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INTRODUCTION TO THE LAW OF TREATIES

PAUL REUTER

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Preface

Paul Reuter's *Introduction to the Law of Treaties*, first published in 1972 by Armand Colin in Paris, provides in-depth treatment of a standard topic of international law, as now codified and developed in the 1969 Vienna Convention on the Law of Treaties. Almost immediately the book became a classic. A second, updated French edition was published in 1985 on behalf of the Graduate Institute of International Studies, Geneva, by Presses Universitaires de France.

The Institute is proud to be able to present a new version of this classic of international law to English-speaking readers. We are confident that in its present form, the book will keep all of its old friends and win many new ones.

The preparation of the manuscript has, in many ways, been the result of a teamwork. Paul Reuter, currently a Visiting Professor at the Institute, is foremost among the members of the team since he had to accomplish the formidable task of revising and updating the French version of 1985. José Mico (Geneva) undertook to translate the book and to check the innumerable references. Peter Haggenmacher (Geneva) cooperated with him and made many valuable suggestions. Derek Bowett (Cambridge) and Nanette Pilkington (Paris) read the manuscript and presented useful suggestions for its improvement. Finally, thanks are due to Catherine Nedzynski (Geneva) who undertook the difficult task of coordinating the efforts of the team and of seeing the manuscript through.

Geneva, February 1989 *Lucius Caflisch*

Table of cases

Abbreviations

AF	*Annuaire français de Droit international*
AJ	*American Journal of International Law*
BYBIL	*British Year Book of International Law*
CMEA	Council for Mutual Economic Assistance
ECR	*European Court Reports*
ECSC	European Coal and Steel Community
EEC	European Economic Community
ELDO	European Launcher Development Organization
ESA	European Space Agency
ESRO	European Space Research Organization
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
ICITO	Interim Committee of the International Trade Organization
ICJ	International Court of Justice
ICLQ	*The International and Comparative Law Quarterly*
ICRC	International Committee of the Red Cross
ILC	International Law Commission
ILM	*International Legal Materials*
ILO	International Labour Organisation
ILR	*International Law Reports*
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
OECD	Organization for Economic Cooperation and Development
OEEC	Organization for European Economic Cooperation
PCIJ	Permanent Court of International Justice
RCADI	*Recueil des Cours de l'Académie de Droit international*
RGDIP	*Revue générale de Droit international public*
RIAA	*Reports of International Arbitral Awards*
UNCLT	United Nations Conference on the Law of Treaties
UNCTAD	United Nations Conference on Trade and Development
UN Pub.	United Nations Publication
WHO	World Health Organization
YILC	*Yearbook of the International Law Commission*
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*

Contents

To make the text more readable, references and some additional material have been included separately, at the end of each chapter. Each paragraph ending with an asterisk (*) is completed by a corresponding paragraph of notes bearing the same number.

Chapter 1
Treaties

I Historical perspective

1 Ever since the days of antiquity, Princes and States have concluded international treaties. In the vicissitudes of war and peace which form the fabric of history, even semantics seem to imply that the establishment of peace is linked to the conclusion of pacts. Yet, however interesting the fact may be that treaties between the Egyptian pharaoh and the Hittite king were concluded by an exchange of letters or that, closer to us, in the seventeenth century Grotius set out the principles of treaty interpretation in terms not unlike those of the 1969 Vienna Convention on the Law of Treaties, it is from 1815 onwards that the development of treaties has been especially remarkable: in a little over a century and a half, this essential instrument of international relations has undergone a tremendous transformation. Let us therefore begin by considering the underlying causes and main phases of this historical evolution.(*)

1. Underlying causes

2 The fundamental cause of the development has been the increasing solidarity between the components of international society: mechanical solidarity between States whereby any change in one of the components alters the balance of power within the whole system; solidarity of the general interests of mankind, requiring problems to be tackled in common and simultaneously; and solidarity between individuals in the development of culture and public opinion.

3 While these aspects of solidarity are first of all apparent within the State, they also imply going beyond the confines of the State, and international treaties constitute the main legal mechanism which, although dependent on national institutions for purposes of conclusion and implementation, reaches further and transcends them. Any treaty could indeed be seen individually as a bridge boldly built out into the void of an international society which has yet to acquire real consistency; collectively the corpus of concluded treaties forms the reality and substance of an international society from which treaties in turn will increasingly derive their legal traits. In that process, nations starting out as entities closed to one another gradually open up and create the very environment to which they submit themselves.

4 The development of national political institutions with increasingly distinct organs and the broader participation of private citizens in public

affairs is in many ways at the origin of an increased variety in conventional instruments. Not only does political consent to a treaty involve a greater number of organs; but the need to conclude a host of agreements on increasingly technical subjects calls for procedural simplification precisely at a time when all State activities and departments are becoming more involved in international affairs.(*)

5 Perhaps the most perceptible sign of this change has been the emergence of multilateral treaties. For a long time, a number of important settlements, such as the Treaties of Westphalia and the major eighteenth century peace treaties, did of course involve agreements between several States; at first these were made up of as many bilateral agreements as there were pairs of States concerned. In the early nineteenth century, and initially as a pure matter of form, it appeared rational to replace a whole set of bilateral treaties by a single multilateral instrument. But this was far more than a mere simplification for the sake of form or protocol. In fields such as public health, communications, maritime security, protection of maritime resources, literary, artistic and scientific property, metrological unification, and protection of certain basic human rights, multilateral treaties were called upon to serve an entirely new purpose: the defence of the common interests of mankind. The parties to such treaties are not so much setting up a compromise on diverging interests as symmetrically pooling their efforts to achieve an identical goal. The great German jurist Triepel even put forward a legal theory of this common will (*Vereinbarung*) as a central element of the theory of the law of treaties. Increasing awareness of the scale of these common interests thus provided the seed for multilateral treaties which were to multiply with the acceleration of history (Hudson in his *International Legislation*, vol. I, p. XIX, lists 157 such treaties between 1864 and 1914). Legal analysis followed suit, striving to capture the real feeling of solidarity which, in varying degrees depending on the case, prevents multilateral treaties from being viewed as merely the sum of independent bilateral agreements.(*)

6 However, the multilateral treaty drawn up at a congress or a conference is not the final and ultimate product of growing solidarity. Conferences become periodical, set up permanent secretariats, create organs which, first in minor and gradually in more important matters, enjoy a measure of legal autonomy with regard to participating States. This is how international organizations come into being on the basis of multilateral treaties, their constituent charters. In turn, as they develop they give rise to a considerable expansion of treaty-making activity: not only do international organizations, owing to their facilities, lead to a greater number of multilateral treaties, but they provide new solutions as to the form of treaties and their proper implementation. Thus the whole life of treaties between States tends from beginning to end to be entwined to some extent with the activity of the organization. Introducing a further degree of complexity in treaty-making is the fact that organizations also conclude treaties with one another and with States and even try to become parties to treaties between States.

7 Multilateral treaties and international organizations are thus the major factors in the evolution of conventional relations, and both are the result of growing global solidarity. Attention should, however, be paid to the importance of international practice, especially the inconspicuous practice of protocol and legal advisers, both domestic and international (in particular, secretariats of international organizations). They directly feel the pressure of international solidarity and try to devise the most economic and realistic responses. Initial choices are frequently guided by mere administrative convenience, and the really significant effects of certain arrangements or innovations often only become apparent later on. On the international level, the basic principles are very simple: only final consent is legally binding, but agreed formalities may act as milestones marking the procedural stages leading up to final consent. Substance prevails over form in the whole of this important field; even the actual wording matters so little that the most varied and ambiguous terms may be used, to say nothing of the considerable uncertainty of equivalent expressions in different languages (see below, No. 94). Caught as they are between the pressing needs of international relations and the rules laid down by national Constitutions, protocol and legal advisers proceed as unobtrusively as possible, seeking to secure appropriate adjustments through empirical solutions.(*)

8 In a more formal manner, and at times with considerable delay, national courts have an even more difficult role to play, for neither their position nor the training of their members gives them any familiarity with diplomatic practice, any more than with the real intentions and needs of government authorities. But in the end, after a certain amount of difficulty, and in some countries with the assistance of the Ministry for Foreign Affairs, they often do contribute to the common achievement by providing the necessary solutions to the daily confrontation between rules and the actual requirements of social conflict.

2. Contemporary developments

Historically, three periods may be distinguished: (A) from 1815 until World War I; (B) between the two World Wars; and (C) after World War II.

A. FROM 1815 UNTIL WORLD WAR I

9 Formally and generally speaking, during this period the law of treaties continued to rely on the monarchical tradition with the Head of State acting as the representative of the State in foreign relations, and all the other participants in foreign affairs, especially ministers and ambassadors, merely serving as delegates. This tradition was in some respects analogous to the one which made the king Head of State in the municipal order, but this monopoly survived longer in the sphere of external representation, while

domestically it was soon eroded by the emergence of parliamentary and democratic systems. Its political justification was also more lasting, since States had an obvious interest in thus regulating their foreign relations through a single channel. Indeed, the centralization of foreign relations is still the best and only way to preserve the integration of interests at the national level alone and hence to defend the sociological basis of sovereignty. The fact that any citizen, department or ministry acquires a direct and effective capacity to take part in foreign relations marks the beginning of a federative process which will only emerge later on, eventually culminating in the demise of the sovereign State careless enough to let the threads of social solidarity stretch beyond its boundaries, thereby giving rise to the very institutions which will deprive it of its sovereignty.

10 In the early nineteenth century this stage had still not been reached. The prevalence of the Head of State in foreign affairs was still overwhelming and had lost nothing of its deep significance, as has been shown after a close scrutiny of practice by illustrious historians and jurists like Bittner, Basdevant and McNair, as well as by eminent theorists like Triepel and Anzilotti. On the other hand, these scholars have also shown how the modern multilateral treaty derives from the pragmatic innovations of practitioners. Even the collectively organized negotiations at the Congress of Vienna in 1815 were initially sanctioned by a set of bilateral treaties, as many as were required to bind each pair of States. But the real link between all these bilateral treaties was provided in the first place by a document summing up the transactions of the Congress, the Final Act of 9 June 1815. Other agreements dealing with a number of implementing measures or secondary matters were similarly recapitulated in the General Treaty of the Territorial Commission of Frankfurt of 20 July 1819 signed by the four Great Powers. Thus the idea that a treaty which is binding upon different States by the same terms constitutes a single legal instrument first appeared at the Congress of Vienna. Yet while the unicity of the legal instrument was recognized, the form was not immediately simplified; in 1815 and again in 1856 as many original copies were drawn up as there were parties, and all of them were signed by all the parties. The far simpler modern procedure based on only *one* original copy implies a very far-reaching practical innovation: the single original copy is entrusted to a particular State which not only ensures its safe-keeping but actually 'manages' the instrument. The State concerned keeps the full powers of the signatories and the instruments of ratification, denunciation, etc.; it reports to the parties all the transactions relating to the treaty; and the idea has gradually emerged that the 'depositary', as this State is called, is not acting on its own behalf but in the interests of all the parties, exercising a truly international function. It could therefore be said that any multilateral treaty, in providing for a depositary, establishes an international organ. This solution is partially apparent in one of the Acts drawn up at the Congress of Vienna, namely the Act of 8 June 1815 concerning the Federal Constitution of Germany (article XX), but less innovative methods were still used for some time: ratifications were

exchanged two at a time, and copies were signed both by the State keeping the original copy signed by all parties and by the State for which the copy was intended (International Sanitary Convention of 3 February 1852).(*)

11 These secondary yet significant aspects were the first to reflect the emergence of the device of multilateral agreements, whose substance draws on a deeper reality, namely the existence of common interests. Hence the enormous expansion of all sorts of instruments covering such widely varying issues as the slave trade at the Congress of Vienna and the 'unions' concerning the telegraph (1865), postal relations, river and rail transport, public health, environmental protection (fishing), as well as freedom of religion (imposed on the new Balkan States) and protection of the wounded in wartime (1864), or codification of the law of war.

12 However, while the concept of 'interest' or of 'common interest' seems straightforward from the sociological point of view, its legal implications are vague and very slow to appear. To say that, with regard to such common interests, all States are in symmetrical positions in relation to each other is easy enough, but is only partly true; indeed to a large extent they have individual interests which make for long and arduous negotiations. Between victorious and defeated powers, between the interests of a number of States agreeing on the need to impose a particular territorial status on a given territory (neutrality, freedom of communication) and the State to which that territory belongs, any symmetry is very limited indeed. The very form of such treaties reveals that in their substance they attempt to link two sets of conflicting interests and strike a balance between them. While the number of parties makes them multilateral, by their content they are in fact bilateral, with a considerable group of States on one side and one or a few on the other. As early as the middle of the nineteenth century, these so-called 'semi-collective' treaties had begun to give rise to some well-known questions, *inter alia* as to the exact scope of the obligations resulting from the Peace Treaty of 1856 for the legal regime of the Straits: were the parties bound only as against Turkey or also as against one another? The issue was debated at the Congress of Berlin in 1878, and the difficulty of assessing the interest of a party in sanctioning a breach of a multilateral treaty has lasted to this day (see below, No. 301).

13 But perhaps, then as now, no aspect of the mechanisms leading up to multilateral treaties was more important than its preparation and adoption. The crucial question has always been which States are in charge of the preparation of a congress or a conference and how the text of a treaty is drawn up. Only the States ratifying the treaty are bound by it and States are free to ratify or not. But it is not enough not to be bound by a treaty, for the freedom preserved is largely illusory, indeed totally so in the case of treaties resolving an issue which at a given time can only be dealt with in a given way, such as a question of political or territorial status. Clearly, it is in the interest of all States that no question which might concern them should be settled