	Revue de droit international et de la législation comparée
REDI	Revue égyptienne de droit international
RHDI	Revue hellénique de droit international
RGDIP	Revue générale de droit international public
RIAA	(United Nations) Recueil of International Arbitral Awards
RTDC	Revue trimestrielle de droit civil
RTDH	Revue trimestrielle des droits de l'homme
RUDH	Revue universelle des droits de l'homme
SFDI	Société française de droit international
SFRY	Socialist Federal Republic of Yugoslavia
SYIL	Singapore Yearbook of International Law
UN	United Nations
UNCIO	United Nations Conference on International Organization
UNCLOS	United Nations Convention on the Law of the Sea
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNJY	United Nations Juridical Yearbook
UNSC	United Nations Security Council
UNSG	United Nations Secretary General
UNTS	United Nations Treaty Series
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
VCSST	Vienna Convention on Succession of States in Respect of Treaties
VJIL	Virginia Journal of International Law
WHO	World Health Organization

YbECHR	Yearbook of the European Commission of Human Rights
YIEL	Yearbook of International Environmental Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Preface

This book is based on research I conducted during my years at the Graduate Institute of International and Development Studies in Geneva. In this context, I would like to express my gratitude to Professors Andrea Bianchi, Vera Gowland-Debbas and Maria Gavouneli for their critical observations and constructive suggestions on drafts of the text. The final manuscript draws inspiration therefrom.

I am most indebted to the late Professor Vera Gowland-Debbas. I had the chance to be her pupil and then her last teaching and research assistant before her retirement, and I was always struck by her humility, generosity and warm personality, her idealism and strong convictions, her broad vision on international law. The idea for this book was conceived during one of her courses and her writings have shaped my thought. She will always remain an academic and life mentor for me.

I would also like to express my gratitude to Professor Laurence Boisson de Chazournes. This book never would have seen the light of day without her constant support and encouragement. I owe her for our collaboration in various research projects and for our discussions on various aspects of international law. During the most difficult moments of this journey, she never let me doubt myself about being able to deliver. Special thanks also go to Professor Miltiadis Sarigiannidis, with whom I discussed parts of the argument and who offered me the opportunity to assist his courses at the Aristotle University of Thessaloniki and test some of my ideas in the postgraduate programme.

This monograph is the outcome of long hours of research. In this endeavour, I have benefited immensely from the help of the Graduate Institute's library personnel. I would like to thank Martine Basset and Marie-Pierre Flotron in particular for their availability and for facilitating my visits to the library. I am also grateful to the Edward Elgar team for all their help in the preparation of the manuscript and the production of the book, to Claire Mahon for reviewing my English, and to Konstantinos Christoglou for uniformizing citations and helping with the bibliography. I should also mention the Ryoichi Sasakawa Young Leaders Fellowship Fund Program of the Tokyo Foundation and the Graduate Institute for financing part of this research.

The writing of a book is an exercise in solitude. Thankfully, my friends have always been there when most needed, to divert my thoughts towards other 'life pleasures'. Special thanks go above all to Patrick, Evgenia, Georgina, David, Konstantinos, Mamadou, Antonella, Nagia and the Thessaloniki 'clan' for putting up with me during that time.

Last but not least, I want to extend my gratitude to my family, and particularly to my parents. They have been a constant source of support and inspiration. I owe them greatly and this book is dedicated to my late father and my mother.

Thessaloniki, 27 December 2016

Contents

Introduction

The law of treaties has been the subject of an impressive number of studies and each aspect has been thoroughly analysed through doctrinal works and codification projects.[1] So, what can a new study on the law of treaties contribute? What can be added concerning this 'sadly overworked instrument' of international law-making?[2] First of all, many of the studies on the law of treaties date back to the period of its codification or a little bit after. Since that period there have been a series of developments in the treaty-making process that challenge the established rules of the law of treaties. These developments put a strain on the principle of State consent, which underpins the law of treaties, and seek to strengthen the relevance of collective interest,[3] thus leading to the transformation of this field of law.[4] This situation creates a serious tension at the heart of the law of treaties.[5]

It is the element of form that is called to adjust and adapt to this new era of collective interest considerations.[6] The protection of human rights – a field where the beneficiaries of the treaty rules are individuals and groups and not other States – or the protection of the environment, which concerns mankind as a whole, are substantive areas of law reflecting this

[1] For analytic purposes, the terms 'law of treaties' and 'treaty law' are distinguished; see Thirlway, H., 'Treaty Law and the Law of Treaties in Recent Case-Law of the International Court', *in* Craven, M., Fitzmaurice, M. (eds), *Interrogating the Treaty: Essays in the Contemporary Law of Treaties*, Nijmegen, Wolf Legal Publishers, 2005, 7–28, 7.

[2] McNair, A., 'The Functions and Differing Legal Character of Treaties', 11 *BYIL* (1930) 100–118, 101.

[3] The terms 'collective interest' and 'communitarianism' are used interchangeably throughout this book with no semantic difference.

[4] Gowlland, V., 'Law-Making in a Globalized Society', *in* Cardona Llorens, J. (ed.), *Cursos euromediterráneos bancaja de derecho internacional*, Valencia, Tirant lo Blanch, 2009, vol. VIII-IX, 505–661, 578.

[5] Brölmann, C., 'The Limits of the Treaty Paradigm', *in* Craven/Fitzmaurice, *Interrogating the Treaty*, 29–39, 30.

[6] Brunnée, J., '"Common Interest" – Echoes from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law', 49 *ZaöRV* (1989) 791–808, 807–8.

new robust communitarian ideal. In these fields the 'overworked' treaty instrument feels increasingly constrained by the relevant treaty rules, which are codified in the three Vienna Conventions that form what we will call the Vienna regime/rules, that is, the Vienna Convention on the Law of Treaties (hereinafter VCLT),[7] the Vienna Convention on Succession of States in Respect of Treaties (hereinafter VCSST)[8] and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[9]

In addition to (and perhaps because of) the emergence of a communitarian narrative on the law of treaties, there is a further challenge due to the increased institutionalization of the treaty-making and treaty-functioning process. Nowadays, the inter-State model is allegedly confronted with a constitutionalized environment.[10] The increased centralization of treaty-making and the existence of treaty bodies involved in the life of the treaty constitute a paradigm shift that tests the adapting ability of treaties, which are allegedly based on a contractual/voluntaristic mindset typical of traditional international law.[11]

But even these recent developments have been identified and thoroughly analysed, as we will see. This communitarian narrative argues that the contractual analogy, which represents the traditional image of the law of treaties, is less appropriate or clearly inadequate in dealing with the new phenomena, and thus the traditional rules need to be modified or even discarded. A debate over the degree of the autonomy from or dependence upon the Vienna regime has ensued.[12]

The purpose of this book, however, is not just to recount and systematize the above narrative.[13] This study attempts first and foremost to challenge the basic idea of this narrative, namely, the reference to a 'traditional concept' of treaties and its routine association with the contractual paradigm. The feeling of inevitability that this narrative

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[7] 22 May 1969, 1155 *UNTS*, pp. 331 *et seq.*

[8] 23 August 1978, 1946 *UNTS*, pp. 3 *et seq.*

[9] 21 March 1986, *ILM*, vol. 25, 1986, pp. 143 *et seq.*

[10] Brölmann, 'The Limits', 29.

[11] Merrills, J., 'The Mutability of Treaty Obligations', *in* Craven/Fitzmaurice, *Interrogating the Treaty*, 89–101, 99.

[12] Craven, M., 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', 11 *EJIL* (2000) 489–519, 490–92.

[13] Vanneste, F., *General International Law before Human Rights Courts: Assessing the Specialty Claims of International Human Rights Law*, Antwerp, Intersentia, 2010; de Frouville, O., *L'intangibilité des droits de l'homme en droit international. Régime conventionnel des droits de l'homme et droit des traités*, Paris, Pedone, 2004.

radiates is put into question. The idea of the law of treaties as a body of rules exclusively oriented to the preservation and furtherance of egoistical State interests is also scrutinized.[14] Through this process the Vienna rules are then reconstituted. The aim is to revisit the claims of their insufficiency and see whether they manage or fail to accommodate the communitarian anxieties of contemporary international law, and what adjustments are warranted. The result seems surprising at times, since the Vienna rules live up to the demands of the collective interest paradigm and succeed in accommodating some of the communitarian expressions of the current international law discourse. Ultimately, the new narratives that dispute the consensual paradigm prove to be less groundbreaking, although they undoubtedly breathe fresh air into the law of treaties.

The gist of the argument in this book is the following. International law, and the law of treaties in particular, faces a constant tension between subjective and objective constructions. On the one hand, States constitute the main pillars of international law and we need to take into account their will and practice; on the other, States can exist only within a collaborative framework (legal order), which means that sometimes we are forced to 'impose' conduct and rules upon States, or to 'construct' their will on the basis of communitarian ideals. Through this oscillation between deductive and inductive techniques, between statal and communitarian ideals, international law evolves, or pretends to evolve, towards less State autonomy and more cooperation between States.

The law of treaties is one of the domains par excellence in which this tension and evolution is present. Treaties try to find a middle ground between the fact that they originate from the will of States and the reality of a legal community created by them. In the VCLT this tension is expressed by the oscillation between emphasis on the unilateral will of each State and emphasis on the communal will of the contracting parties and on the norms created by the treaty (the *negotium*). The outcome of this tension is a constant balancing between paying tribute to consent and trying to tame it, between imposing formalities in the way the consensual element is expressed and functions within the law of treaties and incorporating caveats that consecrate the residual character and, thus, the flexibility of the Vienna regime. This is all the more so in respect of the rules concerning contracting in and contracting out.

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[14] Rosenne, S. 'Bilateralism and Community Interest in the Codified Law of Treaties', *in* Friedmann, W., Henkin, L., Lissitzyn, O. (eds), *Transnational Law in a Changing Society: Essays in Honor of Philip C. Jessup*, New York, Columbia University Press, 1972, 202–27, 203.

The examples I want to invoke highlight the constant dilemma between respecting and sidelining/constructing State will. The relevant Vienna rules try to contain this tension. They seek, for instance, to restrain the ways in which intention to be bound is manifested through an enumeration of the means for expression of consent to be bound; or they try to circumscribe the right to make reservations through the regime of objections by the other States and the reference to the object and purpose; or they aspire to balance between the prohibition of unilateral denunciation and the exceptions based on the intention of the parties and the object and purpose of the treaty in the case of withdrawal, and so on. So, a first element of analysis will concern a critical appraisal of the Vienna regime rules themselves.

Our analysis will then focus on the communitarian narrative challenging the 'traditional' law of treaties. This narrative proposes – openly or implicitly – another conceptual and regulatory framework for the apprehension and resolution of the relevant problems that will apply to specific categories of treaties. The communitarian challenge has taken various forms and has intensified over the past decades. It aspires to radically review both the concept of treaty and the rules on the law of treaties, as they are codified in the Vienna regime.

As far as the concept of treaty is concerned, a new category of treaties has emerged, which creates primarily objective and non-reciprocal obligations for States, cannot be analysed into a bundle of bilateral relations and has as its addressees or beneficiaries individuals or the international community as a whole, and not States. There is, however, a certain difficulty in defining precisely this category of treaties as well as the consequences that flow from its exceptional character. The repeated attempts at treaty classification have showcased the impossibility of using a specific criterion in order to classify treaties. More importantly, the attempt to delineate this new category of treaties speaks volumes about our misconceptions with regard to the 'traditional' treaty concept.

As far as the rules on the law of treaties are concerned, the action of challenging takes either the form of departure from the existing legal framework and proposals for a different regime (a sort of *lex specialis*), or that of enriching the Vienna rules, allegedly filling their gaps and clarifying their ambiguities. In the first case, we can mention the controversies surrounding the legal regime applicable to reservations and perhaps also the way the rules on withdrawal are construed. In the second, we can point to the 'flexibilization' of the rules on expression of consent to be bound, and the doctrine of automatic succession.

Current challenges, however, push the tension a step further. Through the institutionalization of treaty regimes and the confident emergence of a