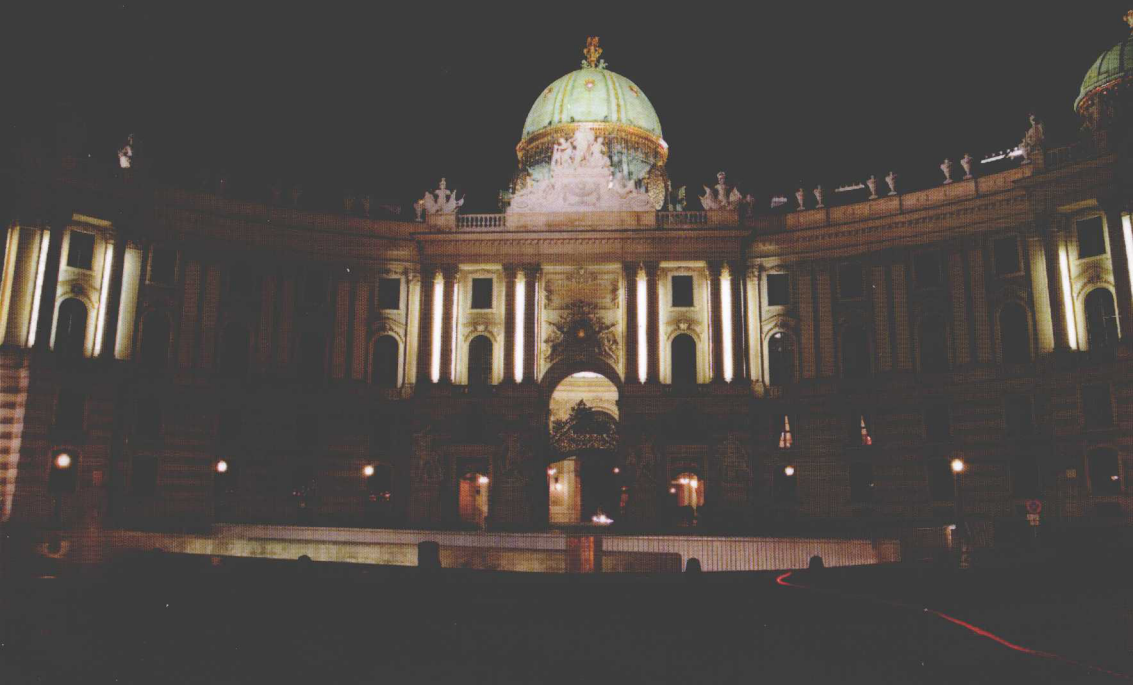
40 Years of the Vienna Convention on the Law of Treaties

Edited by

ALEXANDER ORAKHELASHVILI AND SARAH WILLIAMS



British Institute of International and Comparative Law

40 YEARS OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

Edited by
ALEXANDER ORAKHELASHVILI
and
SARAH WILLIAMS

British Institute of International and Comparative Law

Published and Distributed by
British Institute of International and Comparative Law
Charles Clore House, 17 Russell Square, London WC1B 5JP

British Library Cataloguing in Publication Data
A Catalogue record of this book is available from the British Library

ISBN 978-1-905221-43-1

Typeset by Cambrian Typesetters
Camberley, Surrey
Printed in Great Britain by the MPG Books Group,
Bodmin and King's Lynn

Acknowledgements

The Institute and the editors are very grateful to the authors for their support of this edited collection, and their patience in reaching publication. We also wish to acknowledge the contribution of those participants, who, although for various reasons were unable to submit their papers for inclusion in this collection, generously contributed their time and effort in participating in the conference.

The Institute was assisted in organizing the conference by a steering committee comprising Anthony Aust, Alexander Orakhelashvili, and the author. Sir Franklin Berman, and Loretta Malintoppi and Rodman Bundy of Eversheds LLP, also assisted with designing the programme and in sponsoring the event. The Foreign and Commonwealth Office, in particular the Treaty Section and its legal adviser, Jill Barrett, offered their time and expertise. Professor Robert McCorquodale was also very supportive of the event and this edited collection. Anna Riddell, Jane Nicholson-Biss and Mandy Bouw provided valuable support with the practical arrangements for the conference, while Alexa van Sickle has been invaluable in realizing the publication of the edited collection. On behalf of the Institute and the editors, I would like to extend our appreciation to each of you.

SARAH WILLIAMS

Sydney, August 2010

Contributors

Anthony Aust studied law at the LSE and is a solicitor. After 35 years as a legal adviser with the Foreign and Commonwealth Office, in 2002 he retired as Deputy Legal Adviser. Before and after he retired, he taught international law at LSE and various other universities and institutions in the United Kingdom and abroad. He has written for Cambridge University Press, *Modern Treaty Law and Practice* (2nd edn, 2007) and *Handbook of International Law* (2nd edn, 2010).

Alan Boyle is Professor of International Law at the University of Edinburgh. His research interests include international environmental law, the law of the sea, the law of treaties, international law-making and the settlement of international disputes.

Paul Eden is a Lecturer in Law at the University of Sussex and the co-convenor of the SLS International Law Group. He previously taught at the universities of Cape Town and Leeds. Paul has published in the fields of international, commercial and criminal law. Publications include: Paul Eden and Thérèse O'Donnell (eds) *September 11, 2001: A Turning Point in International and Domestic Law?* (Transnational Publishers, New York, 2005).

Malgosia Fitzmaurice holds a chair of public international law at the Department of Law, Queen Mary, University of London. She specializes in international environmental law and the law of treaties.

Professor **Mary E Footer** joined the University of Nottingham School of Law in 2006, having previously taught at the University of Amsterdam, the Erasmus University Rotterdam and University College London and having served as the first Fellow in Public International Law at the British Institute of International and Comparative Law (1992–1994). She researches and publishes widely on matters of public international law and international economic law, supported by the Nuffield Foundation, and held a Fernand Braudel Senior Fellowship at the EUI, Florence (2010).

Richard Gardiner has practiced as a barrister, was a legal adviser at the Foreign and Commonwealth Office, and has been a member of the Faculty of Laws at University College London where he is now a Visiting Professor. He is a contributing editor of Shawcross & Beaumont on *Air Law*, is the author of *International Law* and of *Treaty Interpretation*, and has written many articles and notes on legal matters.

Jan Klabbers is Professor of International Organisations Law, Director of the Centre of Excellence in Global Governance Research, Erik Castrén Institute of International Law and Human Rights, University of Helsinki. His research interests include the law of treaties, the law of international organizations, state succession, some theoretical work on the position of the individual and other non-state actors in international law, and constitutionalization of international law.

Alexander Orakhelashvili is a Lecturer at the Law School, University of Birmingham. He obtained his LLM *cum laude* from the University of Leiden and his PhD from the University of Cambridge. In 2005–2008 he was a Junior Research Fellow in Law at Jesus College Oxford, and has taught international law at the universities of London, Cambridge and Oxford. His research interests include all areas of public international law. He has published *Peremptory Norms in International Law* (OMIL, OUP, 2006; paperback 2008), and *Interpretation of Acts and Rules in Public International Law* (OMIL, OUP, 2008), as well as about 50 articles in leading international law periodicals.

Sarah Williams is Senior Lecturer in the Faculty of Law, University of New South Wales, Sydney, Australia. She was formerly the Dorset Fellow in Public International Law at the British Institute of International and Comparative Law (2008–2010). Her research interests include international law, in particular international criminal law, international humanitarian law and the law on the use of force.

Foreword

It is a pleasure to write this Foreword, as a celebration both of the 40th anniversary of the Vienna Convention on the Law of Treaties and of the role of the British Institute of International and Comparative Law in this field.

While there is inevitably an element of the arbitrary in the selection of 40 years as the time to look back, there is no room at all for doubt about the significance of the Vienna Convention itself, and the 40 years that have passed since its final conclusion, at the second of the two Vienna Conferences which ended on 22 May 1969, have demonstrated that with absolute clarity. As the convenor of the Conference at which the papers published in this volume were presented points out in her Introduction, it is not the bare number of States that have become party to the Convention that holds the key to its significance, but rather its widespread acceptance as an authoritative statement of the modern law of treaties on the subjects with which it deals. Whether everything in the Convention has or has not become customary law (clearly not all of it has) is less important than the fact that what the Convention has to say on any topic is now the natural and inevitable starting point for anyone grappling with a problem arising from a treaty, whether the problem is theoretical or practical. I lay particular stress on 'anyone'. Whoever the International Law Commission might have had in mind at the time as the audience for their work, the Vienna Convention is not, one may note with great satisfaction, a text for international lawyers alone. Far from it. The Convention has played an enormous role in making treaties accessible to a far wider audience, an audience which embraces in particular legal practitioners in general and judges, including in jurisdictions not previously accustomed to the ready application of treaties as such in the domestic courts. And it has done so, by happy coincidence, at a time when the importance of treaty law has increased steadily, if not dramatically, a time also when the frontier between international law (including treaty law) and national law has turned out to be far less rigid, and far more porous, than used often to be imagined. The increasing receptiveness of this wider audience in the United Kingdom itself is a proper tribute to the formative work of a whole succession of distinguished British international lawyers as the Special Rapporteurs of the International Law Commission throughout its work on the topic.

That shows in turn why the British Institute of International and Comparative Law was the uniquely well qualified body to organize this Conference and to publish a selection of the papers which it stimulated.

In the half-century of its own existence, the Institute has always had international law at the centre of its activity, and has consciously sought to occupy a focal point at which international law meets other legal systems, and *vice versa*, and to build itself into a functional bridge between academic study and research and the rapidly changing needs of legal practice of every kind.

This Conference represents a particularly happy and beneficial example of that process at work, as do the chapters which make up this volume. I warmly commend it.

SIR FRANKLIN BERMAN QC KCMG

INTRODUCTION

40 Years of the Vienna Convention on the Law of Treaties: Cause for Celebration or Concern?

*Sarah Williams**

The British Institute of International and Comparative Law is pleased to present this collection of essays to celebrate the 40th anniversary of the adoption of the Vienna Convention on the Law of Treaties 1969 (VCLT).[1] An anniversary, particularly a 40th anniversary, is often a cause for celebration. The 40th anniversary of the VCLT presented an ideal opportunity to reflect upon the history and continued relevance of the VCLT, and whether this particular anniversary is a cause for celebration or concern.

This collection represents some of the contributions made by participants in a conference arranged by the Institute in June 2009. The conference, kindly hosted by Eversheds LLP, brought together leading practitioners and academics to mark the 40th anniversary of the VCLT and to examine its contribution to public international law during the last four decades. The event was an overwhelming success, facilitating an excellent discussion of various issues surrounding the Convention and the law of treaties generally. Speakers addressed treaty law in a number of contexts, both international and national.

Following the event, the Institute was encouraged to prepare an edited collection for publication, to ensure that the valuable contributions made during the conference were available to others in the future. The following eight chapters that comprise this volume comprise a selection of the papers presented at the conference. They address a number of issues relevant to a modern study of the law of treaties. Professor Alan Boyle considers the treaty as a law-making instrument, while Professor Jan Klabbers revisits (or not) an earlier work on the concept of treaty. Anthony Aust examines the sometimes complicated task of amending or revisiting treaties. Given the importance and frequency of issues concerning treaty interpretation, it is unsurprising that several chapters in this

* Senior Lecturer, University of New South Wales; formerly the Dorset Fellow in Public International Law, British Institute of International and Comparative Law.

[1] 1155 UNTS 331.

study discuss various aspects of this topic. Professor Richard Gardiner studies the the use of the preparatory work in treaty interpretation, Professor Malgosia Fitzmaurice analyses the dynamic or evolutive interpretation of treaties by the European Court of Human Rights, Dr Alexander Orakhelasvili outlines recent practice on the principles of treaty interpretation, and Paul Eden raises the often-neglected problem of interpreting plurilingual treaties. Professor Mary Footer considers the relationship between the VCLT and the 'other' Vienna Convention on treaties, the 1986 Vienna Convention on the Law of Treaties between States and International Organisations and between International Organisations.[2]

Before proceeding to the more specific chapters, it is perhaps appropriate to acknowledge the continued significance of the VCLT and its context. The VCLT is of particular significance for public international lawyers. It has been described as 'the foundation-stone of the modern law of treaties',[3] and 'the basic framework for any discussion of the nature and characteristics of treaties'.[4] Treaties are one of the material sources of international law listed in article 38(1) of the Statute of the International Court of Justice, and are perhaps the most important source of international law.[5] A treaty is often the primary means for directly formalizing interaction between States, particularly where customary international law may prove slow to develop or its content is uncertain. Treaties regulate relationships between States in an increasing number of areas, including: international investment; trade; environmental protection; the use of force; international humanitarian law; title to territory; friendship and cooperation; human rights; and international criminal law. Treaties also cover an enormous range of options, from simple bilateral agreements to complex multilateral agreements, from detailed provisions to framework conventions. It is therefore fundamental that those involved in international law-making understand the principles of treaties and their interpretation and application.

The VCLT has proved to be one of the most successful achievements of the International Law Commission (ILC). The ILC was established by the General Assembly in 1947, with the object of promoting 'the progressive development of international law and its codification'.[6] One of the topics selected by the ILC at its first session in 1949 was the law of treaties, with the members of the Commission recognizing the topic to be one of the most important in international law, both in its theory and practical application, as well as a suitable topic for codification.[7] A number of highly respected special rapporteurs were responsible for guiding the work of the ILC on this topic, in particular James Brierly,

[2] Doc. A/CONF.129/15. This Convention is not yet in force.

[3] I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, MUP, Manchester, 1984) 242.

[4] M Shaw, *International Law* (6th ed, CUP, Cambridge, 2008) 902.

[5] C Parry, *The Sources of Evidence in International Law* (MUP, Manchester, 1965).

[6] Resolution 174(III), 21 November 1947, attaching the Statute of the International Law Commission.

[7] Yearbook of the International Law Commission (1949) 48–49.

Hersch Lauterpacht, Gerald Fitzmaurice and Humphrey Waldock. Work on the codification continued in the ILC from 1950 to 1966. Although there was disagreement as to the final form of the work, the Commission persevered with the topic.[8] The Commission's draft articles on the law of treaties were adopted in final form in 1966 and, along with commentary on the draft articles, were presented to the General Assembly.

The General Assembly convened a diplomatic conference to consider the draft articles. The United Nations Conference on the Law of Treaties met in Vienna from 26 March to 24 May 1968 and 9 April to 22 May 1969. The text provided by the ILC was extensively debated and negotiated, thus States have had considerable input into the text of the resulting document. The delegates to the conference adopted the final text of the Convention on 22 May 1969, some 20 years after it was selected as a topic by the ILC. The Convention opened for signature the next day. Thirty-five States were required to ratify the Convention for its entry into force.[9] This occurred in late 1979, with the VCLT entering into force on 27 January 1980, 30 days after the notice of ratification of the 35th State party, Togo. Given the importance of the topic to States, the adoption of the text and its entry into force were significant achievements. However, as Sinclair writes,

> satisfaction must be tempered with realism. The Convention is the product of many conflicting interests and viewpoints and has the customary vices of compromise. Among these is a tendency to overcome points of difficulty by expressing rules at a level of generality and abstraction sufficient to hide the underlying divergencies.[10]

This comment remains valid today.

In terms of its content, the VCLT sets out a set of comprehensive rules concerning the formation, interpretation and application of treaties. It is thus a set of subsidiary or residual rules, applicable to treaties generally. It does not regulate the substance of the treaties concerned, the content of which is left largely to the negotiating parties. The Convention considers a number of important and practical issues, such as: methods for the formation of treaties; powers to bind a State to a treaty; reservations to treaties; application, modification and amendment of treaties; invalidity, termination and suspension of treaties; and principles of treaty interpretation. It also contains a number of procedural rules, such as those concerning the functions of the depositary, and procedures for notification and registration. It confirms the basic principle of *pacta sunt servanda* and includes notable provisions on peremptory norms of international law, or *jus cogens*.

[8] The disagreement concerned whether the final form of the ILC's work on the topic should take the form of a draft convention, for consideration by States, or a document intended to be in a non-binding form, such as guidelines.

[9] Art 85, VCLT.

[10] Sinclair (n 3) 1.

While the VCLT may be considered the starting point for any international lawyer considering a question concerning treaties, it is not the complete picture. First, the provisions of the VCLT are not mandatory, in the sense that the VCLT is the 'default' position, leaving States free to vary its provisions in particular circumstances or to adopt other arrangements. This flexibility has enabled the VCLT to remain relevant, by adapting to changing circumstances and requirements. Second, the VCLT is subject to a number of important restrictions as to its scope. Article 2 defines a treaty 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 from the scope of the VCLT treaties agreed other than in writing, as well as treaties between States and international organizations or between international organizations. Article 2 also excludes instruments that are considered to be non-binding (for example, a memorandum of understanding) and agreements intended to be regulated by national, rather than international, law. In terms of its temporal application, the VCLT does not allow for retrospective application,[11] although the International Court of Justice has applied its provisions to treaties adopted before its entry into force.[12]

Third, the VCLT did not resolve all issues concerning treaties. The VCLT is stated to be without prejudice to questions arising from State succession to a treaty, the international responsibility of States for violation of a treaty obligation, and the continued application of treaties following the outbreak of armed conflict.[13] The Commission has subsequently considered several of the issues left outside the scope of the VCLT, leading to the adoption of several additional texts and Conventions. The VCLT is now supplemented by the Vienna Convention on Succession of States in Respect of Treaties of 1978,[14] the ILC Articles on Responsibility of States for Internationally Wrongful Acts 2001,[15] and the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986[16] (see Chapter 9, by Mary Footer). The Commission is currently considering the topic 'The effect of armed conflicts on treaties'.[17]

[11] Art 4 provides that the VCLT applies only to those treaties concluded by States after the Convention has entered into force for those States.

[12] For example, in *Kasikili/Sedudu Island (Botswana v Namibia)*, the ICJ applied arts 31 and 32 of the VCLT to an 1890 treaty between Germany and the United Kingdom, even though it recognized that the VCLT did not have retrospective application. See: [1999] ICJ Rep para 18.

[13] Art 73, VCLT.

[14] 1946 UNTS 3.

[15] Adopted by the ILC in 2001.The articles have been commended to States by the General Assembly on several occasions, most recently in 2007. However, there remains disagreement among States on the Sixth Committee as to whether the articles should form the basis for a conference to negotiate a convention text.

[16] See (n 2) above.

[17] This topic was first included on the long-term work programme of the ILC in 2000. The Commission is working towards the preparation of a set of draft articles.

Moreover, the VCLT has not been considered the final word even in respect of the topics it does address. In particular, the ILC is considering the topic of reservations to treaties,[18] with a view to producing guidelines, together with commentaries, to assist States with questions such as the difference between reservations and declarations of interpretation, the scope of interpretative declarations, the validity of reservations, the regime of objections to reservations, and the effect of an invalid reservation on the entry into force of, and participation of a State in, a particular treaty.[19] The ILC has consistently indicated that the draft guidelines are not intended to replace the provisions on reservations in the VCLT.[20] Rather, they are to aid States in their interpretation and application by clarifying these provisions.[21] This reluctance on the part of both States and the ILC to interfere with the provisions of the VCLT suggest that it is highly unlikely that the provisions of the VCLT will be re-negotiated in the foreseeable future.

As at August 2010, there were 111 States parties to the Convention. The VCLT has not achieved universal ratification. States have been reluctant to sign for many reasons. While, initially at least, States did not ratify due to possible concerns about the questionable customary international law nature of some of its provisions, it now appears that States have elected not to ratify due to the belief that the VCLT—or at least some of its provisions—is considered to reflect customary international law. This has been confirmed by the willingness of the ICJ to apply its provisions to treaties not strictly within the scope of the VCLT, or to treaties between States that are not party to the VCLT.[22] Thus there is no real incentive for a State to ratify the VCLT, which perhaps may require a lengthy domestic parliamentary and legislative process.

The final provisions of the VCLT were considered to represent both an exercise in codification and in progressive development.[23] While some of the draft articles restated existing principles of customary international law, several were viewed as *de lege ferenda*.[24] What then is the current relationship between the VCLT and customary international law? It is clear that the application of the Convention is not restricted to States parties. The ICJ and other international judicial bodies have held that several of the provisions in the Convention constitute customary international law. For example, the rules on treaty interpretation have been held to reflect customary international law,[25] as have the provisions on termination for material breach[26] fundamental change of circumstances,[27] and

[18] The topic was first included in the working programme of the ILC in 1993.

[19] Yearbook of the International Law Commission (1993) vol II (Part Two), paras 427–430 and 440.

[20] See arts 19 to 23, VCLT.

[21] ibid.

[22] For example, *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment of 13 July 2009, para 47.

[23] Sinclair (n 3).

[24] For example, the provisions on peremptory norms, in arts 53 and 64.

[25] For example, the *Beagle Channel case* (1977) 52 ILR 93.

[26] *Namibia Advisory Opinion*, ICJ Rep 1971, para 94.

[27] *Fisheries Jurisdiction Cases* (Jurisdictional Phase) [1973] ICJ Rep 3, para 36.

termination and suspension of treaties.[28] It is likely that most, if not all, of the provisions of the Convention can now be considered as representative of customary international law. As Anthony Aust notes, there has to date been no occasion upon which the ICJ has held that a provision of the VCLT does not represent customary international law.[29]

It is this aspect that defines the success of the VCLT over the past four decades. Writing shortly after the Convention's entry into force, Sir Ian Sinclair noted the importance of the VCLT's contribution in this context. He commented:

> The 'treaty on treaties' has accordingly so far had little or no impact *as a treaty*. But as a code—or rather as a restatement and consolidation of existing or emergent principles of treaty law—it has had a dynamic and continuing influence, and it will continue to have that custom.[30]

Boyle and Chinkin, writing several decades later, reiterate the importance of the VCLT as a statement of customary international law. They note: 'Thus the real significance of the ILC's achievement lies not in the conventions themselves, but in the extent to which they have successfully become accepted by international and national courts, or by governments and foreign ministries, as restatements of customary law.'[31]

The aim of the VCLT was to provide an acceptable balance between the need for stability and consistency in the law of treaties and the need to accommodate new development, such as the then emerging concept of *jus cogens* or peremptory norms of international law.[32] While some of the more controversial aspects of the VCLT have, over the course of time become generally accepted, there is still a need for treaties, and the treaty regulating treaties, the VCLT, to remain current and responsive to current challenges. This tension is reflected in the selection of the topic 'Treaties over Time' for inclusion in the ILC's working programme in 2009.[33] Yet, as the chapters in this collection demonstrate, there is no suggestion that the VCLT is unsuited for resolving contemporary challenges. To the contrary, the VCLT remains highly relevant to government lawyers and diplomats, including those of States not party to it. Its continued significance is certainly a cause for celebration.

[28] *Gabcikovo* [1997] ICJ Rep 3, paras 42–46 and 99.
[29] A Aust, *Modern Treaty Law and Practice* (2nd edn, CUP, Cambridge, 2007) 13.
[30] Sinclair (n 3)252, emphasis in original.
[31] A Boyle and C Chinkin, *The Making of International Law* (OUP, Oxford, 2007)190.
[32] See arts 53 and 64, VCLT. Sinclair (n 3) 245.
[33] See the 2009 Report of the International Law Commission, and the note on this topic prepared by Mr Georg Nolte.

Contents

CHAPTER 1

Reflections on the Treaty as a Law-making Instrument

*Alan Boyle**

I. INTRODUCTION: THE VCLT AND THE LAW-MAKING PROCESS

In the modern world treaties are no longer simply a source of obligations between the parties. Many of the more important multilateral treaties have become law-making instruments, codifying existing law, creating new law, establishing widely accepted norms and principles applicable to all or the large majority of States. The 1969 Vienna Convention on the Law of Treaties (VCLT) is one of the leading examples of this phenomenon. Few multilateral conventions have established such a universally accepted, comprehensive, and enduring legal regime as the 1969 Convention, and none has been so widely relied on by governments and courts. By any measure, it is one of the International Law Commission's (ILC) successes, despite a slow rate of ratification or accession.[1] Moreover, even for those States which are parties, the VCLT does not apply to all treaties: because it is not retrospective, prior treaties continue to be governed by customary law, as do treaty relations between parties to the Vienna regime and non-parties. Thus the real significance of the ILC's achievement lies not in the Convention qua treaty, but in the extent to which it has become accepted by international and national courts, or by governments and foreign ministries, as a restatement of customary international law for all States.

The 1969 VCLT is not solely the work of the ILC. As a draft convention it was submitted to a UN diplomatic conference that undertook some significant revision and redrafting. The most notable addition was article 66, providing for compulsory dispute settlement procedures in respect of Part V of the convention, although ironically these procedures have never

* Professor of Public International Law, University of Edinburgh and Barrister, Essex Court Chambers, London.

[1] As late as 2004, 35 years after adoption of the VCLT, there were still only 81 parties, but by the fortieth anniversary in October 2009 this had grown to 110.

been used. Without this compromise text it was likely that the diplomatic conference would have failed.[2] Articles 11 (consent to be bound), 13 (exchange of instruments), 46(2) (violation of internal law), 60(5) (material breach of humanitarian treaties) and 74 (diplomatic and consular relations) were also proposed by States rather than by the ILC. The 1969 Convention and its 1986 counterpart,[3] with their subtle melange of codification and progressive development, have undoubtedly shaped the modern law of treaties,[4] but it is the interaction of the ILC, the diplomatic conferences, subsequent practice and judicial decisions which has brought this about.

While building on existing law, the 1969 Convention made important clarifications, reformulations, and additions, most notably in regard to interpretation, invalidity, reservations and *ius cogens*. The Convention's provisions on interpretation (articles 31 and 32) have been applied in the case-law of nearly all international tribunals and many national courts.[5] Commenting on the *Gabčíkovo-Nagymaros Case*, in which various articles were relied on by the ICJ, Aust concludes that it is not unreasonable to assume that the Court will apply the same approach to virtually all of the provisions of the 1969 Convention. As he points out, there is no case in which the Court has found that the Convention does not reflect customary law.[6] Some provisions go beyond previous precedents, such as article 18 on the obligation not to defeat the object and purpose of a treaty pending signature, or article 20 on the effect of objections to reservations. The degree of progressive development contained in Part V of the Convention, dealing with invalidity, termination and suspension, was acceptable to many States only because article 66 provides for compulsory settlement procedures in the event of a dispute.[7] Nevertheless, the ICJ has been willing to accept many of these articles as evidence of current customary law, and thus applicable to States not bound by the Convention. Article 62 on change of circumstances was applied by the ICJ in the *Icelandic Fisheries Cases*,[8] although the Convention was not then in force and had been

[2] I Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, Manchester, 1982) 231–232.

[3] Vienna Convention on the Law of Treaties between States and International Organisations, opened for signature 21 March 1986. Not yet in force.

[4] See Sinclair (n 2); A Aust, *Modern Treaty Law and Practice* (2nd edn, CUP, Cambridge, 2007) ch 1; P Daillier and A Pellet, *Droit International Public* (7th edn, Paris, 2002) 119.

[5] See eg *Golder v UK* (1975) 1 EHRR 524; *Advisory Opinion on 'Other Treaties' Subject to the Consultative Jurisdiction of the Court*, IACHR OC-1/82, 24 September 1982; *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* [2004] ICJ 136, para 94; *R v Immigration Officer at Prague Airport ex parte European Roma Rights Centre* [2005] 2 AC 1.

[6] Aust (n 4) 11.

[7] Sinclair (n 2) 226–236.

[8] *Fisheries Jurisdiction Case (UK v Iceland) (Jurisdiction)* [1973] ICJ Rep 3.